

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
ATWATER ELEMENTARY SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of:

MANUEL MERCADO,

Respondent.

OAH No. 2015120558

DECISION

This matter was heard before a Commission on Professional Competence (Commission) in Atwater, California, on April 18 to 22, and April 25 to 28, 2016. The Commission members are Lisa Neally, Karen Young, and Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings and Commission Chairperson.

Gabriela D. Flowers and Luke E. Bernthal, Attorneys at Law, Lozano Smith, appeared on behalf of the Atwater Elementary School District (District). Also present on the District's behalf was its Assistant Superintendent of Human Resources, Sylvia Nelson.

David Renteria, Attorney at Law, appeared on behalf of Manuel Mercado (respondent), who was present.

The record was held open until May 31, 2016, to allow the parties to submit closing briefs. The District's closing brief was received on May 31, 2016, and marked as Exhibit 32. Respondent's closing brief was received on June 1, 2016, and marked as Exhibit L. The Commission met in executive session on June 9, 2016. By stipulation of the parties, the matter was submitted for decision on that date, at the conclusion of deliberations.

ISSUE

Did the District prove by a preponderance of the evidence that respondent should be dismissed from his position as a special education teacher for immoral conduct, dishonesty, evident unfitness for service, and persistent violation of or refusal to obey the District's rules, based upon: (1) inappropriate conduct with students and staff, in particular, respondent's actions directed at special education student ND, (2) failing to implement ND's Behavior Intervention Plan and appropriate behavior strategies, (3) dishonesty during the investigation

and towards ND's parents, and (4) repeated instances of corporal punishment for behavior intervention with ND, in violation of governing board (Board) policy, the Education Code and the District's administrative regulations?¹

SUMMARY

The District proved by a preponderance of the evidence that respondent is subject to dismissal for immoral conduct, dishonesty, evident unfitness for service, and persistent violation of or refusal to obey state laws or the District's regulations. The weight of the evidence established that during the 2014-2015 school year, respondent swung a special education student around by his ankles, shot rubber bands at the student, and threatened the student with harm. Respondent was repeatedly dishonest when he denied the allegations. Respondent also violated and refused to obey Board policy, the Education Code and the District's administrative regulations. The evidence established that respondent is unfit to teach.

FACTUAL FINDINGS

Respondent's Background

1. Respondent is a permanent certificated employee of the District, where he has been employed as a special education teacher at Thomas Olaeta Elementary School (Thomas Olaeta) in Atwater, California. Respondent was first hired by the District during the 2012-2013 school year as a long-term substitute teacher. He became a permanent certificated employee at the start of the 2014-2015 school year. Respondent does not have a history of prior discipline with the District.

2. Respondent holds an Education Specialist Credential originally issued on August 19, 2008, and renewed on September 15, 2012. His credential expires on October 1, 2017. Respondent's credential authorizes him to conduct educational assessments related to students' access to the academic core curriculum and progress towards meeting instructional goals, provide instruction, and provide special education support to individuals with a primary disability of specific learning disabilities, mild to moderate mental retardation, other health impairment and emotional disturbance for grades kindergarten through twelfth grade, through age 22. Respondent did not have experience working with elementary school students prior to being hired by the District.

3. In addition to his Education Specialist Credential, respondent holds an Autism Spectrum Disorders Authorization, which authorizes him to conduct assessments, provide

¹ To protect students' privacy, designated initials will be used instead of students' names. The governing board refers to the governing board of the District.

instruction, and provide special education-related services to individuals with a primary disability of autism across the continuum of special education options at the grade and age levels authorized by his credential.

4. Respondent was employed by the District as a Special Day Class Teacher for mild to moderate special education students. During the 2014-15 school year, Thomas Olaeta kept all special day class students in respondent's classroom, while another special education teacher served all resource students. During the 2014-15 school year, Ana Boyenga, Thomas Olaeta's principal at the time, supervised respondent.² Respondent's work evaluations were completed by his prior supervisor during the 2013-14 school year. Respondent was not evaluated during the 2014-15 school year.

5. Respondent's evaluations during the 2013-14 school year indicated that respondent needed to improve in the areas of classroom management and behavior management. Respondent was assigned a "peer resource" teacher to assist him in the areas of improvement. In the 2014-15 school year, Principal Boyenga had concerns regarding respondent's classroom management skills, and assigned a retired special education teacher to mentor respondent and to assist him with classroom management and drafting Individual Education Programs (IEPs). In addition, respondent had two instructional aides assigned to his classroom in the 2014-15 school year.

Student ND

6. ND was a seven-year-old second grade student at Thomas Olaeta during the 2014-15 school year. ND has been eligible for special education since 2011 under the disability category of autism. His last annual IEP was held on April 28, 2015, and his last triennial IEP was held on April 29, 2014. Due to ND's autism, he has a difficult time expressing his feelings. ND has a history of aggressive and impulsive behaviors, including crying, screaming, spitting, running around and hitting staff and students who are near him. ND's behaviors are often triggered by loud noises or people crying. ND is also attention-seeking, and his behavior is often the result of his need for constant attention.

7. According to ND's last IEP, ND has special education needs in the areas of language development, behavior and social-emotional skills. ND rarely speaks or engages in conversation with other students. However, ND is very intelligent.

8. During the 2014-15 school year, ND was placed in a special day class taught by respondent. The class consisted of a mix of kindergarten to sixth grade students. Respondent's class had a total of 12 students, including ND. Respondent was assisted by two classroom instructional aides, Sherry Simmons and Angelica Miranda, as well as an assigned mentor, retired special education teacher Cathy Schrier. In the summer of 2015,

² Ms. Boyenga is currently the Assistant Superintendent of Educational Services for the District.

ND was placed in Crystal Kline's classroom at Peggy Heller Elementary School. During the 2015-16 school year, ND was in Edward Keene's class at Thomas Olaeta.

9. During the 2014-15 school year, ND was "mainstreamed" for lunch, recesses and physical education. Mainstreaming eventually ceased because the District determined that ND's behaviors were too disruptive to other students in the class. ND began receiving consult services from Alyson Padgett, a behavioral analyst with the Merced County Office of Education's Behavioral and Emotional Support Team (BEST). BEST is a school-based program serving students with current IEPs whose behaviors interfere with learning and progress at school. In April 2015, Ms. Padgett gave respondent behavioral strategies that would be effective with ND.

September 1, 2015 Incident at Thomas Olaeta Elementary School

10. Edward Keene was ND's special education teacher for the 2015-16 school year. On September 1, 2015, after lunch, ND was acting out in Mr. Keene's classroom, and punched Mr. Keene in the back. Mr. Keene's teacher's aide, Elizabeth Vasquez, restrained ND so that ND would not punch Mr. Keene a second time. In response, ND kicked Ms. Vasquez.

11. Mr. Keene told Ms. Vasquez to take ND to respondent's classroom so that ND could have a "time out." Ms. Vasquez did so. She told respondent that ND hit Mr. Keene and kicked her. She also told respondent that ND wrote "fuck" on his paper. Respondent asked ND, "Do you want to fly?" ND said "No," and hid behind Ms. Vasquez. Respondent walked around Ms. Vasquez and grabbed ND by the ankles. Respondent held ND's ankles together and flipped him forward onto the ground, forcing ND to break his fall with his arms. While continuing to hold ND's ankles, respondent sat down at his desk. ND struggled and yelled, "[ND] doesn't want to fly!" As ND struggled to break free of respondent's grip, he hit his head on a nearby desk, resulting in a large knot. Ms. Vasquez put her hand on the desk in order to prevent ND from hitting his head on the desk again. According to Ms. Vasquez, it all happened very quickly.

12. While respondent still held ND by the ankles, ND was yelling, and a student in the class asked respondent, "Why don't you pop him like you did last year, a little sting?" ND continued yelling and respondent released his ankles. ND ran and hid behind Ms. Vasquez, pleading, "I don't want him to pop me." Respondent went to his cabinet and retrieved a rubber band. He held up the rubber band and asked ND, "Do you want me to sting you?" ND replied, "No! Don't pop me."

13. Shocked, Ms. Vasquez told respondent that they were not to touch kids. Respondent stated, "No, we aren't supposed to, but you pop them where they don't see it." Respondent pointed to the back of ND's knee.

14. After respondent threatened ND with being shot with a rubber band, respondent turned to the students in his classroom and asked them if they saw anything.

They unanimously responded “No.” Ms. Vasquez asked respondent, “What does it mean to make him fly?” Respondent stated that he picks up ND by his ankles and hold him upside down.

15. Ms. Vasquez and ND walked back to Mr. Keene’s classroom. Ms. Vasquez felt so upset by what she had witnessed that she began crying on their walk back. When ND saw Ms. Vasquez crying, he asked Ms. Vasquez if she was okay. Ms. Vasquez responded by asking ND if he was okay, and ND said “Yes.” When they got back to Mr. Keene’s classroom, Ms. Vasquez showed Mr. Keene the bump on ND’s head. Mr. Keene asked ND what happened, and ND stated “I hit my head on [respondent’s] desk.” Ms. Vasquez did not say anything more to Mr. Keene.

16. After school, ND’s parents came to pick him up. According to Ms. Vasquez, ND’s mother asked Mr. Keene about the bump on ND’s head. Mr. Keene answered that he sent ND to respondent’s classroom with Ms. Vasquez. ND told his mother, “ND hit his head on [respondent’s] desk.”

17. On several occasions after September 1, 2015, student EG asked Ms. Vasquez if she wore rubber bands around her wrist to scare ND. Ms. Vasquez responded, “No,” and asked EG why she would ask that. EG stated that “Miss Sherri and Ms. Miranda wore the rubber bands to scare ND. They would stretch it but not hit him with it.”

18. In addition, at the start of the 2015-16 school year, ND would ask Ms. Vasquez, “Are you going to pop me?” ND pointed to the hair tie on Ms. Vasquez’s wrist. Ms. Vasquez told ND that she used the band on her wrist to tie her hair in a ponytail when it got hot.

19. Ms. Vasquez did not report the September 1, 2015 incident to the District sooner because she was scared and intimidated by respondent. She felt bad for ND and knew that what was happening to him was wrong, but at the same time, she did not know who to tell, or who she could trust. She was afraid of losing her job. On September 13, 2015, Ms. Vasquez told a friend, Esmerelda Sanchez, an Office Manager at Peggy Heller Elementary School (Peggy Heller), about the incident. Encouraged by Ms. Sanchez, Ms. Vasquez reported the incident to the District on September 14, 2015, and completed a Child Protective Services report explaining the incident with the help of Assistant Superintendent of Human Resources Sylvia Nelson.

Similar Incidents Observed During 2014-15 School Year at Thomas Olaeta

20. Angelica Miranda, a special education aide assigned to respondent’s classroom in the 2014-15 school year, observed respondent shooting rubber bands at ND, but not at the other students. She observed respondent threaten ND with rubber bands approximately 10 to 15 times a week during the 2014-15 school year. Respondent threatened ND with rubber bands every day. He would threaten ND with rubber bands by only flicking them, but not shooting them at ND. Ms. Miranda did not see respondent shoot rubber bands at ND because

she was busy working with the other students in the class. However, she would notice a rubber band on the floor after respondent would hit ND with it. Respondent would joke that he did not really mean to hit ND. ND knew that the presence of rubber bands meant that he might get hit by one. Respondent asked Ms. Miranda to wear a rubber band around her wrist, but she refused.

Ms. Miranda also observed respondent grab ND by his hands and legs, and swing him around. Ms. Miranda asserted that respondent swung ND by his hands and legs because he knew that ND did not like it. ND learned that if respondent attempted to grab his legs, he would be swung around by respondent. Ms. Miranda observed respondent pick up ND once, and respondent pretended or threatened to pick up ND at least once a week. Respondent began doing this to ND during the second half of the year, because during the first half, respondent only used the rubber bands to discipline ND.

Ms. Miranda admitted that ND was not an easy student to work with because he hit the aides, his teachers and students. When respondent saw Ms. Miranda and other aides trying to put ND on time out, respondent would state, “No, let me do it.” Respondent would explain to Ms. Miranda and the other aides that ND was too aggressive, and that the strategies provided by the behavior analyst would not work. Respondent would then proceed to “use” the rubber band(s) on ND.

Ms. Miranda admitted that she did not report respondent’s conduct towards ND earlier. She feels “awful” for not saying anything. The reason she did not come forward was because she felt scared. She felt that respondent bullied her, and working with respondent made her feel uncomfortable.

21. Sherry Simmons, an instructional aide that worked with ND in respondent’s classroom during the 2014-15 school year, observed that respondent used rubber bands to “hit” ND. One day, she heard ND scream and noticed that his ear was red. Ms. Simmons suspected that respondent hit ND with a rubber band. She asked respondent what happened, and respondent stated that he did not know. ND was afraid of rubber bands, and respondent would wear a rubber band around his wrist and would make sure that ND always knew that the rubber band was there. Respondent would also snap the rubber band to further intimidate ND. Ms. Simmons knew this, and she consequently never wore a rubber band around her wrist. Ms. Simmons observed respondent threaten ND with a rubber band approximately three to four times. She saw respondent hit ND with a rubber band approximately two to three times. Respondent used the rubber bands only on ND.

Ms. Simmons also observed respondent grab ND by the hands and feet, and swing him around. Respondent knew that ND did not like heights, and swung ND around anyway. ND cried when respondent swung him. Respondent knew ND did not like it. Ms. Simmons observed respondent swing ND around by the hands and feet one time.

Ms. Simmons now knows that she should have come forward with her observations of respondent and ND sooner. The reason she did not do so was because she did not see

respondent hurt ND. She knows what respondent did was wrong, and that as a teacher, respondent should have known how to properly treat his students.

22. Cathy Schrier is a retired general education teacher with a special education background. The District hired Ms. Schrier to mentor respondent two days a week, during March and April 2015. Ms. Schrier's mentoring role was to help respondent with planning his lessons, general organization, room setup, and drafting IEP's for his students. Ms. Schrier also spent time with respondent's instructional aides, because they had many questions on how to best help the students.

Ms. Schrier observed an unorganized, chaotic atmosphere in respondent's classroom. She saw students in the class playing with rubber bands, and saw the rubber bands flying across the classroom. She recalled watching a student launch a pencil across the classroom. Respondent allowed the boys to shoot "baskets" into the trash can.

Ms. Schrier observed ND kick Ms. Miranda at times, and lash out at Ms. Sherry. When this happened, respondent would restrain ND to prevent him from kicking other people.

Similar Incidents Observed During Summer School 2015 at Peggy Heller

23. During summer school in late June 2015, Ms. Sanchez was in the nurse's office when ND was sent there by Crystal Cline, a special education teacher at Peggy Heller who taught ND's summer school class in 2015. Respondent came into the nurse's office after ND had been sent there, and told Ms. Sanchez, "Let me know if [ND] gives you any problems. [ND] doesn't like to fly." Not understanding what respondent meant, Ms. Sanchez thought respondent was joking, and she responded that she thought ND was fine. Respondent then reached for ND's ankles, but did not grab them. Ms. Sanchez noticed a change in ND's demeanor. ND backed away from respondent and seemed afraid. ND repeatedly stated to respondent, "[ND] be good, [ND] be good." Respondent again stated "[ND] doesn't like to fly," and reached for ND's ankles to show Ms. Sanchez ND's reaction. Ms. Sanchez asked respondent what he meant by his statement "[ND] doesn't like to fly." Respondent stated that he would lift ND by his ankles and hold ND upside down, and that ND knew what would happen if respondent told ND that he was "going to fly."

24. Respondent made random visits to Ms. Cline's classroom during summer school in 2015 to check on ND. During those visits, respondent asked Ms. Cline whether ND continued to engage in problem behaviors. One day, respondent told Ms. Cline that he would lift ND off the ground. Ms. Cline did not find respondent's "joke" to be funny, so she urged respondent to stop making comments like that. She did not think respondent was being serious, "but even a joke about the subject really bothered me." Respondent chuckled and walked away. After this conversation, respondent never talked to Ms. Cline about picking up ND off the ground again.

25. Kirsten Shulley, a summer school instructional assistant assigned to Ms. Cline's classroom in summer 2015 to assist with ND, observed that respondent dropped by Ms. Cline's classroom that summer at the request of Ms. Cline, and other times, respondent made uninvited visits. Each time that respondent stopped by the classroom, he asked specifically how ND was doing. Ms. Cline's classroom was located near railroad tracks. Ms. Shulley indicated that they could hear, but could not see the trains going by. Ms. Shulley observed respondent pick up ND so that he could see the trains. When ND was being difficult, respondent asked ND if he wanted to dance or fly. Respondent warned ND by saying, "Remember you need to be good or [ND] will have to dance." Ms. Shulley did not know what this meant, and did not ask respondent about it. Ms. Shulley also recalled respondent mention something about rubber bands, but she did not understand what he meant by it. She thought that ND might like to play with rubber bands, but felt it was strange because she did not remember seeing ND play with them.

26. Cynthia Varela, a special circumstances associate assigned to a student in Ms. Cline's summer school class in 2015, also heard respondent tell Ms. Cline to send ND to his classroom if ND misbehaved. Respondent had a lot of interaction with ND during summer school and "at times, it seemed like [respondent] would seek ND out." For example, respondent would stop and talk to ND in the hallways, before school, during recess, and after lunch. On several occasions, Ms. Varela observed respondent point his finger at ND and say, "You know better than that," "You'd better listen," and "Do you want to come to my room?" ND would become quiet and put his head down. Respondent continued to drop by Ms. Cline's class uninvited, to check up on ND, even after Ms. Cline received an extra aide, Ms. Shulley. Ms. Cline continued to send ND to respondent's class.

27. Melissa McIver, an instructional aide during summer school 2015 in respondent's classroom, observed ND being sent to respondent's classroom by Ms. Cline approximately three times. She observed respondent acting silly, playful and firm with ND. Ms. McIver observed respondent to be "a free spirit, unorganized, and very laid back." She recalled one time when respondent wore a t-shirt to school with a naked woman on the front. Respondent only changed his t-shirt when asked to do so by one of the other teachers. Ms. McIver also observed respondent to be on the phone a lot during class, and respondent was often looking at car and motorcycle parts with his students. At times, respondent ordered motorcycle parts during class.

28. Special Education teacher Edward Keene taught summer school at Peggy Heller with respondent in 2015. Mr. Keene asked for advice from respondent and Ms. Cline about ND, because ND was going to be in Mr. Keene's class the coming school year. Respondent did not share any techniques on how to deal with ND, but suggested that Mr. Keene send ND to his class if he needed help. Respondent insisted that he could help in getting ND to calm down. Mr. Keene did not share with ND's parents that he was sending ND to respondent's classroom for time outs because "it never came up" during his conversations with them.

Similar Incidents Observed During 2015-16 School Year at Thomas Olaeta

29. Mr. Keene sent ND to respondent's classroom approximately 10 times during the early part of the 2015-16 school year. Mr. Keene sometimes heard respondent ask ND, "Do you want to dance?" Mr. Keene did not know what this meant, and did not ask respondent. In retrospect, Mr. Keene thinks he should have asked. Respondent would ask ND twice, and ND would respond by saying "No." Mr. Keene could not tell if the question upset ND because ND did not have any variation in his voice. In working with ND, Mr. Keene noticed that when he leaned over to redirect ND, he would flinch. Mr. Keene was not sure why ND did this. At hearing, Mr. Keene did not remember when Ms. Vasquez brought ND to respondent's classroom on September 1, 2015. Mr. Keene did not recall ND having a bump on his head when ND returned to his classroom that day.

Behavior Intervention Plan Developed in 2014-15 School Year by Behavior Analyst

30. Alyson Padgett was a behavior analyst for BEST at the Merced County Office of Education (MCOE) during the 2014-15 school year. She is currently a behavior analyst with the Stanislaus County Office of Education. Ms. Padgett has a Master's degree in Psychology with an emphasis in Behavior Analysis from California State University, Fresno, and is a Board Certified Behavior Analyst by the Behavior Analyst Certification Board. Ms. Padgett is also a doctoral candidate in the area of Psychology with an emphasis in Behavior Analysis from the Chicago School of Professional Psychology in Los Angeles. Ms. Padgett has worked in the field of behavior analysis for seven years, and worked for MCOE from August 2010 to July 2015.

31. Ms. Padgett's role as a behavior analyst was to field referrals, assess students, and determine eligibility for behavior intervention services for District students referred to BEST, a school-based program service for students from preschool to 22 years with current IEPs whose behaviors were interfering with learning and progress at school. Programs and/or services are developed for each student and classroom environment on an individual basis, based on the specific needs of the student, and developed in coordination with the student's IEP team.

32. At the end of the 2013-14 school year, MCOE's BEST received a referral from MCOE's Autism Program, to provide assistance for ND in behavior management upon transition back to a District classroom. Ms. Padgett was assigned to ND's case. She informed the District that she would be following up with the referral at the beginning of the next school year, 2014-15.

33. When Ms. Padgett approached respondent regarding the referral in August 2014, respondent stated that he did not need assistance managing ND's behavior. Ms. Padgett followed up with respondent over the next few weeks, through September 2014, and respondent continued to report that he had no concerns and was not in need of additional supports.

34. On October 29, 2014, respondent contacted BEST and requested help, despite not having any concerns a month earlier. Ms. Padgett made visits to the classroom, and it was determined by respondent and staff that the materials and strategies suggested in ND's IEP meeting were difficult to implement, so new materials were developed to assist with their implementation. Ms. Padgett checked in with respondent regarding the new materials and respondent indicated that they were easier to use to meet ND's needs. In December 2014, Ms. Padgett requested an update after respondent had time to implement the new materials. Respondent indicated that ND was doing fine in the classroom, especially when compared to the beginning of the school year. This statement was contradictory to respondent's statements made at the beginning of the school year, when respondent indicated earlier that he had no concerns and did not need assistance with ND.

35. Respondent made little or no effort to communicate with Ms. Padgett from August to December 2014. Ms. Padgett would email respondent, then wait for weeks to get a response from respondent. Ms. Padgett attempted to contact respondent one last time after winter break, and he failed to respond. By the end of January 2015, Ms. Padgett closed ND's case. As part of the closure process, Ms. Padgett contacted Principal Boyenga and the coordinator of Special Education, Gina Peters. Upon learning of the case closure, Ms. Boyenga and Ms. Peters informed Ms. Padgett that assistance was in fact needed for ND, and requested the case be re-opened. As a result, a new referral was sent to MCOE for ND.

36. After receiving the second referral, Ms. Padgett visited respondent's classroom three times, for approximately one to two hours, from February to April 2015, in order to complete a functional behavior assessment and to provide behavior support for ND. During that time, Ms. Padgett observed ND interacting in the classroom and with staff, including respondent. Ms. Padgett provided support to ND and assessed the most effective behavior interventions to use to promote desired classroom behaviors. In addition, Ms. Padgett provided feedback and additional information for staff, modeled the effective interventions, and tried to troubleshoot with them if they observed a particular behavior, and wanted some additional information and guidance of what to do in those situations. During her assessments, Ms. Padgett did not observe respondent picking up or swinging ND around in order to influence ND's behavior. However, Ms. Padgett did hear respondent ask ND if he wanted to "fly" or "dance," but she did not understand what respondent meant by those words. Respondent often joked around with his students. Ms. Padgett concluded that respondent must have been joking around with ND in asking those questions.

37. Ms. Padgett concluded that ND required "differential and individualized reinforcement in order to shape desired classroom behaviors." Ms. Padgett learned that ND loved popcorn. She explained to ND's parents that popcorn would be a great item to use as reinforcement to change ND's behaviors. She also explained that the use of popcorn could eventually fade as appropriate behaviors increased, and other forms of reinforcement, for example, verbal praise, could instead be used.

38. On April 27, 2015, an IEP meeting was held in part to review the assessment results and proposed Behavior Intervention Plan (BIP). The team approved the BIP, which was incorporated into ND's IEP.

39. The BIP was based on Ms. Padgett's observations of ND's struggles inside and outside of the classroom centered on elopement, defined in the BIP as ND walking or running in the opposite direction of a staff member or location of an activity when prompted to come toward the staff member or engage in the activity. In addition, ND would also make a high-pitched whining sound due to being prompted back to task he did not want to do, or when being deprived of an item he wanted. The BIP included: (a) prompting ND to engage in the required task; (b) providing ND with adult help when necessary during teaching or completion of a non-preferred task; (c) calmly approaching ND if he eloped, and prompting him to take the adult's hand and practice walking from the original location back to the destination; (d) providing ND with preferred items, activities or edibles when engaging in desired behaviors on a continuous basis (to be faded as levels of appropriate behaviors increased and inappropriate behaviors decreased); and (e) providing ND with immediate social praise for appropriate behavior.

Failure to Follow Through With BIP

40. Ms. Padgett described respondent as "passively" refusing to follow the BIP. Respondent admitted to her that he did not use the strategies effectively. Respondent did not have an explanation for failing to follow through with the BIP, and he typically made comments like, "I know, I know," when reminded of particular strategies that would help. He was also reminded that the BIP strategies are only effective when used consistently. Ms. Padgett observed that in general, respondent's classroom lacked structure for all students.

41. Ms. Padgett recalled a similar situation with another student, where respondent was reluctant to follow her behavior management recommendations, or take necessary data for the student. Specifically, during the 2013-14 school year, respondent refused to follow Ms. Padgett's recommendations regarding the student, even when the suggested intervention was centered around using a strategy he was already employing in the classroom. Ms. Padgett's recommendation was to simply increase the frequency of reinforcement using the classroom management strategy. Ms. Padgett noted that respondent's reluctance and refusal to implement her recommended behavior strategies negatively impacted his student, as the student's behaviors of concern did not improve, and at one point, escalated in frequency and intensity, resulting in behaviors continuing to impede the student's and other students' learning.

42. Ms. Schrier, respondent's mentor, was aware of the Ms. Padgett's recommendations to use popcorn with ND as a reward for positive behavior. However, respondent did not want to use this method because he felt it was not fair to the other students who were not getting a treat. Respondent eventually used the popcorn for ND because ND's parents requested that he reward ND this way. Ms. Schrier observed that

respondent's use of the popcorn reward for ND was not consistent, and as a result, not as effective in changing ND's behavior as it could have been.

District's Investigation

43. Upon receipt of Ms. Vasquez's complaint on September 15, 2015, the District began its investigation into allegations of respondent's conduct with ND. The District is required to conduct an investigation pursuant to Board Policy and Administrative Regulation 1312.3, which sets forth uniform complaint procedures. Assistant Superintendent of Human Resources, Sylvia Nelson, served as the Board's compliance officer for receiving and investigating Ms. Vasquez's complaint, and ensuring the District's compliance with the law. Respondent was placed on paid administrative leave on September 15, 2015.

44. Ms. Nelson investigated the following allegations: (1) Respondent picked up ND and swung him around; (2) Respondent threatened to pick up ND and swing him around; (3) Respondent hit ND with rubber bands; (4) Respondent threatened to hit ND with rubber bands; and (5) Respondent failed to follow ND's BIP. In addition to interviewing District staff, Ms. Nelson interviewed ND, ND's mother, and a number of ND's classmates.

ND'S CONFIRMATION OF RESPONDENT'S CONDUCT

45. When ND was interviewed on September 18, 2015, ND's mother was also present. ND stated to Ms. Nelson that when he misbehaved, respondent would grab his wrists and ankles and spin him around. When Ms. Nelson reached for ND's wrists and ankles, ND became frightened and backed away very quickly. ND did not like it when respondent spun him around. ND also said that respondent shot rubber bands at him, and that respondent shot rubber bands only at him. In a soft and frightened voice, ND told Ms. Nelson that respondent would warn him that he was going to shoot a rubber band at him. ND also stated that respondent would hit him in the chest and ear with a rubber band. ND also testified briefly at hearing, and confirmed that respondent swung him by his wrists and ankles, and shot rubber bands at him. ND also briefly testified at hearing, confirming that respondent swung him and shot rubber bands at him.

ND'S MOTHER CONFIRMED THAT ND WAS TRUTHFUL

46. ND's mother gave assurances that ND was truthful to Ms. Nelson, due to the way that ND answered "Yes" in a subdued, quiet voice. His manner and tone was an indication that he was telling the truth. If ND answered "Yes" in a bright, cheerful voice, such a response indicated that that he was not telling the truth, according to ND's mother.

47. ND's mother told Ms. Nelson that she and her husband did not know that there were any issues with respondent disciplining ND. She and her husband talked to respondent every day after school during the 2014-15 school year. During their conversations, they discussed strategies that worked and did not work, and new strategies, including re-direction and reinforcements, as well as ND's interests, which included books on planets. Respondent

told ND's mother that he only occasionally had to put ND on time outs. ND's mother indicated that respondent knew how to handle ND better than anyone else. She also indicated that ND hates being off the ground. Even when ND's father picks him up to give him a hug, ND does not like it.

STUDENTS WITNESSED RESPONDENT'S CONDUCT

48. On October 9, 2015, Ms. Nelson interviewed a number of ND's classmates individually.

a. Student RA stated that when ND misbehaved, respondent grabbed ND's hands, placed them behind his back, and made him stand in a corner. In addition, respondent would pretend to shoot ND with rubber bands.

b. Student TM similarly stated that respondent would make ND stand in a corner. Respondent would also trick ND by calling him to the sink, then he would splash water on ND, which ND did not like. Respondent also shot rubber bands at ND. When respondent pretended to shoot a rubber band at ND, ND would get scared. Respondent also asked ND, "Do you want to dance?" Respondent would then take ND's hands and swing ND back and forth in the air.

c. Student EG stated that when ND misbehaved, respondent would take a rubber band and flick it at him. Respondent only flicked the rubber band at ND, and not the other students. Respondent would also grab ND's hands and twirl him in the air. Sometimes this made ND laugh, so respondent would keep twirling ND until he felt scared. Student EG felt sad when respondent did this to ND, because she thought ND was being hurt. EG also testified at hearing, and confirmed her statements to Ms. Nelson.

d. Student AV stated that respondent treated ND differently during a time out. Instead of asking ND to "go take a time out," he grabbed ND and put him on a time out. AV also stated that respondent would grab ND by the hands and legs, and swing him around to make ND listen to him. ND did not like it. Respondent only did this to ND. When respondent finished swinging ND, ND behaved.

RESPONDENT'S DENIALS

49. Ms. Nelson interviewed respondent, in the presence of his counsel, Mr. Renteria, on October 13, 2015. Respondent denied the following:

- a. Intentionally picking up ND and swinging him upside down.
- b. Picking up ND and swinging him in another manner.
- c. Picking up ND by the hand and ankle.

- d. Asking ND if he wanted to fly.
- e. Asking ND if he wanted to dance.
- f. Grabbing both of ND's ankles from behind, causing ND to fall forward.
- g. ND's parents telling him that ND did not like to be picked up.
- h. Picking up ND in any manner.
- i. Picking up ND at any time during his career.
- j. Accidentally picked up ND.
- k. Picked up any of his students.
- l. Picking up students to remove them from an area or place them on time out.
- m. Intentionally hitting ND with a rubber band.
- n. Hitting ND with a rubber band.
- o. ND reacting when [respondent] was holding a rubber band.
- p. Observing ND being injured from being hit with a rubber band.
- q. ND hitting other staff.
- r. Ms. Vasquez bringing ND to his classroom on September 1, 2015.
- s. ND hitting his head in [respondent's] classroom.

50. Respondent stated that he disciplined ND by using verbal prompting, proximity control, or "pulled a card" on his chart. When asked why Mr. Keene sent ND to his classroom, respondent stated that Mr. Keene would "drag" ND to his classroom, stating, "I can't handle him right now, I need 15 minutes." Respondent would tell ND to go to the corner. Respondent stated that ND listened to him. ND would count backwards from 10.

51. Ms. Nelson gave respondent an opportunity to change his "No" answers after telling respondent that multiple witnesses stated that they observed respondent doing the very things he denied doing. Respondent declined to change his answers.

52. Ms. Nelson found all of the persons that she interviewed to be credible, except respondent. In many, if not all instances, the witnesses gave corroborating statements. Ms.

Vasquez, Ms. Miranda and Ms. Simmons were mandated reporters³ and made statements against their personal interests. Ms. Vasquez admitted that she should have come forward sooner. Ms. Miranda and Ms. Simmons expressed regret that they had not reported respondent's conduct.

53. As a result of her investigation, Ms. Nelson concluded that all of the allegations occurred, as follows:

- a. Respondent picked up ND and swung him upside down multiple times during the course of the 2014-15 and 2015-16 school years.
- b. Respondent threatened to pick up ND and swing him around at least once a week during the second semester of the 2014-15 school year.
- c. Respondent shot ND with rubber bands approximately once a week during the 2014-15 school year.
- d. Respondent threatened to shoot ND with rubber bands every day during the 2014-15 school year, approximately 10 to 15 times per week.
- e. Respondent did not follow ND's BIP strategies and did not consistently follow the behavior strategies recommended by MCOE's Behavior Analyst (Ms. Padgett).

Board Policies and District's Regulation

54. Education Code section 49000 and Board Policy 5144 prohibit the use of corporal punishment as a disciplinary measure against a student. Corporal punishment is defined in the policy, and is set forth under Education Code section 49001, as "the willful infliction of, or willfully causing the infliction of, physical pain on a student."

55. District Administrative Regulation 5141.4 defines "child abuse" as including a physical injury on a child by another person. District Administrative Regulation 6159.4 sets forth behavioral interventions for special education students. The regulation sets forth prohibited interventions, including the use of corporal punishment. The regulation also prohibits any intervention designed or likely to cause physical pain, or likely to subject the student to ridicule, humiliation or excessive trauma.

56. Board Policy 4119.21 sets forth professional standards for District employees. The policy states, among other things, "Employee conduct should enhance the integrity of the district, advance the goals of the district's educational programs, and contribute to a

³ A mandated reporter is one that is legally required to make a report to the appropriate agency when abuse is observed or suspected.

positive school climate.” Inappropriate employee conduct includes, but is not limited to, “[e]ngaging in harassing behavior towards students.”

57. Ms. Nelson testified at hearing and confirmed the statements made by the witnesses in this case. She testified that respondent was given the Board’s policies by her assistant, Peggy Vanderhorst, by email. She knows this because the District sent an email to all certificated teachers and principals, informing them of the various Board policies that they are required to adhere to. Ms. Nelson was not sure when the email was sent. Respondent denied receiving the Board’s policies.

Statement of Charges and Request for Hearing

58. The District’s Governing Board approved a Statement of Charges against respondent based upon his alleged conduct which was the subject of Ms. Nelson’s investigation. On November 10, 2015, the District served its Notice of Intent to Dismiss and Statement of Charges; Imposition of Suspension without Pay on respondent. Respondent was notified that he was immediately suspended without pay pursuant to Education Code section 44939. Respondent filed his request for hearing on November 6, 2015.

Respondent’s Evidence/Contentions

59. Respondent began teaching in 2003. He first started teaching at Patterson High School as a part-time special day class teacher. Halfway through the school year, he was hired as a full-time teacher. Respondent worked there for two years, then transferred to Merced Unified High School District where he taught emotionally disturbed high school students. After two years, he took a position at a non-public school in Denair, teaching high school students. Respondent then worked for the Delhi Unified School District teaching a special day class consisting of seventh and eighth graders. Three years ago, respondent began working for the District as a substitute teacher at Peggy Heller. He was then offered a full-time position. Respondent taught for over ten years, but received tenure for the first time while teaching at Peggy Heller. He worked at Peggy Heller for two years before going to Thomas Olaeta.

60. In his first year at Thomas Olaeta, beginning in the 2014-15 school year, respondent had 18 students in his classroom, consisting of three students from six different grade levels. Respondent also had general education students with an IEP, who were also in his classroom. Respondent asserted that he had many challenges in his first year. Respondent described one of his challenges as having students in all grade levels, and creating the curriculum for first through sixth grade was very difficult. He also testified that it was “not an ideal situation” when a sixth grader had to line up with the first and second graders. Respondent dealt with the challenges by having a positive attitude. He also described himself as an “overachiever,” and that he knew he could do the job. He solved the problem of the embarrassment of the older kids by having them line up with their respective general education grade level for morning announcements. They were later sent back to respondent’s classroom.

61. Respondent asserted that Thomas Olaeta's Principal at the time, Ana Boyenga, always gave respondent positive feedback, despite Ms. Boyenga's testimony that respondent was not a good teacher and maintained a chaotic classroom environment.

62. Respondent had the assistance of Ms. Miranda, a six-hour per day aide, and Ms. Sherry, a three-hour per day aide. Ms. Sherry's hours were increased to six hours in the middle of the 2014-15 school year. Respondent also had the assistance of Ms. Schrier, a retired teacher. Ms. Schrier was in respondent's classroom a few times per week, for approximately three hours per day. Respondent also had parent helpers who came in occasionally.

63. Respondent was first introduced to ND during his first year of tenure, by ND's mother, when she brought him to school. Respondent's early impression of ND was that he "was smarter than everybody in the classroom, including the adults." Respondent further stated, "If you showed any weakness, [ND] was going to expose you." Respondent asserted that ND respected him. Respondent was confident that he could "handle ND," despite not being sure why ND qualified for special education services. He then stated that in the second week of school, "when the honeymoon was over and the real ND came out, I was, like, oh no." Respondent inquired with ND's previous kindergarten teacher, asking how ND went from her class to his class "with these behaviors." Respondent was concerned that ND needed a lot more support than Thomas Olaeta could provide, and wanted suggestions on how to handle ND. The kindergarten teacher suggested "tying everything down," and using "pictorials with autistic kids."

RESPONDENT'S BEHAVIOR STRATEGIES USED WITH ND

64. Respondent asserted that he used popcorn as a reward system in his class at the beginning of the school year, well before Ms. Padgett recommended the use of popcorn as part of ND's BIP. Respondent provided the popcorn for all of the students, not just ND. Respondent explained that the popcorn was only effective before lunch, because ND would be "popcorned out" after lunch. It was then that ND's negative behaviors would increase, such as hitting other students, hitting staff, climbing on file cabinets, and running on the tables.

65. Respondent stated that ND would often hit Ms. Miranda. Respondent described that he always saw the "aftermath." He would enter his classroom and see both aides holding ND while he was on the ground kicking and screaming. Respondent would say, "Stop. You guys don't go hands-on with [ND]. Give him his space." Respondent would then tell ND, "Let's take a time out." He gave directives to Ms. Miranda and Ms. Sherry to "go ahead and clean yourselves up and write it on the behavior log. Write it on the referral, if you want to." Respondent told the aides he would talk to ND's mother, instructed them to work with the smaller kids, and he would tend to ND. Respondent represented to ND's mother that he only occasionally had to put ND on time out, and she felt that respondent knew how to handle ND better than anyone else.

66. Respondent explained that he would primarily spend time with ND at 9:00 a.m. to 9:30 a.m., when ND would come over to respondent's group in his classroom. ND sat next to respondent when they were working together. Respondent kept ND close so that he could keep ND in his seat. Respondent would put his foot around ND's chair, so that ND could not get up and move around. ND liked "getting into everything." ND liked to grab things. He would grab respondent's glasses, or a pencil, and smell it. ND also liked to run to the water faucet in the classroom. Respondent explained that "it was hard keeping him in my grips."

67. Respondent stated that ND never hit him. Respondent knew how to prevent from being hit through his crisis prevention intervention training. He asserted that the use of "proximity control," which is to provide space between the student and the teacher, and to address the student from the side, instead of standing in front of the student and putting your face in front of the student, is a way to deescalate a situation.

68. In addition to proximity control, respondent utilized verbal praise and verbal prompting with ND. In addition, respondent stated, "Me being male, the infamous beard, and just me being firm with him, he knew I was in charge of that classroom." Respondent did not indicate whether he used proximity control and verbal praise on a consistent basis with ND.

69. When ND misbehaved in another teacher's class, respondent would go to that classroom, walk in, and ask ND what he was doing, and ask ND to come to him. Respondent would have a serious look on his face, and ask ND if he was making good choices. ND would respond that he was making bad choices. Respondent would then take ND back to his classroom, "and then the gig was up." Respondent would then let ND calm down. Respondent claimed to have insight into ND's negative behaviors, stating that "the aides didn't understand that you can't give ND consequences 15 minutes later or 30 minutes later. It's gone. He doesn't know why he did that. He doesn't understand emotions or feeling sorry for somebody. It's already gone." Respondent admitted that he sometimes "buted heads" with Ms. Miranda, because instead of depriving ND of recess when he misbehaved, respondent believed that ND should "run all that little energy out or in that little body." Respondent characterized ND as "not your average student." Respondent asserted that one had to "think outside of the box" with ND.

70. Respondent also utilized preferred activity time (PAT) in his classroom. During PAT, respondent allowed ND to engage in activities that he enjoyed, such as working with a laptop, playing with the water in the sink, and dipping a paint brush in water when using water colors. Respondent asserted that he had to always find something new for ND to do, since he was bored and distracted easily.

71. Respondent asserted that "the one thing that did work [with ND] was being stern with him and meaning business," when ND misbehaved. According to respondent, he had to be firm with ND, in order for ND to take him seriously. Respondent claimed that

when ND would “take off,” he would say to ND, “here, now,” and ND would listen and comply.

RESPONDENT’S ASSERTED COMPLIANCE WITH THE BIP

72. Respondent claimed that he followed the BIP established for ND. He stated that Ms. Padgett instructed him to tell his aides that they had to give ND popcorn more often. Respondent understood Ms. Padgett’s instructions to mean that with every little task ND completed, the aides were to give ND popcorn. For instance, if ND wrote his name on a worksheet, he was given popcorn. Then, if ND completed a problem on the worksheet, he was given more popcorn, and so on. Respondent asserted that the popcorn reward did not work after lunch. Other rewards that respondent incorporated, that were not part of the BIP, were allowing ND to sit at his desk, letting ND wear his sunglasses, and allowing ND to go on field trips with the first graders. Respondent asserted that ND “shined” when he was in an outdoor setting.

73. With regard to ND’s elopement from the classroom, respondent asserted that he solved the issue by covering the clock in his classroom. No one suggested this solution to respondent. Respondent did not provide testimony on whether he followed the BIP with regard to ND’s elopement.

RESPONDENT’S UNDERSTANDING OF BOARD POLICIES

74. Respondent asserted that when he was hired by the District, he was not provided with Board policies or the District’s administrative regulations. He did not read them, and was not asked to do so. He was not asked by the District whether he understood his duties by reading the Board’s policies and regulations.

RESPONDENT’S DENIALS OF SWINGING ND AND SHOOTING RUBBER BANDS AT ND

75. Respondent asserted that he answered all of Ms. Nelson’s questions truthfully during the investigative interview. Respondent denied doing anything that would have inflicted injury on ND. He denied doing anything inappropriate to ND. He denied ever touching ND. Respondent asserted that he was committed to the well-being of all of his students, including ND. He took full responsibility for everything that happened in his classroom. Respondent stated, “In my classroom, I’m it. I’m the captain.” As the “captain,” respondent contended that he was a good teacher, and provided the necessary creativity to manage the behavior of a difficult student like ND. Respondent further contended that the District’s investigation was incompetent, and that teacher’s aides Vasquez and Miranda were not credible, because they neglected their duties as mandated reporters.

Discussion

76. Respondent was not credible when he denied: (1) swinging ND; (2) threatening to swing ND; (3) shooting rubber bands at ND; and (4) threatening to shoot

rubber bands at ND. There was ample adverse testimony that respondent committed the acts as alleged in the Notice. “A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or his own conduct as to discredit his whole story.” (*La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 346.)

77. Teachers, administrators, teacher’s aides, and students all had independent recollection of respondent’s conduct. Two teacher’s aides witnessed respondent swinging ND. Students witnessed the same, and saw respondent shoot ND with rubber bands. Many teachers heard respondent ask ND if he wanted to “fly” or “dance.” Respondent picked up ND to watch the trains go by. Ms. Padgett testified that respondent “passively” followed the BIP. Respondent touted that he knew how to handle ND better than anyone. The accounts of these witnesses were consistent and credible. They established that respondent swung ND around by his ankles, shot rubber bands at ND, and threatened ND with harm. Respondent was repeatedly dishonest when he denied the allegations, both during the District’s investigation and at hearing, and when he told ND’s parents that he only occasionally had to put ND on time outs. Respondent also violated and refused to obey state laws and reasonable regulations of the District, in particular, Education Code section 49000 and Board Policy 5144, Administrative Regulation 5141.4, and Board Policy 4119.21, which all address corporal punishment of a student.

Morrison Criteria

78. Education Code sections 44932 and 44944 create the statutory framework for this proceeding. The statutes give discretion to both the District and the Commission. The District has the right to determine when to seek disciplinary action against a teacher and what discipline to seek. The Commission, however, is not bound by the District’s choice. It has broad discretion in disciplinary matters. Its role is not limited to determining whether charged conduct in fact occurred, but it must also decide whether that conduct demonstrates unfitness to teach when measured against the criteria set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-30. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219-22.) In exercising its discretion in this matter, the Commission determines whether dismissal is warranted by the facts established at the hearing.

79. Before a decision can be made as to whether respondent’s conduct was immoral (Ed. Code, § 44932, subd. (a)(1)), dishonest (Ed. Code, § 44932, subd. (a)(4)), constituted evident unfitness for service (Ed. Code, § 44932, subd. (a)(6)), and was in persistent violation of Board policy and District rules (Ed. Code, § 44932, subd. (a)(8)), it must be determined first whether respondent’s conduct demonstrated he was unfit to teach using the *Morrison* criteria. (*Board of Education v. Jack M.* (1977) 19 Cal. 3d 691, 696.) Those criteria are: (1) the likelihood the conduct may have adversely affected students or fellow teachers, (2) the degree of such adversity anticipated, (3) the proximity or remoteness in time of the conduct, (4) the type of teaching certificate held by the party involved, (5) the extenuating or aggravating circumstances, if any, surrounding the conduct, (6) the likelihood of the recurrence of the questioned conduct, and (7) the extent to which disciplinary action

may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Morrison v. State Board of Education*, *supra*, 1 Cal.3d at p. 229.)

LIKELIHOOD CONDUCT MAY HAVE ADVERSELY AFFECTED STUDENTS OR TEACHERS

80. The likelihood that students, teachers or teacher aides would be adversely affected by watching respondent target ND by swinging ND by his hands and ankles, shooting rubber bands at ND, and threatening ND in the classroom is self-evident. Respondent's students were special education students of various grade levels who were vulnerable and susceptible to harm. The students who saw respondent's conduct towards ND, would undoubtedly have been adversely affected, and their trust in respondent to provide a safe, secure and nurturing environment as a teacher irreparably damaged. Furthermore, respondent instilled fear in ND.

A teacher is often described as “...an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection.” (*Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 970.) Ms. Nelson credibly testified that teachers must abide by the District's rules and Board policies. Students look up to and admire teachers. Respondent violated the trust the school, students, parents, and the District placed in him. Fitness to teach must be viewed in a context broader than one's ability to engage in classroom instruction when students are physically present in class:

“[T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment.... His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.” [Citations.]

There are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and school teachers fall into such a category....

(*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463.)

Respondent's conduct could have adversely affected other teachers had they been aware of his actions towards ND, and what respondent meant by his words “fly” and “dance.” His conduct most certainly had an adverse effect on teacher aides Vasquez and Miranda, who were eyewitnesses.

Student eyewitnesses were adversely affected by watching respondent treat ND differently than the other students in respondent's class. They watched a teacher misuse his authority in a way that was inappropriate. It is clear that respondent's actions were pervasive and so extensive that his conduct towards ND occurred over the course of one full school year, summer school, and the beginning of the 2015-16 school year. Had Ms. Vasquez not reported respondent's conduct on September 15, 2015, respondent would have continued to target and harm ND, leading to greater adverse effects on students and teachers.

THE DEGREE OF THE ADVERSE EFFECT

81. Again, this is self-evident. The damage respondent's actions could have caused to students who saw respondent abuse ND in the classroom is incalculable. In addition to causing emotional harm caused to students, as well as to the teacher's aides, respondent's conduct could have subjected the District to adverse legal action.

PROXIMITY OR REMOTENESS IN TIME OF THE CONDUCT

82. The conduct forming the basis of the District's decision to dismiss respondent occurred in the 2014-15 school year. The conduct involved abuse of a special education student and failure to follow the student's BIP. The District's decision to dismiss respondent came within two months of its discovery of his conduct. Respondent's conduct is particularly disturbing because of its proximity (location, manner of access and time) to the District.

TYPE OF TEACHING CERTIFICATE

83. Respondent in the 2014-15 school year was a special education teacher. He holds an Education Specialist Credential with an Autism Spectrum Disorders Authorization. These types of teaching certificates allow respondent to work with some of the most vulnerable students in the District.

EXTENUATING AND AGGRAVATING CIRCUMSTANCES

84. There was ample evidence of students and teachers observing respondent swing ND by his hands and ankles, and shooting ND with rubber bands. Moreover, teachers who did not observe respondent committing these acts heard respondent asking ND to "fly" or "dance," which meant that respondent threatened to swing ND by his hands and ankles. Respondent did not hide his conduct. Respondent boasted that he knew how to handle ND's behavior better than anyone else, including Ms. Padgett, the behavioral analyst. He was dishonest during the investigation and at hearing when he denied his conduct. Respondent denied doing anything wrong. He took no personal responsibility or accountability for his actions. He blamed the teacher's aides, school administration, and the District for an incompetent investigation and their failure to bring criminal charges against the teacher's aides for failing their duties as mandated reporters. These facts constitute significant

aggravating factors. Respondent did not demonstrate that there were any extenuating circumstances to justify or excuse his behavior.

LIKELIHOOD OF RECURRENCE

85. In considering the likelihood of recurrence, the following was considered: Respondent knew the rules regarding the prohibition of corporal punishment to discipline a student. He knew to use edibles or praise to redirect ND from negative behaviors. He knew that he had to carry out the strategies in ND's BIP. He knew that he had to exercise good judgment when interacting with his students. Nevertheless, he engaged in targeting and harming ND over two school years. Had he not been observed by Ms. Vasquez, there is no indication that his conduct towards ND would have stopped. His conduct demonstrated a high level of recklessness and an extreme lack of judgment. His outright denial of the very acts he was observed doing to ND is appalling.

Respondent demonstrated a lack of insight into his conduct, and considered himself an exceptional teacher because he knew ND better than all the other teachers and staff on how to make ND behave. In reality, respondent intimidated and threatened ND into submission. Respondent had no remorse for his conduct, because he believed that he did nothing wrong. But the overwhelming evidence established that respondent targeted and abused ND, did not follow Ms. Padgett's BIP strategies, and violated Board policy.

All this strongly indicates that respondent would continue to engage in conduct that harms a student regardless of the rules prohibiting such conduct if he were not dismissed.

ADVERSE IMPACT OR CHILLING EFFECT UPON THE CONSTITUTIONAL RIGHTS OF THE TEACHER INVOLVED OR OTHER TEACHERS

86. There was no evidence that dismissing respondent would inflict an adverse impact or chilling effect upon the constitutional rights of respondent or other teachers.

CONCLUSION

87. After considering the *Morrison* factors outlined above, the evidence established that respondent is unfit to teach.

Immoral Conduct

88. Having determined that respondent's conduct demonstrates that he is unfit to teach, the next question becomes whether his conduct is immoral. Pursuant to Education Code section 44932, subdivision (a)(1), a school district may discipline a permanent certificated employee for "immoral" conduct. In *San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466, the court explained that:

A teacher may ... be dismissed for “[i]mmoral or unprofessional conduct.” (§ 44932, subd. (a)(1).) “The term “immoral” has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.” (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811, 4 Cal.Rptr. 286.) Moreover, the definition of immoral or unprofessional conduct must be considered in conjunction with the unique position of public school teachers, upon whom are imposed “responsibilities and limitations on freedom of action which do not exist in regard to other callings.” (*Board of Trustees v. Stubblefield, supra*, 16 Cal.App.3d at p. 824, 94 Cal.Rptr. 318.)

89. Respondent’s swinging of ND by his hands and ankles, shooting rubber bands at ND, threatening to swing ND by asking him if he wanted to “dance” or “fly,” threatening to shoot ND with rubber bands, and targeting only ND, constituted immoral conduct. (Findings 10 to 42.) Respondent showed a moral indifference to the opinions of respectable members of the community, and an inconsiderate attitude toward good order and the public welfare. His conduct was inconsistent with the reasonable expectations society places upon teachers to act as exemplars who model proper adult conduct to the students they teach. This conduct therefore establishes cause to dismiss respondent for immoral conduct under Education Code section 44932, subdivision (a)(1).

Dishonesty

90. Pursuant to Education Code section 44932, subdivision (a)(4), a school district may discipline a permanent certificated employee for dishonest conduct. Respondent was dishonest during the District’s investigation, when asked whether he picked up ND, swung him around, shot rubber bands at him, and threatened to do the same. Respondent was dishonest with ND’s parents when he indicated that ND’s behaviors were manageable, and he knew best how to manage ND. Respondent was also dishonest when he told Mr. Keene and Ms. Cline to send ND to his classroom for time out, when in fact respondent physically and emotionally abused ND. This conduct therefore establishes cause to dismiss respondent for dishonesty under Education Code section 44932, subdivision (a)(4).

Evident Unfitness for Service

91. In *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-45, the court held Education Code section

44932, subdivision (a)(5), “‘evident unfitness for service’ connotes a fixed character trait, presumably not remedial merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” It further interpreted “evident unfitness for service” to require that “unfitness for service be attributable to a defect in temperament--a requirement not necessary for a finding of ‘unprofessional conduct.’”

The District established that respondent has defects in temperament, specifically respondent’s recklessness and lack of judgment. Despite the abundance of evidence establishing his conduct, he completely denied doing anything improper. He considered himself an exceptional teacher despite being assigned a mentor teacher and two aides, and teachers describing his classroom as disorganized and chaotic. He viewed himself as the “captain of the ship,” answerable to no one. He even rejected the behavioral analyst’s strategies, thinking he knew better how to handle ND. His lack of judgment and recklessness in specifically targeting ND for physical discipline is astounding. These facts establish respondent’s evident unfitness for service.

Persistent Violation of Rules

92. A charge of persistent violation of or refusal to obey requires a showing of insubordination. (*Midway School District of Kern County v. Griffeath (Midway)* (1946) 29 Cal.2d 13, 18-19.) Furthermore, “persistence” requires a showing of “continuing or constant” behavior. (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 27 Cal.App.3d 77, 82.) As indicated in *Midway*, “[p]ersistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent.” (*Midway, supra*, 29 Cal.2d at p. 18.)

93. Respondent engaged in repeated instances of corporal punishment (Findings 10 to 42, and 48) in violation of Board Policy 5144, and Education Code sections 49000 and 49001, which prohibit corporal punishment as a disciplinary measure against a student. Respondent also violated District Administrative Regulation 6159.4, which prohibits the use of corporal punishment as a behavioral intervention for special education students. Respondent’s conduct rose to the level of child abuse as defined by District Regulation 5141.4, when he caused a bump ND’s head. Respondent’s conduct, as a whole, violated Board Policy 4119.21, by failing to enhance the integrity of the District, advance the goals of the District’s educational program, and contribute to a positive school climate. These facts establish that respondent persistently violated and refused to obey applicable laws, Board policies and District regulations.

Appropriate Discipline

94. Having determined respondent’s conduct was immoral, dishonest, constituted evident unfitness for service, and demonstrated persistent violations of the District’s rules, and having found his conduct established he was unfit to teach, the only remaining question

is whether dismissal is the appropriate discipline. The Commission concludes that it is. Respondent's only real defense is his ability as a teacher. However, his evaluations indicated that he needed to improve in the areas of classroom management and behavior management, and required the assistance of a peer resource teacher, teacher's aides, a mentor, and a behavior analyst. Respondent's conduct towards ND in his classroom is indefensible. He demonstrated extremely poor judgment and recklessness over a substantial period of time. It is concerning that respondent denied his conduct, and admitted no wrongdoing. His pervasive and long term conduct towards ND demonstrated that he could not differentiate between what was appropriate and what was not appropriate in his classroom.

The District cannot be satisfied such misconduct on respondent's part would not recur, particularly if respondent were again allowed have a special education student like ND in his classroom. There is no requirement the District impose a lesser form of punishment first. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th at 1450-53.) The District's decision to dismiss respondent is the correct one.

LEGAL CONCLUSIONS

1. It was established by a preponderance of the evidence that respondent committed acts constituting immoral conduct pursuant to Education Code section 44932, subdivision (a)(1), and that such acts demonstrated an unfitness to teach, by reason of Findings 78 to 89.

2. It was established by a preponderance of the evidence that respondent committed acts constituting dishonesty pursuant to Education Code section 44932, subdivision (a)(4), and that such acts demonstrated an unfitness to teach, by reason of Findings 78 to 87, and 90.

3. It was established by a preponderance of the evidence that respondent committed acts constituting evident unfitness for service pursuant to Education Code section 44932, subdivision (a)(6), and that such acts demonstrated an unfitness to teach, by reason of Findings 78 to 87, and 91.

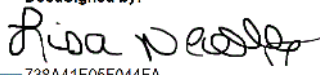
4. It was established by a preponderance of the evidence that respondent committed acts constituting persistent violation of the rules of the District pursuant to Education Code section 44932, subdivision (a)(8), and that such acts demonstrated an unfitness to teach, by reason of Findings 78 to 87, and 92.

5. By reason of Legal Conclusions 1 to 4, and Finding 94, dismissal of respondent from his position as a certificated teacher with the Atwater Elementary School District is warranted.

ORDER

Respondent Manuel Mercado is DISMISSED as a permanent certificated employee of the Atwater Elementary School District.

DATED: July 11, 2016

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LISA NEALLY
Commission Member

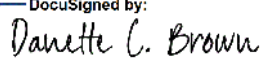
DATED: July 12, 2016

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KAREN YOUNG
Commission Member

DATED: July 12, 2016

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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings
Commission Member