

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA**

In the Matter of the Suspension of:

DAREN ENGSTROM,

Respondent.

OAH No. 2010100088

In the Matter of the Suspension and Dismissal
of:

DAREN ENGSTROM,

Respondent.

OAH No. 2011010187

DECISION

The above-captioned consolidated matters came on regularly for hearing before the Commission on Professional Competence (Commission) at McFarland, California on September 12-16 and 19, 2011. The Commission consisted of the following members: Val E. Donaire, Hueneme School District; Roberta Parnell, Delano Union School District; and Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, who presided.

McFarland Unified School District (District) was represented by GCR, LLP, by Chaka C. Okadigbo, Attorney at Law.

Daren Engstrom (Respondent) was present and was represented by Tuttle & McCloskey, by Ernest H. Tuttle, III, Esq.

Oral and documentary evidence was received on September 12-16 and 19, 2011. The record was held open to allow the parties to submit written closing briefs by 12 noon on October 5, 2011. Each party timely submitted a written closing brief. The District's closing brief was marked for identification as Exhibit 71. Respondent's closing brief was marked for identification as Exhibit 526. The record was closed and the matter was submitted for decision on October 5, 2011.

In this case, the District seeks a three-day suspension against Respondent and termination of his employment as a permanent teacher, based on charges that Respondent failed and refused to teach the District-approved curriculum in accordance with the lesson

plans prepared by his grade-level chair, despite being told by his principal that he was required to do so.

After due consideration of the entire record herein, the Commission makes the following factual findings, conclusions of law, and order:

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Governing Board of the District is the duly elected, qualified and acting governing board of the District, organized and existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a permanent certificated employee of the District.

3. By letter dated September 15, 2010, the District's Assistant Superintendent, Kim McManaman (McManaman) notified Respondent that the Governing Board voted to immediately suspend him without pay for three days, with the suspension to be served on September 16, 20, and 24, 2010. The letter included an Accusation dated September 15, 2010, which set forth the grounds for the three-day suspension. Respondent timely submitted a notice of defense by which he requested a hearing to contest this Accusation.

4. Respondent served the three-day suspension on September 16, 20, and 24, 2010.

5. On November 15, 2010, the District placed Respondent on paid administrative leave. Also on this date, McManaman notified Respondent, in writing, that she would be recommending to the Governing Board that he be immediately suspended without pay and dismissed from employment.

6. By letter dated November 24, 2010, McManaman notified Respondent that the Governing Board voted to immediately suspend him without pay effective November 24, 2010, and to dismiss him from employment with the District. The letter included an Accusation dated November 23, 2010, which set forth the grounds for immediate suspension and for dismissal. Respondent timely submitted a notice of defense by which he requested a hearing to contest this Accusation. One of the grounds for dismissal alleged in the Accusation is for unprofessional conduct, which is based on the notice of unprofessional conduct that the District served on Respondent on September 3, 2010, pursuant to Education Code section 44938.

7. Respondent has been on unpaid administrative leave from the District since November 24, 2010.

8. Respondent waived the 60-day deadline under Education Code section 44944, subdivision (a), for commencing the hearing in this matter.

9. All jurisdictional requirements have been met.

Respondent's Background

10. Respondent has been employed by the District as a teacher since 1997. He has taught at the District's two elementary schools, Kern Avenue Elementary School (Kern Avenue) and Browning Road Elementary School (Browning Road). Respondent started his teaching career at Kern Avenue, where he taught third, fourth, and fifth grade. For the past six years, Respondent has been a teacher at Browning Road. He taught fourth grade from 2006 to 2009. He taught third grade for the 2009-2010 and 2010-2011 school years.

11. Prior to the 2009-2010 school year, Respondent received positive performance evaluations. He did many volunteer activities for his students on his own time and sometimes at his own expense, including yearbook activities and accompanying students to summer camp.

12. Maria Gonzalez-Salgado (Salgado) has been the principal of Browning Road for the past four years.

13. On November 12, 2009, Salgado conducted a formal classroom observation of Respondent's classroom during a language arts lesson. On the Classroom Observation Checklist, Salgado gave Respondent a rating of excellent for having the daily plan posted, 70 percent of students on task, and maintaining student interest. She rated him as good in the areas of feeling tone of classroom, room appears safe and orderly, student work is displayed, students know and follow procedures, students involved in the learning process, student engagement strategies used, children accept responsibilities, enthusiasm for teaching the lesson, quality of instructional delivery, use of motivational factors, appropriate variety of activities, student monitoring, and respectful attitude toward students. Salgado gave Respondent a rating of acceptable in the areas of appropriate teaching aids, clearly defined discipline procedures, classroom management evident, clearly presented directions, and quality of lesson plans. The areas of lesson objective posted, checking for understanding observed, and higher thinking skills used were rated as unobserved.

14. On May 4, 2010, Salgado conducted another formal classroom observation of Respondent's classroom, this time during a math lesson. On the Classroom Observation Checklist, Salgado gave Respondent a rating of good in all areas, except that she rated Respondent as acceptable in the areas of appropriate teaching aids, children accept responsibilities, quality of lesson plans, use of motivational factors, appropriate variety of activities, and higher thinking skills used.

15. Salgado prepared an Evaluation of Teaching Performance dated June 3, 2010, which was Respondent's annual evaluation for the 2009-2010 school year. Respondent was evaluated in the six California standards for the teaching profession. For Standard I (engaging and supporting all students in learning), Respondent was rated as needs improvement in all five areas of this standard. For Standard II (creating and maintaining effective environments for student learning), in six areas, Respondent received five ratings of satisfactory-meets standards and one rating of unsatisfactory-does not meet standards. For Standard III (understanding and organizing subject matter), in five areas, Respondent received four ratings of unsatisfactory-does not meet standards and one rating of needs improvement. For Standard IV (planning instruction and designing learning experiences for all students), in five areas, Respondent received one rating of satisfactory, three ratings of needs improvement, and one rating of unsatisfactory-does not meet standards. For Standard V (assessing student learning), in five areas, Respondent received one rating of satisfactory-meets standards and four ratings of needs improvement. For Standard VI (developing as a professional educator), in five areas, Respondent received one rating of satisfactory-meets standards, one rating of needs improvement, and three ratings of unsatisfactory-does not meet standards.

16. Specifically, Respondent received ratings of unsatisfactory-does not meet standards in the areas of using instructional time effectively, demonstrating knowledge of subject matter content, organizing curriculum to support student understanding, developing student understanding through instructional strategies, using materials, resources, and technologies, developing and sequencing instructional activities and materials, reflecting on teaching practice, establishing professional goals, and working with colleagues to improve professional practice.

17. As a result of the unsatisfactory ratings in this evaluation, Respondent was required to participate in the Peer Assistance Review (PAR) program for the ensuing 2010-2011 school year. PAR is a peer assistance program where exemplary teachers are assigned to mentor other teachers in need of development in subject matter knowledge, teaching strategies, or both. This was the first time Respondent was referred to the PAR program.

18. Salgado gave the Evaluation of Teaching Performance to Respondent on June 3, 2010, the last day of the 2009-2010 school year. Salgado's practice is to give teacher evaluations on the last day of school rather than 30 days before the end of the school year as required under the Education Code. Salgado testified she does this because of her concern that if a teacher receives an evaluation stating that they need improvement, then the teacher's performance may deteriorate in the last 30 days of the school year because of the evaluation. In this case, Respondent was allowed to submit a written response to this evaluation after the school year ended.

Browning Road School

19. The District has determined that the fundamental learning needs of its students are in the areas of reading, mathematics, and the acquisition of English for English-learner students.

20. Browning Road is designated by the California Department of Education (CDE) as a program improvement school. Generally, a school may be designated a program improvement school based on low family incomes and low academic achievement by its students.¹ Browning Road has been a program improvement school for at least five years. It was a program improvement school in the 2010-2011 school year.

21. As a program improvement school, Browning Road is required to implement the nine essential components of program improvement developed by the CDE. The nine essential components include, but are not limited to: (1) use of State Board of Education adopted or standards-aligned English/reading/language arts and mathematics instructional materials and documenting their daily use in every classroom with materials for every student; (2) adherence to instructional minutes for English/reading/language arts and mathematics, and monitoring compliance with instructional time for the adopted core programs for reading/language arts, reading intervention, and core mathematics; and (3) preparation and distribution of a district/schoolwide pacing schedule for each grade level for the reading/language arts and mathematics program "in order for all teachers to know when and in what sequence each lesson is expected to be taught to ensure content coverage." [Exhibit 51.]²

22. The District requires Browning Road to implement the nine essential components of program improvement by, among other things, "provid[ing] and monitor[ing] daily, the full implementation of the reading and language arts program, including instructional time requirements . . . for reading intervention at K-12 for all students, including . . . English Learners (EL), through monitoring class schedules, lesson plans, and classroom observations." School site administrators (e.g., principals) are required to visit "classrooms on a daily basis to monitor schedules, lesson plans, and make classroom observations." With regard to English Language Development (ELD), the District requires that "at least 45 minutes daily of [ELD] is provided to EL's in grades 1-12 . . . using ELD materials approved by CDE."

23. For the 2010-2011 school year, the District adopted a new reading/language arts curriculum called Treasures. A three-day training in Treasures was held during the

¹ See, Education Code sections 54633, 54635, and 54483.

² Exhibit 51 is the District's plan for implementing the nine components of program improvement. Although this plan is dated 2007-2008, the testimony of Assistant Superintendent McManaman established that this is the plan followed by the District in the 2010-2011 school year.

summer of 2010. Respondent was unable to attend this training due to a previously scheduled vacation. However, over the summer, he spent 20 hours reviewing the teacher's manuals and other materials for Treasures. Based his review of the materials, Respondent felt he was prepared to teach the Treasures curriculum in the upcoming school year.

24. The Treasures program includes an ELD component that is tied to the English Language Arts (ELA) part of the curriculum. The ELD component teaches strategies that EL students will need for the ELA curriculum. Browning Road divides its EL students into four groups based on abilities. Students are assigned a homeroom teacher to receive math and ELA instruction. During the ELD time block, the ELD students go to another teacher's classroom for ELD instruction. The third grade teachers are assigned to teach one group of ELD students. After ELD, the students return to their homeroom teacher's classroom.

August Events

25. The first day of the 2010-2011 school year was August 11, 2010. Myriam Maldonado (Maldonado) was the grade-level chair for the third grade at Browning Road. Maldonado held grade level meetings for the third grade on August 9, 13, 16, 20, and 25, 2010. The grade-level meetings provided a forum for Browning Road's third grade teachers to collaborate and express and discuss their classroom or curriculum related concerns. Respondent was present at the grade-level meetings in August. He did not express concerns or raise any issue about teaching the Treasures curriculum during any of the August grade-level meetings.

26. At the August 9, 2010, meeting, it was agreed that Maldonado would prepare the weekly lesson plans for the third grade and distribute them to the teachers by email and a hardcopy in the teachers' mailboxes. Per Salgado's directive, the lesson plans were to be distributed on Friday. It was agreed that the lesson plan would attach a copy of the week-at-a-glance page from the Treasures Teacher's Manual which detailed the specific pages to be taught during class instead of Maldonado retyping the same information into the lesson plan. The lesson plans sent by email would not have a copy of the week-at-a-glance page, which would be attached to the hardcopy placed in the teacher's mailbox. Respondent requested to receive the lesson plans only by email. Maldonado provided the lesson plans to all third grade teachers, including Respondent, by email and hardcopy. Respondent's request to receive the lesson plans on Wednesday instead of Friday was denied.

27. In general, the lesson plans prepared by Maldonado contained minimal information, with more detailed information about the day's lessons contained in the week-at-a-glance and other pages attached to the lesson plans. The Commission noted some of the lesson plans had minor discrepancies. For example, the lesson plan for the second week of school showed incorrect days of the month (August 11-13 instead of August 16-20). The lesson plans for August also showed a time block designated for RTI, even though RTI was not scheduled to be taught until September 14, 2010. According to Maldonado, RTI was included on the lesson plans even before it was scheduled to be taught to alert the teachers that RTI would be taught in the time block in the future.

28. According to the lesson plans, the first 10 days of the school year were to be spent teaching Start Smart. Start Smart introduced various strategies and skills to the students that they would use as they work through the Treasures curriculum during the course of the school year. The teaching of Start Smart was discussed at the grade-level meeting on August 9, 2010.

29. The second week of the school year started on August 16, 2010. On that date, Salgado did a walk-through of all third grade classrooms, including Respondent's classroom. According to the lesson plan for August 16, 2010, the teachers were to be teaching "Start Smart Day 3." Salgado saw that all third grade teachers were teaching the same strategy from Start Smart except for Respondent. Respondent was introducing the first story of the Treasures ELA curriculum to his students. Salgado saw that the students had the Treasures books open in front of them.

30. On August 17, 2010, Salgado met with Respondent and Sonia Bangi (Bangi), a representative of the McFarland Teachers Association. The purpose of the meeting was to discuss Salgado's observation of Respondent's classroom the previous day. During the meeting, Salgado reminded Respondent that the lesson plans and pacing were determined over the summer, the ELD portion of the program frontloaded the lessons in the core curriculum, and it was important to stay with the lesson plan for Respondent's grade level. Salgado directed Respondent to follow the lesson plan and teach Start Smart. Respondent indicated to Salgado that he would teach lessons to his students as soon as possible and he would follow the pacing guide. According to Respondent, the pacing guide or pacing calendar is a schedule of the subjects that must be covered each week so that students understand the subject matter by the time the benchmark tests are given. Respondent's statement to Salgado that he would following the pacing guide, after she directed him to follow the lesson plans, demonstrated defiance and insubordination.

31. On August 27, 2010, Salgado conducted a walk-through of Respondent's classroom. According to the lesson plan for this day, the lesson for the Reading Language Arts time block was "Unit 1 Opener." In Respondent's classroom, Salgado saw the students working with construction paper, glue and glitter. The students told Salgado that Respondent gave them time for free art. Respondent told Salgado that he was teaching the students the concept of "setting" in a story. Salgado saw the art work was of various unrelated subjects; some students wrote in glitter "Mom," "Dad," or "Mr. Engstrom," while others made pictures of various objects, like hearts and stars. Salgado saw nothing in the artwork indicating a relation to the concept of the setting of a story. Respondent explained to Salgado that the artwork was to teach "setting" by having the children create artwork to make their classroom setting more interesting and enjoyable. Respondent's explanation was dishonest. If Respondent was teaching the students about "setting," then the student's artwork should have reflected places or settings where stories take place. It did not. Further, in light of the meeting with Salgado on August 17, 2010, Respondent's explanation appears to be an attempt to hide the fact that he was not following the lesson plan as he was directed to do.

32. Violeta Alvarez (Alvarez) is a third grade teacher at Browning Road. On August 30, 2010, some of Alvarez's students returned to her classroom after attending ELD class with Respondent. According to the lesson plan for this day, the lesson for the Reading Language Arts time block was "Unit 1, Lesson 1, Day 1." This lesson involved a story called Tina's Try-Out Day. When Alvarez began teaching the Tina's Try-Out Day story to her students, some of the students told her they had already read the story in Respondent's ELD class. When Alvarez took out the story the students should have been reading in the ELD time block for August 30, 2010, the students indicated they had not read that story. According to the lesson plans, Tina's Try-Out Day was not scheduled to be taught until August 30, 2010.

33. On August 31, 2010, Salgado held a meeting with all third grade teachers. Respondent was present at the meeting, along with Sonia Bangi. During this meeting, Respondent denied teaching the Tina's Try-Out story to his students. The August 30, 2010 incident with Alvarez's students was discussed. The teaching of Start Smart was also discussed. Respondent stated that he taught Start Smart in five days; the lesson plan indicates Start Smart was to be taught over 10 days. It was also discussed at this meeting that ELD was supposed to frontload strategies for the reading program. Respondent said he was doing what he felt was best for his students. Other teachers raised concern with Respondent about following the sequence of the lesson plans. During this meeting, Respondent was defensive and confrontational rather than collaborative. He persisted in his disagreement with the lesson plans.

34. Board Policy 4100 requires each District certificated employee to be accountable for the duties assigned to him or her. Board Policy 4119.21 requires each District certificated employee to advance the goals of the District's educational program. Respondent's failure and refusal to follow the lesson plans and pacing established for his grade level demonstrated a lack of accountability for his assigned duties, and did not advance the District's educational program, as required under Board Policy 4100 and 4119.21, respectively.

September to November Events

35. On September 3, 2010, McManaman sent Respondent a 45-day notice of unprofessional conduct pursuant to Education Code section 44938. The 45-day notice of unprofessional conduct set forth the August 2010 incidents described above as the basis for the notice. The 45-day notice directed Respondent to, among things, "follow the directives given by your Principal," "follow the lesson plan and pacing, in its entirety, developed by your grade level staff, as written," and "[t]each all lessons in [2010-2011³], including English Language Development lessons, in accordance with the lesson plans and pacing established for your grade level at your school."

³ The 45-day notice erroneously referenced the 2009-2010 school year instead of the 2010-2011 school year.

36. The FRISK method is a system of progressive discipline, which starts with oral warnings, and then progresses to written warnings, letters of reprimand, followed by more serious consequences. Salgado prepared a FRISK letter dated September 2, 2010, which documented the incidents from August 2010. However, she did not send the letter to Respondent because she felt it would not have any effect on Respondent, as nothing happened in response to the oral warnings and directives she gave him previously.

37. Respondent's failure to teach according to the lesson plans continued in the month of September 2010.

38. On September 2, 2010, Salgado was in Respondent's classroom during the ELA time block. Salgado had her Treasures Teacher's Edition with her. She was unable to find the lesson the children were working on in the Teacher's Edition. When she asked Respondent to find the lesson in the Teacher's Edition, he pointed to a page that did not correspond to the lesson plan for this day. When Salgado walked through the other third grade classrooms, she saw those teachers were all teaching the same lesson. Respondent was teaching a different lesson. Salgado also saw that vocabulary words on the board in Respondent's classroom did not match the vocabulary in the Teacher's Edition for that week. Respondent testified that he used the Teacher's Edition and made notes and lessons based on that review. This testimony was not persuasive. If Respondent was creating lessons based on the Teacher's Edition, then the lessons and vocabulary should have matched or been fairly close to the Teacher's Edition. Even though he did not have the Teacher's Edition book open, if Respondent was following the Teacher's Edition, his lesson should have matched. They did not.

39. Respondent did not have his students write in their daily journals each morning after recess, as called for in the lesson plans. On September 14, 2010, Salgado was present in Respondent's classroom during the journal writing time block, from 9 to 9:15 a.m. Salgado did not observe any journal writing by the students during this time. Teachers were given no discretion as to when to teach journal writing. Respondent testified that he taught journal writing during the reading time block on the lesson plan. He contends he was told that lessons in the reading time block could be moved around. This explanation does not excuse Respondent from teaching journal writing during the 15-minute block required by the lesson plans. On the lesson plans, journal writing was clearly within its own separate time block, as compared to reading language arts, which occupied two time blocks, from 10:10 to 11:25 a.m. and 12:05 to 1:00 p.m. Teachers had some flexibility in the order they taught the reading language arts lessons during those two time blocks.

40. Respondent failed to teach the ELD curriculum from the Treasures program during his ELD classes. On September 16, 2010, Respondent was serving the first day of his three-day suspension and was not present in his classroom. A substitute teacher was teaching Respondent's class. Salgado was present to observe the ELD block of this day. The lesson plan for the ELD time block for September 16, 2010, indicated the lesson was Unit 1, Lesson 3, Day 2. The substitute could not locate the ELD workbooks in the classroom. Salgado asked the students about their ELD workbooks. Only half of the class had ELD

workbooks. Salgado found several brand new ELD workbooks with no work completed in them. As of September 16, 2010, the ELD workbooks should not have been blank if the ELD lessons were taught according to the lesson plans. Respondent's testimony that he was unaware of the existence of the ELD workbooks was not persuasive. He should have seen that some students had ELD workbooks when they came to his classroom, which should have prompted him to ask about workbooks for his ELD class.

41. Respondent taught a math test ahead of the schedule set by the lesson plans. For the week of September 20-24, 2011, Maldonado's homeroom class was displaced from its classroom due to flooding and was combined with Respondent's homeroom class. Respondent was absent during this week. Maldonado and a substitute teacher taught the students in the combined classes. The lesson plan for September 24, 2011, called for Excel Math Test 4 to be given during the Math time block. When Maldonado attempted to give the test to the students, Respondent's students indicated they had already taken the test. Maldonado found that those students knew the picture on the back of the story to be read for Excel Math Test 4. Under the circumstances, Maldonado decided to move on to another activity and the class did not do Excel Math Test 4 that day.

42. Respondent did not consistently use the assigned Treasures ancillary materials but instead used materials from other sources not approved by the District for use in his class. On some occasions, he used materials that were not appropriate for third grade level students. Respondent did not use Treasures ancillary curriculum materials. Salgado found such materials in Respondent's classroom not being used. Salgado collected worksheets from a student in Respondent's classroom in early November. The worksheets were not appropriate third grade level work. Respondent supplanted, not supplemented, the Treasures materials.

43. It was not established by a preponderance of the evidence that Respondent failed to teach the Standards Plus curriculum described in the lesson plans. Standards Plus Language Arts is a supplemental curriculum that is standards-based, where the teacher gives direct instruction on a specific standard. The lesson plans called for Standards Plus Language Arts to be taught on November 1 - 5, 8, 9, and 10, 2010. Salgado collected a Standards Plus Language Arts workbook from one student in Respondent's classroom. The pages in the workbook corresponding to Standards Plus lessons called for on the lesson plans for November 1-10, 2010 were blank. The Commission finds that the blank pages in this single workbook is insufficient to establish that Respondent failed to teach the Standards Plus curriculum. Other reasons might explain the blank pages in the workbook, such as the student being absent or out of the classroom at the time and/or days that Standards Plus was scheduled to be taught.

Other Matters

44. Respondent testified that the lesson plans prepared by Maldonado were not clear and he was confused as to what was required to be taught. He does not feel his actions were insubordinate. He feels he did what he thought was in the best interest of his students.

He pointed out that students in his classroom performed comparable to or better than students in other classrooms on benchmark tests. Principal Salgado did a formal observation of his classroom on October 14, 2010, and gave him ratings of good and acceptable on the Classroom Observation Checklist. He denied teaching ELA stories ahead of schedule; he contends that he taught “aspects” of stories but did not teach the stories. He feels he taught the Treasures curriculum the best he could, even though he did not receive the three-day Treasures training over the summer.

45. Respondent further points out that, after approximately September 3, 2010, no one from his school or the District took the initiative to discuss with him that he was not following the lesson plans or that he was not properly teaching the curriculum. He noted that Salgado did not give him feedback during walk throughs to alert him of any problems with his teaching. Three other teachers from Browning Road, not third grade teachers, testified that principal Salgado did not give feedback to teachers when she did classroom walk throughs. There was no evidence that Respondent himself contacted principal Salgado, grade-level chair Maldonado, his PAR coach Bangi, or others to clarify or confirm that he was teaching the curriculum properly and according to the lesson plans.

46. Bangi was assigned as Respondent's PAR coach in September 2010. Bangi did not see positive results happening in the communication between Respondent and his grade-level, although Respondent described the communications to her as being positive. Bangi's impression was that Maldonado and Alvarez tried to communicate the need to follow lesson plans to Respondent but were unsuccessful in getting him to do so. According to Bangi, Maldonado and Alvarez knew how the lessons were tied from one class to another and that students switched classrooms and teachers. Bangi's impression was that Respondent had difficulty in seeing how those related and that he should not teach ahead of the schedule. Bangi testified that Maldonado and Alvarez were communicating clearly but Respondent's understanding was not sufficient. In her written report dated September 30, 2010, Bangi suggested that Respondent should visit other classroom teachers to learn more effective strategies regarding direct instruction, another teacher should model a reading lesson with a focus on direct instruction for him, and Respondent should attend an outside conference, or one by the District, on direct instruction. No evidence was presented that Bangi's suggestions were implemented for Respondent.

LEGAL CONCLUSIONS

1. The Commission has jurisdiction to proceed in this matter, pursuant to Education Code section 44944 and Factual Findings 1 through 9.

2. The District has the burden of proof in this matter, and the standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

Three-Day Suspension

3. Education Code section 44932 sets forth the grounds for the dismissal and suspension of permanent certificated employees. Subdivision (a) sets forth the grounds for dismissal. Subdivision (b) governs suspensions and authorizes an employee's suspension without pay for a specific period of time only on grounds of unprofessional conduct "pursuant to the procedures specified in [Education Code] Sections 44933, 44939, 44935, 44936, 44937, 44943, and 44944." Under Education Code section 44933, "[a] permanent employee may be dismissed or suspended on grounds of unprofessional conduct consisting of acts or omissions other than those specified in Section 44932, but any such charge shall specify instances of behavior deemed to constitute unprofessional conduct."

4. The Accusation filed on September 15, 2010 seeks a three-day suspension without pay against Respondent on grounds of willful refusal to obey reasonable regulations, willful refusal to perform regular assignments without reasonable cause, and dishonesty. Respondent contends that the Accusation is improper because Education Code section 44932 provides that the suspension of a permanent teacher "may be based only on a charge of unprofessional conduct." (Ed. Code, § 44932, subd. (b).) It is true that unprofessional conduct is the only ground for suspension provided in section 44932. However, under section 44933, a suspension may be based on unprofessional conduct consisting of acts or omissions not specified as a ground for dismissal under section 44932, subdivision (a), if the charges "specify instances of behavior deemed to constitute unprofessional conduct." In this case, the Accusation filed on September 15, 2010, specifies instances of behavior that may be deemed to constitute unprofessional conduct. The Commission construed the Accusation as seeking a three-day suspension for unprofessional conduct based on Respondent's conduct on August 16, 17, 27, and 30, 2010, specified in the Accusation.

5. It is the unanimous decision of the Commission that cause existed to suspend Respondent for three-days without pay, for unprofessional conduct, pursuant to Education Code section 44932, subdivision (b).

6. "Unprofessional conduct" may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) Respondent engaged in unprofessional conduct by failing to teach the District-approved curriculum according to the lesson plans for his grade level, refusing to follow the lesson plans after being directed by his principal to do so and instead indicating he would follow the pacing guide or pacing calendar, being dishonest with principal Salgado in explaining the free art incident on August 27, 2010, and failing to collaborate with the other third grade teachers. (Factual Findings 25-34.) This conduct was unbecoming of a member of the teaching profession in good standing and was unprofessional conduct under Education Code section 44932, subdivision (b).

Immediate Suspension and Dismissal

7. Evidence Code section 44932, provides, in part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) [U]nprofessional conduct.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) Persistent violation of or refusal to obey the . . . reasonable regulations prescribed . . . by the governing board of the school district employing him or her.

8. Under Education Code section 44939, a permanent employee may be immediately suspended on grounds of, among other things, "willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district."

9. It was established by a preponderance of the evidence that cause exists for the immediate suspension and dismissal of Respondent, pursuant to Education Code section 44932, subdivision (a)(1), for unprofessional conduct. Respondent's conduct (as established in Factual Findings 25-34 and 35-42), taken as a whole, was unprofessional conduct unbecoming of a member of the teaching profession in good standing. Further, as discussed in Legal Conclusion 15, below, Respondent's conduct demonstrated an unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

10. It was not established by a preponderance of the evidence that cause exists for the immediate suspension and dismissal of Respondent, pursuant to Education Code section 44932, subdivision (a)(5), for evident unfitness for service. Evident unfitness for service means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. Unlike unprofessional conduct, evident unfitness for service connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) The Commission concludes that Respondent's refusal and failure to teach according to the lesson plans was not due to a defect in temperament or an unremediable fixed character trait.

11. It was established by a preponderance of the evidence that cause exists for the immediate suspension and dismissal of Respondent, pursuant to Education Code section 44932, subdivision (a)(7), for persistent refusal to obey reasonable regulations prescribed by the District.

12. Under Education Code section 44932, subdivision (a)(7), the violation of the school district's regulations or rules must be either "persistent" or "motivated by an attitude of continuous insubordination." (*Governing Bd. of Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81.) "The word 'persistent' is defined by lexicographers as 'refusing to relent; continuing, especially in the face of opposition ... stubborn; persevering ... constantly repeated.' And in the judicial decisions of this, as well as other states, the word has been interpreted to mean 'continuing or constant.'" (*Seaman, supra*, 28 Cal.App.3d at p. 82.) Respondent's failure and refusal to teach the District-approved Treasures curriculum according to the lesson plans, despite being admonished on multiple occasions he was required to do so, was persistent and demonstrated an attitude of continuous insubordination.

13. It was established by a preponderance of the evidence that cause exists for the immediate suspension and dismissal of Respondent, pursuant to Education Code section 44939, for willful refusal to perform regular assignments without reasonable cause.

14. There are no cases that interpret the meaning of this part of Education Code section 44939. However, cases interpreting section 44932, subdivision (a)(7), which provides cause for discipline for insubordination, require a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) The charge of insubordination is viewed as analogous to the charge of willful refusal to perform regular assignments. In this case, Respondent willfully refused to perform regular assignments without reasonable cause, by failing and refusing to teach the District-approved curriculum in accordance with the lesson plans. Respondent's conduct was willful because it continued even after he was warned and directed to follow the lesson plans.

15. In reaching the above, the Commission concluded that Respondent's conduct demonstrates an unfitness to teach within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. The Commission considered all the factors suggested in *Morrison* and compared them to the facts established above. However, it is settled that not all "Morrison factors" need be present for the *Morrison* test to be satisfied. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369, 384.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland, supra*, 2 Cal.App.4th at p. 1457.) The Commission applied the *Morrison* analysis to the accumulated facts established collectively.

(A) The likelihood that the conduct may have adversely affected students or fellow teachers. This factor applies against Respondent. His failure and refusal to teach the District-approved curriculum and follow the lesson plans for his grade-level adversely

affected students and his fellow teachers. By not teaching according to the lesson plans, other teachers had to adjust their teaching. The students did not receive the benefit of learning skills and strategies taught in early lessons that would be used in later lessons. Students who were taught lessons ahead of schedule by Respondent had an advantage over other students who did not get such information ahead of time.

(B) The degree of such adversity anticipated. The adversity under the circumstances was serious, in that Respondent's failure to teach according to the lesson plans impacted not only the students in his classroom, but the students and teachers in other classrooms.

(C) The proximity or remoteness in time of the conduct. The misconduct is proximate, having occurred during the 2010-2011 school year.

(D) The type of teaching certificate held by the party involved. This factor is not applicable.

(E) The extenuating or aggravating circumstances, if any, surrounding the conduct. The Commission considered principal Salgado's practice of not giving feedback to teachers during walk-throughs of their classrooms, of giving performance evaluations on the last day of school rather than 30 days prior, and the fact she did not give Respondent any further specific warnings regarding his performance after September 3, 2010. The Commission is concerned that Respondent was not given an ample chance to correct his deficiencies, as principal Salgado gave him no feedback or further directions after September 3, 2010, and she did not send him the FRISK letter she prepared. Despite these concerns, however, the Commission concludes that Salgado's conduct does not extenuate Respondent's conduct at issue. Respondent's task was simply to teach the District-approved curriculum according to the lesson plans prepared by his grade-level chair. Respondent, as a teacher with 13 years of experience, had the capability to carry out that simple task. Nothing principal Salgado did or did not do justified Respondent's failure and refusal to carry out that task. The Commission also considered Respondent's explanations for his conduct (as established in Factual Findings 44 and 45) and found they were insufficient to establish extenuating circumstances for his failure and refusal to teach according to the lesson plans.

(F) The praiseworthiness or blameworthiness of the motives resulting in the conduct. The Commission considered that Respondent is blameworthy for his conduct in this case. Respondent was defiant and insubordinate in response to directives from principal Salgado. Respondent did not collaborate or consult with his grade-level colleagues or grade-level chair to confirm he was teaching according to the lesson plans or that he was teaching the correct lessons. He knew that he was under scrutiny about following lesson plans. He could have simply confirmed with another third grade teacher the lesson he would teach for the day if he was, as he testified, unsure about what was required under the lesson plans. In addition, when confronted by his fellow third grade teachers about the importance of teaching according to the lesson plans, Respondent was defensive and defiant.

(G) The likelihood of recurrence of the questioned conduct. The Commission concludes that there is a likelihood that Respondent's conduct will recur in the future. Despite being given written and oral warnings about following the lesson plans, Respondent failed to do so. Respondent, by his testimony, did not express remorse or accept responsibility for his conduct.

(H) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. This factor is not applicable.

16. It is the majority decision of the Commission, based on the above Factual Findings and Legal Conclusions, that cause exists to dismiss Respondent from employment with the District, for unprofessional conduct and for persistent refusal to obey reasonable regulations prescribed by the District, pursuant to Education Code section 44932, subdivision (a)(1) and (7). Further, it is the majority decision of the Commission, based on the above Factual Findings and Legal Conclusions, that the District established cause to immediately suspend Respondent, for willful refusal to perform regular assignments without reasonable cause, pursuant to Education Code section 44939.

17. "The Commission has broad discretion in determining what constitutes unfitness to teach . . . and whether dismissal or suspension is the appropriate sanction." (*California Teachers Assoc. v. State of California* (1999) 20 Cal.4th 327, 343-344.) Following lesson plans and teaching the District-approved curriculum was an integral part of Respondent's teaching duties at Browning Road. Carrying out these duties was particularly important given Browning Road's program improvement status, and because the Treasures curriculum was being used in the District for the first time in the 2010-2011 school year. The totality of the incidents established in Factual Findings 25-34 and 35-42 demonstrate Respondent's failure and refusal to follow the lesson plans for his grade level. The majority decision of the Commission is that the totality of those incidents establishes Respondent's unfitness to teach and establishes grounds for his dismissal from employment with the District.

//

//

//

//

//

//

ORDER

WHEREFORE, IT IS HEREBY ORDERED that:

Respondent Daren Engstrom is terminated from his employment as a permanent certificated employee of the McFarland Unified School District.

DATED: December ____, 2011

VAL E. DONAIRE
Member
Commission on Professional Competence

DATED: December ____, 2011

ROBERTA PARNELL
Member
Commission on Professional Competence

DATED: December ____, 2011

ERLINDA G. SHRENGER
Administrative Law Judge, Member
Commission on Professional Competence