

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

In the Matter of the Accusation Against:

OAH Case No. 2009101532

SAMUEL CARTER,

Respondent.

DECISION

The hearing in the above-captioned matter was held on February 16 and 17, and March 3, 2010, at Port Hueneme, before the Commission on Professional Competence. The Commission consisted of Thomas Holtke, Virginia Escobar, and Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Complainant was represented by James R. Lynch and Natashia Sawhney, Garcia Calderon L.L.P. Respondent appeared and was represented by Richard Schwab, Trygstad, Schwab & Trygstad.

Evidence was received, the case argued, and the matter was submitted for decision on the March 3, 2010.

The Commission hereafter makes its Factual Findings, Legal Conclusions, and Orders, as follows:

INTRODUCTION AND STATEMENT OF THE CASE

The Hueneme Elementary School District (District) brought this proceeding to terminate one of its permanent certificated employees, Respondent Samuel Carter (Carter or Respondent). Respondent has taught sixth grade in the District for the past ten years.

The Accusation filed against Respondent asserted three of the statutorily-authorized bases for termination. It was first alleged that Respondent was evidently unfit for teaching. The second claim was that he had engaged in unprofessional conduct. Finally, it was alleged that his actions constituted immorality. The factual allegations included assertions that Respondent had called students names, made them run sprints and laps as a disciplinary measure, threatened the children with violence, and threw a backpack at a child. It was also alleged that Respondent acted

unprofessionally in a meeting with two parents, which degenerated into an argument, and then a challenge to fight.

Respondent, at hearing, admitted to some unprofessional acts, provided evidence to disprove other claims, and submitted evidence of efforts toward remediation of any professional deficiencies.

FACTUAL FINDINGS

A. The Parties, Jurisdiction, and Procedural Background

1. Respondent is a permanent certificated employee of the District, and had been employed by the District for 13 years at the time of the hearing. He has taught sixth, seventh, and eighth grade classes, and as noted above, has been in a sixth grade classroom for the past ten years. During his entire tenure at the District, he has been assigned to E.O. Green Middle School (Green), one of the two middle schools in the District.

2. Complainant Deborah DeSmeth executed and filed the Accusation while acting in her official capacity as Assistant Superintendent of the District. The Accusation was executed on September 15, 2009.

3. The Governing Board of the District had previously voted, on July 27, 2009, to immediately suspend Respondent without pay, effective September 15, 2009, and to proceed with dismissal of Respondent.

4. Respondent requested a hearing and the case proceeded to hearing. All jurisdictional requirements have been met.

B. Findings Pertaining to the Charges Against Respondent

I. The Parent-Teacher Meeting of February 27, 2009

5. On February 27, 2009, Respondent participated in a parent-teacher conference with Mr. and Mrs. F., and Ms. Felicitas Perez, one of the assistant principals at Green. As detailed below, that meeting devolved into a loud confrontation between Respondent and Mr. F., which confrontation could have become violent.

6. The parents in question had a son, R ■■■ F., in Respondent's class. Before the school year they had asked the school administration to place their son in Respondent's class, because he had taught their older son, and they considered Respondent to be a good teacher.

7. In the weeks prior to the meeting, R■■■■ had been misbehaving, mainly by harassing conduct aimed at another boy, N.A., who was a special education student. While N.A. was not severely handicapped—he was placed in a regular day class—the boy was not as socially adept as other children in the class, and it is inferred from the record that he was a sensitive child. R■■■■ would bother N.A., harassing and teasing him. Respondent had told R■■■■, on more than one occasion, and in no uncertain terms, not to bother N.A.¹

8. Prior to the February meeting, R■■■■ had been suspended, and he was required to attend Saturday school because of an incident where he harassed N.A. to the point that the other made a violent response, and was transferred from Respondent's class. Thereafter, Respondent referred R■■■■ for suspension because the boy had thrown an eraser during class. This second suspension brought R■■■■'s mother to school, where she met with the principal, Mr. Carlos Dominguez (Dominguez). During their discussions, she raised the possibility of transferring her son from Respondent's class. They decided to set up a meeting between the parents and Respondent before that step was taken.

9. Respondent was told of the meeting about one day before it was to occur. Dominguez told Respondent that he should be ready to detail R■■■■'s behavioral issues. Dominguez informed Respondent that he would like to avoid transferring the boy, as the principal thought such action might be perceived as rewarding bad behavior.

10. On the day of the meeting the parents met with Ms. Perez, because Mr. Dominguez was busy, and Ms. Pena, another vice principal who had dealt with the suspension and R■■■■'s mother, was also unavailable. It is clear that Ms. Perez had little or no information about the purpose of the meeting.

11. When the parents and Ms. Perez arrived at Respondent's classroom, he was at his desk, finishing up some work. It was not established, as alleged, that Respondent ignored them, nor was it established that he only came to meet with them after Ms. Perez retrieved him. Instead, he finished his task within approximately one minute of the others' arrival, and he came and sat with them.

12. It was not established, as alleged, that Respondent interrupted Ms. Perez to speak to the parents. Nor was it established, as alleged, that he belittled the child in question. He did describe matters pertaining to the boy's misbehavior, but it was not established, as alleged, that he stated he would not take the boy's "B.S." It was not established that he was rude, confrontational, or interrupting, as alleged. To the contrary, Mr. F. in his testimony described Respondent's recitation of his son's

¹ R■■■■ was one of the students to whom Respondent made statements of a threatening type. See Part B. III, below, at Factual Findings 21 and 27.

behaviors as being delivered in a monotone, though he perceived Respondent as somewhat agitated.

13. It was established that after Respondent finished with his description of R█ F.'s behavior, Mrs. F. told her husband that "this isn't going to work." Although she testified she did not say it loud enough for Respondent to hear, that statement was heard by Ms. Perez, and it is inferred that Respondent did hear Mrs. F. let her husband know that she did not consider the meeting was going to be fruitful.

14. Mr. F. asked Respondent why the behavior problems had not previously been brought to their attention. Respondent stated that he did not want to do so because when a teacher has something negative to say about a student, parents and administrators "get bent out of shape." (Ex. 6, p. 2, 2d par.) He also stated that in general he did not like talking to parents.

15. As the parents neared the door of the classroom, Respondent was at his desk retrieving his jacket. Mr. F. said that his son wasn't going to be picking up any more trash for Respondent.² Respondent reacted by saying, "then you pick it up." Mr. F. replied, "make me." The exchange quickly escalated, with Mr. F. resorting to profanity, and calling Respondent an old man. Rather than de-escalate the matter, Respondent moved closer to Mr. F., and he began arguing with Mr. F. The two men soon were outside of the classroom, almost bumping chests, yelling at each other, essentially each daring the other to throw a punch and thereby start a fight. The two were eventually separated by Mrs. F. and Ms. Perez. Shortly thereafter, R█ was transferred from the class, and he did not have to serve the two day suspension that had brought his mother to school and set the events in motion.

16. Respondent acted unprofessionally by allowing himself to become embroiled in a shouting match with a parent, a confrontation that came close to fisticuffs. The Commission does not find unprofessional conduct until the point where Respondent told Mr. F. that he should pick up the trash, and from that point on. While Mr. F.'s actions are not excused in these findings, and while the Commission does not find that a teacher must be required to submit to profanity, name calling, or threatening behavior, it is incumbent on a professional to take steps not to escalate such a situation. Had Respondent not replied to Mr. F.'s statement about his son's future behavior, or if he had simply left the room without comment once Mr. F. became angry, this situation could have been avoided.³

² Apparently, the teachers could assign such duties to students who had misbehaved, and Respondent had assigned R█ to pick up trash on occasions when the latter had misbehaved.

³ This finding against Respondent is not an endorsement of the administration's handling of the matter prior to the meeting. The purpose of the meeting was not clearly communicated to Respondent, and Ms. Perez had not been

II. The Notice of Unprofessional Conduct

17. On March 11, 2009, Ms. DeSmeth issued a Notice of Unprofessional Conduct (NUC) to Respondent, pursuant to section 44938 of the Education Code.⁴ The NUC made clear that Respondent's behavior was deemed unprofessional and unacceptable, and was a violation of District administrative regulations. The NUC then "direct[ed]" Respondent to take the following steps to remediate his unprofessional conduct:

"1. Talk to co-workers, parents and staff in a professional manner.

"2. Refrain from engaging in threatening or aggressive body movements or tone of voice towards co-workers, parents or students.

"3. Refrain from making disparaging, derogatory or belittling comments to or about students."
(Ex. 7, p. 2.)

18. The NUC warned that failure to comply with the directives could lead to discipline including suspension.

III. Respondent's Conduct Toward Children in the Classroom

19. During the 2008-2009 school year, including during the period after issuance of the NUC, Respondent engaged in unprofessional conduct by his behavior in the classroom and while instructing. His unprofessional conduct manifested itself in statements he made to his students, individually or together, as well as other conduct. Respondent's unprofessional conduct included the following acts:

20. (A) He called many of the children names, on more than one occasion, and in front of all the children in his class. He repeatedly called one particular boy a "buffalo head" which embarrassed the boy.⁵ He also referred to children as

briefed on the situation. She appeared to have no knowledge about the problems that Respondent had been having with R■■■■. However, such can not justify Respondent's action.

⁴ All further statutory references are to the Education Code.

⁵ Just what the significance of this term is, or what was meant by it was never established, although several students, including the boy referred to in this way, testified to Respondent using this term on more than one occasion.

“knucklehead[s],” “stupid,” “chump[s],” and “twit[s].” Other terms he used included “ignorant” and “tart.”

(B) Respondent engaged in these acts by either by calling the child by such names, or making statements to the effect that a certain child was “acting like a chump” or was “being a knucklehead,” or words to that effect. On some occasions, the statements had an admonishing tone, i.e., “don’t act like a knucklehead.” In the context of classroom instruction, a professional should not compare a child’s behavior in this way to some negative stereotype, as it is tantamount to calling the child that name, and that is how the child will perceive the teacher’s conduct. In fact, some children who testified perceived Respondent’s comparisons as actually calling the children the name in question.

21. Respondent made threatening statements to students, saying things such as “I will rip your throat out” or “I will rip your skull out.”

22. During a lockdown that occurred on or about March 6, 2009, and after turning the lights off in the classroom, Respondent wanted the children to remain quiet. So, he told them stories to frighten them, attempting to show why they should be quiet in an emergency. He told them stories about combat in Vietnam, where some soldiers, in an effort to remain undetected by the enemy, would slit their friends throats to silence them. He also told them about a group of nurses who were murdered because some could not stop crying, and were located by the murderer.⁶ He stated that he would snap the children’s necks if they did not be quiet.

23. It was not established, as alleged, that Respondent poked his finger in the chest of a boy named T [REDACTED] because the boy would not be quiet.

24. During the period after the issuance of the NUC, 2009, and at other times during the school year, Respondent yelled at the children, on a regular and nearly routine basis, often slamming desks or other objects and yelling in their faces. Much of the Respondent’s yelling was aimed at a group of four or five children who were often misbehaving. Respondent would get his face close to the children’s faces when yelling at them, the distance estimated by child witnesses as being from a few inches to one or two feet. He face was described as angry during these incidents.

25. (A) During the period after the issuance of the NUC, and at other times during the school year, Respondent often made students run laps or sprints outside of his classroom. During the day, he would keep a tally on the board of how many laps or sprints would have to be run by students in the class. This occurred during class time not devoted to physical education. Although Respondent asserted that the

⁶ From the testimony of the students it is reasonably inferred that he was talking about the infamous case involving Richard Speck, who murdered eight student nurses in Chicago in 1966.

purpose of these exercises was not punitive, and that he was only trying to burn off some of the students' excess energy, the weight of the evidence is to that the activity was disciplinary, and punitive in nature.⁷ More than one student testified that they were made to run because they had talked in class, or not paid attention, or otherwise had failed to comply with the rules. The student witnesses clearly perceived the sprints and laps as a disciplinary response. For example, one testified that he told his mother that he had had to run sprints, and when she asked why, the student told her it was because he had misbehaved.

(B) One child, M.M., testified that he sometimes had to run more than once per day. He also testified that Respondent made him run in the rain, and he recalled that another boy had been forced to run in rainy weather as well. One boy, T.J., passed out while running laps, or appeared to.

(C) It was not established, as alleged, that Respondent did not supervise his students when he made them run sprints or laps.

26. (A) On or about May 21, 2009, Respondent became angry with several of his students, who were misbehaving while he was trying to teach. He directed the students, who included a 12-year-old girl, A.S., to go outside and run some sprints. As A.S. was in the process of going outside, Respondent picked up her backpack, and threw it across the room in her direction. However, it did not strike her.

(B) It was not established, as alleged, that A.S., had to duck to avoid being struck by the backpack, and it was not established that Respondent meant to strike her with it. However, he stated to the rest of the class, after the girl had left the classroom, that he wished the backpack had hit her.

27. On or about May 21, 2009, Respondent became angry with a student, J., 12 years old, and Respondent told the boy, that if he were the boy's age, he would rip his throat out. Respondent's intention was to warn the boy that his behavior could lead to conflict with others, but Respondent's method was inappropriate and unprofessional. On another occasion, Respondent held up his fist to the face of one of the children, who had been roughhousing with another child, and asked the child how the child would like it if Respondent socked him. On yet another occasion, he told R. F. that if he were that boy's father, he would throw him off the roof.

28. At various times Respondent told the students stories of how people involved with violence could be badly hurt. He told stories, purportedly from his youth, of people having their teeth broken out on street curbs by assailants, or being

⁷ During his testimony, Respondent stated that the running was not punitive, just "corrective behavior."

stabbed with knives. This was apparently done with an eye toward convincing the children not to become involved with gangs and drugs.

29. While it was established that one or two students did not want to come to school due to Respondent's demeanor during classes, it was not established, as alleged, that the students feared Respondent and found his class a terrifying experience.

IV. Respondent's Conduct Toward the School Principal

30. Respondent acted disrespectfully toward the school principal, Mr. Dominguez, during the period from March 11 to May 21, 2009, in front of the children, although not in Dominguez's presence. He would call Dominguez by his first name, Carlos, in front of the children. He stated that Dominguez did not know how to run things, and he stated that he did not care what Dominguez said or did, and that he was not afraid of Dominguez. He also stated that he would go "toe to toe" with Dominguez, or words to that effect. He led the children to believe that they would not have recourse with the school principal, and they perceived that Respondent did not respect the principal.

C. Respondent's Efforts at Remediation and Improvement

31. Respondent failed to improve his performance following his receipt of the NUC, as established by Factual Findings 19 through 21, 24, 25(A), 26(A), 27, and 29. Although the NUC called for professional and courteous behavior on Respondent's part, and required him refrain from loud, aggressive, and threatening behavior, and to refrain from disparaging or derogatory remarks to or about students, he continued to do so in the approximately 90 days following service of the NUC.

32. After he was suspended, and beginning in October 2009, Respondent began receiving counseling on a regular basis.⁸ His counselor, Ann Kosinski, testified on Respondent's behalf. She is a licensed clinical social worker, and is licensed to act as a psychotherapist. At the time of the hearing, she was seeing Respondent once per week, on average.

33 (A). Ms. Kosinski attested that Respondent has attempted to and has gained insight into his conduct and why it was problematic. From her sessions with Respondent, she has gleaned that he is passionate about teaching, and that he was not aware that many of his behaviors, which were meant to control the classroom, assist in instruction, and inculcate certain values in the students, were in fact negative actions. Thus, for example, he was not aware that his constant yelling, or pounding the desk, which he did to get the children under control and paying attention, was so

⁸ He testified that he had obtained some counseling at his church in the summer of 2009, but it is clear that routine counseling began in October.

inappropriate and potentially frightening to the children. Although he grew up in a cultural milieu where name-calling was an everyday occurrence, he had not understood that it could have a negative effect on children when coming from a teacher.

(B) Regarding the incident with Mr. and Mrs. F., Ms. Kosinski perceived that Respondent felt that his authority was being attacked and challenged, and that Respondent felt that his character was being assaulted as well. She counseled him not to respond in kind to those who might do such things. She is of the opinion that over a period of time Respondent had come to take responsibility for the teacher-parent conference becoming an ugly confrontation.

(C) According to Ms. Kosinski, Respondent has come to understand that many of his actions are inappropriate and counterproductive to his goals as a teacher. She has counseled him to use positive approaches with students, rather than the negative ones he had been using, and that he must give up some of the control he has maintained. She is of the opinion that wrongful conduct would not recur if he were placed back in a classroom, in part because his being placed on leave was a wake-up call, and because he has obtained counseling.

(D) Much of Ms. Kosinski's work with Respondent has focused him on teaching strategies. Thus, at the hearing, she produced a list of goals he has set. All pertained to changing Respondent's methods in the classroom.

34. (A) Respondent became a teacher relatively late in life, after having served in the Marine Corps, and in various business positions, such as stock broker, and personnel management. He has also served as a Vista volunteer. He has earned a Masters Degree in Christian Education. He holds a multiple subject credential. There was no evidence of any disciplinary action against him by the District in the four years leading up to the filing of the Accusation.

(B) Respondent attested that he did not realize that the students were frightened by his stories of real life disasters, acknowledging that he said too much in his efforts to quiet them during the lockdown, or in his efforts to deter them from involving themselves with gangs and drugs. When he yelled, he was not intending to scream, and was not controlling what he describes as a voice that is loud to begin with. He asserted that he has learned that some of his methods were counter-productive. He acknowledged that he should not have escalated the encounter with R ■ F.'s father, and that name calling is inappropriate. He attested that he would maintain his counseling if he were retained in his position.

D. Findings Pertaining to the Morrison Factors:

35. Where there is conduct that might justify termination of a teacher, an examination must be made of whether or not that conduct indicates that the

Respondent in question is unfit to teach. This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229. There the Supreme Court held that factors that may be examined to determine fitness include the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; and, the proximity or remoteness in time of the conduct. Other factors may include the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood that the conduct in question will recur; and, the extent that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved, or other teachers.

36. (A) *Adverse consequences on students and teachers, and the degree thereof*: There were adverse consequences for students in Respondent's class. Calling children names, directly or indirectly by comparison, is detrimental to them. Two students did not want to come to class due to the tone set by Respondent. Threatening children or telling them stories that frighten them, is detrimental to them as well. Engendering disrespect for school administrators is also detrimental to students and can be to other teachers.

(B) *Proximity in time*: This conduct occurred in the period 2008 to 2009. Thus, the events described herein must be deemed recent.

(C) *Type of certificate held by Respondent*: Respondent holds a multiple subject teaching credential.

(D) *Likelihood of recurrence*: The conduct in question was ongoing during much of the 2008-2009 school year. While Respondent began seeing a counselor, that did not occur until the proceeding was well under way. It did not occur after the confrontation with Mr. F., or at any time during the second semester of the 2008-2009 school year. Although Respondent's counselor has a positive outlook, it must be noted that the focus of the counseling has been on developing teaching goals, and it is not clear that there has been a real gain in insight by Respondent, aside from developing a sense of why he does what he does, i.e., his experience as a youth, and how education helped him achieve during his life. Based on the entire record and the inferences reasonably drawn from it, Respondent's unprofessional conduct is likely to recur.

(E) *Implication of constitutional rights*: No constitutional rights, of either the Respondent or other teachers, are implicated if Respondent is terminated for his conduct described in this decision.

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(F) *Extenuating or aggravating circumstances:*

(i) In aggravation, Respondent's actions occurred over a period of months, and after he received an NUC that flowed from seriously unprofessional conduct.

(ii) While there is some extenuation regarding the events of the parent-teacher meeting, in that Mr. F. had used profanity and had escalated the matter, there is no extenuation in Respondent's other actions. Respondent's desire to scare his students straight, or to make them behave does not justify his methods, which can not be allowed in public schools at this time. Likewise, there is some extenuation by the way the school administration failed to curtail Respondent's use of laps and sprints to control his students.⁹

37. Under all the circumstances, Respondent's ongoing conduct establishes that he is unfit to teach in the district, within the meaning of the *Morrison* decision, and he should be terminated as a teacher.

LEGAL CONCLUSIONS

Legal Conclusions Generally Applicable to the Case

1. The Commission has jurisdiction to proceed in this matter, pursuant to section 44944, and Factual Findings 1 through 4.

2. "Unprofessional conduct" as used in section 44932, subdivision (a)(1), 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.) However, the conduct in question, to amount to unprofessional conduct, must indicate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

3. "Evident unfitness for service," within the meaning of section 44932, subdivision (a)(5), requires that the unfitness for service be attributable to a defect or inadequacy in temperament, presumably not remediable merely on receipt of notice that the teacher's conduct fails to meet the expectations of the employing school

⁹ Ms. Perez testified that at some time prior to the events in question, she came upon Respondent and a female student outside the classroom; he was having her run. The child had been transferred into his class because she was a behavior problem. Mr. Perez took the child to the office, and the child was transferred out of the class. Respondent testified that Mr. Dominguez knew that he was using running as well.

district. (*Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 4 Cal.App.4th 1429, 1444-1445.)

4. “Immoral conduct,” of which Respondent has been accused, has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, 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 of the San Francisco Unified School District v. Weiland* (1960) 179 Cal. App.2d 808, 811 (*Weiland*).)

5. Even where grounds for termination under the statutes are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230; *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence (Zuber)* (1992) 4 Cal. App.4th 1429, 1444-1445.)

6. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040 at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* 191 Cal. 295, 304.)

7. It was not established that Respondent’s conduct constituted immoral conduct within the meaning of the Education Code as set forth in Legal Conclusion 4. While his conduct is not condoned by the Commission, given all the evidence, it can

not be found that his conduct was immoral; his actions can not be determined to be depraved or indecent, especially given the context in which they occurred. The Commission was unanimous in this Conclusion.

7. It was established that Respondent engaged in unprofessional conduct during the 2008-2009 school year, based on Legal Conclusion 2 and Factual Findings 5 through 16, 19 through 22, 24 through 28, and 30. The Commission is unanimous in this Conclusion.

8. It was established that Respondent is evidently unfit to teach within the District, based on Legal Conclusion 4 and Factual Findings 5 through 16, 19 through 22, 24 through 28, and 30. Commission member Escobar was not in agreement with this Conclusion.

9. Respondent's conduct renders him unfit to teach within the meaning of *Morrison v. State Board of Education, supra*, based on Legal Conclusion 5, and Factual Findings 5 through 16, 19 through 22, 24 through 28, 30, 35 through 37. The Commission was unanimous in this Conclusion.

10. Based on the foregoing, Respondent should be terminated as a teacher within the District. Ms. Escobar does not join in this Conclusion, and would, notwithstanding Respondent's unprofessional conduct, retain him, relying on *Fontana Unified School District v. Burman*, (1988) 45 Cal.3d 208.

Discussion:

Complainant established, by a preponderance of the evidence, that Respondent had engaged in numerous acts of unprofessional conduct over several months, even after receiving notice that he must change the way that he interacts with children and others. Respondent provided evidence that his style of instruction and classroom control was designed to convince his students to study hard, to succeed in school, and to avoid drugs, gangs, and other pernicious activities. This had aspects of a "scared straight" program, but it was not appropriate for a sixth grade classroom. The inappropriate nature of the Respondent's methods is exacerbated by the fact that Respondent took the concept too far. It is one thing for a teacher to tell a 12-year-old-boy that if he bullies others one of the consequences might be a fight in which that bully himself gets hurt; it is quite another for the teacher to hold his own fist in that boy's face and to say what he, the teacher, would do to that child.

Respondent provided evidence that he has endeavored to change his ways, through counseling and introspection. For those Commissioners who would terminate him, it does not appear that such change is deep enough, and it comes late in the process given that the NUC and the events of the conference with Mr. and Mrs. F. occurred early in 2009.

As noted in Legal Conclusion 10, Ms. Escobar would, despite his failings, retain him in his position. She would note that school administration had, in part, contributed to the situation in that expectations had been set by prior conduct by site administrators. Further, she does not find Respondent to be evidently unfit, and therefore more amenable to remediation. However, the balance of the Commission has found factual basis for termination, and has concluded that under applicable law, Respondent should be terminated from his position.

ORDER

May ____, 2010

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

May ____, 2010

Thomas Holtke

May ____, 2010

Virginia Escobar