

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JESUS RODRIGUEZ,

Respondent.

OAH Case No. 2012030007

DECISION

This matter came on regularly for hearing before the Commission on Professional Competence (Commission) at Los Angeles, California, on January 8, 9, 10, February 27, and March 7, 2013. The Commission consists of the following members: Julie Gautreau, teacher, Cypress School District; Joyce Abrams, teacher, retired; and David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings.

The Los Angeles Unified School District (District) was represented by Bergman Dacey Goldsmith, by Michele M. Goldsmith, Attorney-at-Law. Respondent Jesus Rodriguez was present and was represented by Trygstad, Schwab & Trygstad, by Lawrence B. Trygstad, Attorney-at-Law.

Oral and documentary evidence was received and the parties submitted argument. On March 7, 2013, the last day of hearing, Respondent objected to Exhibit 56, and made a motion to strike the exhibit, sometime after it had been moved and received in evidence. The late objection was sustained, and the motion to strike was granted, on the condition that Respondent submit a transcript of the proceedings on March 7, 2013 to determine where references had been made to Exhibit 56. The record was left open for Respondent to decide whether to submit a transcript. On March 15, 2013, Respondent filed a Notice of Non-Filing of Transcript, received in evidence as Exhibit Q. As Respondent has not met the condition imposed to support his objection and motion, the rulings are vacated, the objection to Exhibit 56 is overruled, the motion to strike Exhibit 56 is denied, and Exhibit 56 is received in evidence. The matter was submitted for decision as of March 15, 2013.

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

FACTUAL FINDINGS

1. The Accusation and Statement of Charges were brought by Vivian K. Ekchian in her official capacity as Chief Human Resources Officer for the District.

2. Respondent Jesus Rodriguez (Respondent) has been employed by the District for 24 years. He is a permanent certificated employee. Since approximately September 2005 he has been assigned to teach at Pacific Boulevard School, an elementary school. Respondent's most recent assignment was to teach fourth grade. At various times Respondent has been the Grade Level Chairperson, a LEARN Council member, a UTLA Chapter Chair and an LA – SI science implementation presenter.

3. The Statement of Charges is dated February 3, 2012, and recommends the dismissal of Respondent from the District for the following legal causes under Education Code¹ sections 44932 and 44939: (1) immoral conduct; (2) unprofessional conduct; and (3) evident unfitness for service. (Exhibit 1.) On February 3, 2012, Ms. Ekchian, on behalf of the Board of Education of the District, prepared a notice that the District intended to immediately suspend Respondent without pay and dismiss him from his teaching position. (Exhibit 2.) After being served with a copy of the Statement of Charges, Respondent submitted a Demand for Hearing dated February 21, 2012. (Exhibit 3.) An Accusation was signed by Ms. Ekchian and filed with the District on March 9, 2012. (Exhibit 6.) After being served with a copy of the Accusation, Respondent submitted a Notice of Defense dated March 13, 2012. (Exhibit 7.) The parties stipulated that the hearing could commence beyond the statutory time limit. (Exhibit 9.)

4. All pre-hearing jurisdictional requirements have been met by the parties and jurisdiction exists for these proceedings.

5. The allegations in the Accusation relate to Respondent's actions on September 1, 2010, of exposing himself in public and other actions in Elysian Park, as well as his subsequent conviction for disturbing the peace, and suspension by the District. Factual Findings 6-13 track the substantive allegations.

6. On September 1, 2010, while in a public area near Park Row Drive, Los Angeles, Respondent was observed by an undercover police officer walking towards the officer touching his exposed penis.

7. On September 1, 2010, while in a public area visible from Park Row Drive, Respondent exposed his erect penis. (That this action was visible from Park Row Drive was found by a Commission vote of two-to-one.)

¹ All statutory references are to the Education Code, unless otherwise noted.

8. On September 1, 2010, while in a public area visible from Park Row Drive, Respondent masturbated his erect penis. (That this action was visible from Park Row Drive was found by a Commission vote of two-to-one.)

9. On September 1, 2010, while in a public area visible from Park Row Drive, Respondent gestured to the undercover police officer while masturbating his exposed penis. (That this action was visible from Park Row Drive was found by a Commission vote of two-to-one.)

10. Respondent pled “no contest” to a violation of Penal Code section 415 in relation to the events of September 1, 2010.

11. Respondent was convicted of a violation of Penal Code section 415 in relation to the events of September 1, 2010.

12. On March 9, 2011, the District issued to Respondent a Notice of Unsatisfactory Acts referring to these same events and indicating that Respondent’s services were unsatisfactory for the following reasons: (1) immoral conduct; (2) unprofessional conduct; and (3) evident unfitness for service. (Exhibit 33.)

13. On March 9, 2011, the District issued to Respondent a Notice of Suspension referring to these same events and indicating that Respondent would be suspended for 15 days for the following reasons: (1) immoral conduct; (2) unprofessional conduct; and (3) evident unfitness for service. (Exhibit 34.)

14. On September 1, 2010, Respondent was arrested for violating Penal Code section 647, subdivision (a), for soliciting another person or engaging in lewd conduct in public. On October 26, 2010, as part of a plea bargain, the charges were amended and Respondent pleaded nolo contendere to, and was convicted of a violation of Penal Code section 415. Imposition of sentence was suspended and Respondent was placed on summary probation for 24 months on terms and conditions.

15. Penal Code section 415 is often referred to as “disturbing the peace.” Penal Code section 415 is titled “Fighting; noise; offensive words,” and states:

“Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine:

“(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.

“(2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.

“(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.”

16. Based on his arrest for lewd conduct in violation of Penal Code section 647, subdivision (a), the Commission on Teacher Credentialing (CTC) issued a mandatory suspension of Respondent’s teaching credential, effective October 5, 2010. Respondent was then convicted under a different Penal Code section, section 415, which would not require automatic suspension of his credential. Therefore, on December 8, 2010, the CTC notified Respondent that it reinstated his teaching credential, retroactive to October 26, 2010. (Exhibits 50 and P.)

17. On January 15, 2013, the Superior Court granted Respondent’s petition for relief under Penal Code section 1203.4 and the plea was set aside and vacated, a plea of not guilty was entered, and the criminal complaint was dismissed. (Exhibit M.) This process is often referred to as an expungement. Under Penal Code section 1203.4, Respondent is required to disclose the conviction in response to any direct question in any application for public office or for licensure by any state agency.

18. According to Respondent, on the day of the incident, he had been setting up his classroom. He changed his clothes at school and drove approximately six miles to Elysian Park to run on some of the trails in preparation for running in a marathon several months later. He ran for about one hour, using a clock/timer function on his cell phone, and finished close to his starting point, about a 10 minute walk to his car, as a cool down period. When he had the urge to urinate, he stepped off the side of the trail to a footpath, looking for shrubbery, and exposed his penis through the leg opening of his running shorts for that purpose. Respondent testified that, at that point, he was not visible from Park Row Drive, due to the shrubbery and foliage by the hillside path. Respondent had seen a man near the path who had removed his shirt and had also seen another man (the undercover officer) walking on the path, and he was curious to see what would happen. Respondent is homosexual. He passed the officer and turned back, to see the officer looking at him. Respondent glanced down two or three times, to break eye contact, checking his cell phone time function and, when he glanced up, the officer was looking at him. Respondent believed the officer was a gay man who was expressing interest in him and flirting with him. Respondent was attracted to him and interested to see if a social connection could be made. Respondent testified he “tucked himself away” and approached the man to make social contact, but not with intention to engage in a sex act in the park. Respondent explained that he had condoms and a pack of lubricant in his pocket at the time of his arrest because they were old and he had decided to remove them from his car to dispose of them. Respondent testified that he said “I’m sorry” after he was arrested because he knew his intent to urinate in public was “highly incorrect,” and because he was embarrassed about misreading the situation. At the hearing, Respondent accepted responsibility for his conduct, was highly embarrassed about it, and expressed that he let down his colleagues. He characterized it as a “dumb mistake,” and added that it happened in seconds, and he felt trapped, humiliated, and fearful.

19. In many regards, the Commission did not find credible the foregoing version of events as described by Respondent. Rather, the Commission found more credible the testimony and written report of the undercover officer who described actions by Respondent that support Factual Findings 6 through 9. Respondent had numerous opportunities to discard the condoms and lubricant before the events occurred. Respondent had opportunities to use restrooms or portable restrooms to urinate before the events occurred, or could have used them later without exposing himself in public. Based on the evidentiary record, the Commission concluded that Respondent was likely in that area of the park, known for homosexual and other sexual activity, for the purpose of performing a lewd act or soliciting a sexual act with another.

20. Respondent denies that he had such purposes. He denies that his penis was erect at any time during the events, or that he was masturbating his erect penis. There were inconsistencies in Respondent's testimony and between his testimony and other evidence, such as his earlier arrest and the status of his credential, that also had a negative effect on his credibility. For example, Respondent initially testified that his credential had never been suspended or revoked. However, after he was made aware of the CTC's letter of mandatory suspension, and the subsequent reinstatement, he acknowledged that his credential had been temporarily suspended. In another example, Respondent's counsel represented that Respondent had never been arrested before his arrest on September 1, 2010, and that this explained his shock, surprise and reaction upon this, his "first" arrest.² However, the evidence revealed that Respondent did have a prior arrest for a bicycle equipment violation. While at first blush this seems to be a minor memory failure, in subsequent testimony Respondent explained that he was also accused of having outstanding warrants and it took some effort on his part to appear in court and explain that the warrant related to another person named Jesus Rodriguez. He first learned of the outstanding warrants in 1989, when he spent most of the day in court with a Public Defender trying to sort things out. The arrest for the bicycle equipment violation was in 1999, and he again was involved with the warrants when he was stopped for a moving violation in 2009. These are memorable events, and the representation by Respondent's counsel that Respondent had never been arrested before September 1, 2010, is attributable to Respondent and should be viewed with disbelief. Respondent's credibility is also negatively affected by his testimony and sworn answers to interrogatories addressing the timing of the events of September 1, 2010, due to evidence that his phone clock did not have the function for showing seconds, yet his answers indicated that it did. Again, although the individual examples discussed herein may each seem to be minor, the cumulative effect is to raise questions of Respondent's credibility.³

² Statements of counsel in arguments, pleadings or briefs may bind the client. (See, *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599; 1 Witkin, Cal. Procedure (4th ed.) Attorneys, § 235 et seq.) Briefs and arguments may constitute admissions by a party. (*Mangini v. Aerojet-General Corp.* (1991), 230 Cal.App.3d 1125, 1152, citing and quoting *De Rose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn 3.)

³ On credibility of witnesses generally, see Conclusion of Law no. 4, below.

21. As also discussed in the Conclusions of Law below, various factors must be examined to determine if there is a sufficient nexus between Respondent's acts and his position as a teacher to support termination from that teaching position. These factors are: (1) the likelihood that the conduct in question 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 teacher; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) 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.

22. The significant facts are that there was no evidence that any students were aware of the events. At least two teachers were aware of some aspects of the events: Grace Ollerenshaw, a friend and colleague who was also Respondent's union representative during the meeting when he was given the Notice of Unsatisfactory Acts and Notice of Suspension, and David Basso, a friend and colleague of Respondent who had dinner with him wherein some aspects of the events were discussed.

23. Of significance was testimony from several District employees about the adverse effects as they perceived them. Natividad Rozsa (Rozsa) is an Instructional Director of the East Educational Service Center of the District responsible for supervising 15 schools, including Pacific Boulevard School. It was her decision, with the input of others, that Respondent should be suspended and dismissed from employment. One immediate effect of the events is that the school year was about to start and it was immediately necessary to find a replacement for Respondent. According to the school principal, Gabriel Duran (Duran), he arranged for a substitute teacher, and subsequently needed two more substitutes that school year due to Respondent's continued absence from the classroom. Duran also communicated with parents, who expressed concern about the changes in teachers. Rozsa spoke of the numerous steps and people involved in the process of reaching the decision to suspend and dismiss Respondent. Rozsa believes that Respondent committed egregious conduct and exercised poor judgment. She did not think it was appropriate for Respondent to be around students and expressed concern for their safety. Rozsa noted that, due to special education programs at Pacific Boulevard School, there is a student population with disabilities, several of whom have difficulty communicating, implying that she had a concern that students might have difficulty reporting any improper acts by Respondent. She considered the acts as immoral because people in the profession must be above board and students should be able to trust their teachers, and because Respondent showed a lack of control in not restraining himself while in public. Although Rozsa was aware of information that the District had handled some cases of teacher discipline in the past with a letter of reprimand, she was responsible for determining the appropriate discipline in this case and decided the suspension and dismissal were warranted.

24. Rowena Lagrosa (Lagrosa) is the Operations Administrator of the East Educational Service Center of the District overseeing 90 schools and approximately 159,000 students. (Lagrosa was the Superintendent of Local District 6 during the events in this matter, before a recent reorganization of the District that restructured eight Local Districts into four Educational Service Centers.) She echoed many of the concerns expressed by Rozsa, particularly mentioning Respondent's poor judgment, lack of self-control and integrity, and a resulting risk to Respondent's students. She commented on the risk that, if Respondent masturbated in public, he might do so in the classroom. Lagrosa spoke of the need for immediate action because Respondent's arrest so closely preceded the beginning of school for students, and the various actions taken by different District personnel. She expressed concern for students' safety and well-being, and was also concerned that the events occurred during the day, there was a school in proximity to Elysian Park, and that parents visiting schools and school personnel are often present in the days leading up to the beginning of the students' school year. Although Lagrosa was aware that Respondent pleaded to the lesser charge of disturbing the peace, this did not change her opinion as the original charges related to criminal and deviant behavior. When she later informed Duran of the details of Respondent's arrest, she characterized his reaction as shock and disappointment. She stated Duran answered "no" to the question whether he would be comfortable with his children in Respondent's classroom. Lagrosa confirmed that each case of discipline is decided on its own merits, with no guidelines for particular offenses. When Respondent did not submit any reply or added information during the disciplinary process, the District proceeded to its decision to suspend and dismiss him.

25. Lagrosa addressed the District's Employee Code of Ethics (Exhibit 16) and concluded that Respondent did not meet the District's expectations of its employees. Among other things, the Code of Ethics states: "Everything we do has an impact in the classroom" and "We are committed to creating an environment of trust, care and respect." (Exhibit 16, p. LAUSD 254, section A.) In her testimony she spoke specifically of these references. In the opinion of Lagrosa, these responsibilities exist beyond a teacher's presence in the classroom. She considers Respondent's actions to be a breach of the trust placed in teachers in the professional learning community and she has lost trust in his ability to serve as a role model for students, teachers, and in the community. Lagrosa was concerned that, if parents and students became aware of Respondent's acts, they would be distraught and the parents would hold the administrators accountable and question why Respondent would be permitted to have day-to-day contact with children. She was also concerned that Respondent had not taken responsibility for his actions. Lagrosa acknowledged that some people who have made a mistake might serve as a role model, but was concerned that the mistake might also be repeated.

26. Duran has been employed with the District for 21 years and has been the principal at Pacific Boulevard School for six years, where he oversees 520 students in the District's largest elementary school that has a mixture of general education and special education students. The 220 special education students range in age from three to 21. Many have adult assistants. Many have disabilities whereby they cannot be left unattended.

27. Duran first met Respondent at the school in 2006. In the week prior to the beginning of school in September 2010, Duran had seen Respondent on campus during math training. On September 1, Duran received a call from the police inquiring whether Respondent was a teacher at the school or a flight risk. Duran learned Respondent had been arrested for a lewd act, with few details. District personnel instructed Duran to obtain a substitute for Respondent's class for the first day of school. Duran did not know how long Respondent would be out of the class, but was able to find a day-to-day substitute. As time went on, he also needed to notify parents and other teachers of Respondent's absence, which also required modification of the grade level planning at the school. Duran needed a long term substitute to cover for Respondent. All told, Duran needed three substitute teachers to cover for Respondent for the school year and, for the next school year, a permanent replacement was assigned. The use of the substitutes required additional actions, coordination and communication by Duran.

28. Duran authored a letter dated February 4, 2011 (Exhibit D) summarizing Respondent's experience and, in a very positive way, indicating that observations and evaluations of Respondent were favorable. The letter depicts Respondent as a knowledgeable teacher who is collaborative, open to suggestions, and skillful in communicating and interacting with parents, students, colleagues and staff. Based on positive personal and professional teaching qualities, Duran recommended that Respondent be returned to his assignment as a fourth grade teacher.

29. Duran explained that, when he wrote the letter, he was aware that Respondent had been convicted of disturbing the peace, but was not aware of the underlying details of the arrest. He thought Respondent had solicited a prostitute. Duran had been asked by Ignacio Garcia in the District's staff relations office to supply background information on Respondent. Duran stated this usually means that some level of discipline was being considered by the District. Duran testified that, if he knew then what he knows now about the underlying acts, he would not have written the letter.

30. Duran was directed by his superiors to serve Respondent with the Notice of Unsatisfactory Act and a 15-day suspension, and he did so on March 9, 2011. It was only on reading these notices that Duran learned of the nature of Respondent's acts in the park. Duran testified he was shocked and that this was contrary to the impression given by Respondent by virtue of his teaching activities at the school. At the meeting, Respondent made no comment after being given the notices. After the meeting, Duran spoke to Lagrosa, who told him she had serious concerns that if Respondent returned to the campus it would have a detrimental effect on the students and that the charges involved a lack of judgment. Duran agreed. Duran testified that students' parents are very active at the school and he anticipated they would probably want their students removed from class if Respondent returned. He wouldn't speculate on the children's reactions, but agreed it would be hard for Respondent to serve as a good role model.

31. As noted above (Factual Finding 22), Grace Ollerenshaw (Ollerenshaw) was the union representative who accompanied Respondent to the meeting with Duran on March 9, 2011. Ollerenshaw is also a fourth grade teacher at Pacific Boulevard School and considers Respondent to be friend. She described Respondent as an “amazing” teacher who is very passionate about his job. She and other teachers were first told only that Respondent had been arrested. Ollerenshaw first learned of Respondent’s acts when she read the Notice of Unsatisfactory Acts. Respondent told her he was urinating at the park. Later, when meeting with other teachers, Ollerenshaw told them of the Respondent’s acts. Later, in preparing to testify at the hearing, she read the police report for the first time. After, she stated it would be hard to believe that Respondent was urinating. Her opinion of Respondent had changed slightly. If he was returned to the classroom, she would be worried about judgments he might make, as the incident depicted his lapse of judgment.

32. Respondent holds a Multiple Subject teaching credential with an authorization in Math, and holds a BCLAD certificate (Bilingual, Crosscultural, Language and Academic Development). For the school year to begin in September 2010, Respondent had been assigned, for the first time, to teach the gifted and talented class for fourth grade. There were four fourth grade classes and, over the prior several years, Respondent had been active in advocating and advancing team teaching and expansion of the science curriculum. Respondent was considered “highly qualified” by the District and, under the union contract, formal evaluation of his performance, which would usually be at intervals of every one, two or three years, was extended to longer intervals.

CONCLUSIONS OF LAW AND DISCUSSION

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

2. The District has the burden of proof in this matter because it is seeking to dismiss Respondent from employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

3. The Commission has examined each alleged instance of conduct to determine whether it was proven, and for those which were proven, the Commission has determined, as set forth below, whether such charges were a violation of one or more of the statutory bases for dismissal as alleged.

4. On credibility generally: Evidence Code section 780 relates to credibility of a witness and states, in pertinent part, that a court “may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (b) The character of his testimony; . . . (f) The existence or nonexistence of a bias, interest, or other motive; . . . (h) A statement made by him that is inconsistent with any part of his testimony at

the hearing; (i) The existence or nonexistence of any fact testified to by him. . . .”

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, 1052.) Discrepancies in a witness’s testimony, or between that witness’s testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.) Positive testimony of a witness may be contradicted by the inherent probabilities as to its accuracy contained in that same witness’s own statement of the transaction. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125).

5. The statutory bases for dismissal alleged in the Accusation and Statement of Charges are: (a) immoral conduct, pursuant to sections 44932, subdivision (a)(1), and 44939; evident unfitness for service, pursuant to section 44932, subdivision (a)(5); and unprofessional conduct, pursuant to section 44932, subdivision (a)(1).

6. “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445 (*Woodland*).) Evident unfitness for services requires that unfitness be attributable to a defect in temperament which “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.* at 1444.)

7. The Commission has broad discretion in determining what constitutes unfitness to teach, in determining what constitutes immoral conduct, and in deciding whether the teacher should be sanctioned. (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327.)

“Immoral conduct,” pursuant to sections 44932, subdivision (a)(1), and 44939, has been defined to mean 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. It is sometimes used as synonymous with “dishonesty” or a high degree of unfairness. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811 (*Weiland*).) Immoral conduct can be construed according to common usage. “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 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.” (*Palo Verde Unified School District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972 (*Hensey*).)

8. The factual scenarios in *Weiland* and *Hensey* are helpful in understanding the types of actions that can constitute “immoral conduct” and “evident unfitness for service” as bases to dismiss a teacher. In *Hensey*, dismissal was justified for a junior college teacher who used vulgar language and engaged in questionable acts. It was not necessarily each individual act or comment but, rather the totality. As summarized from the published opinion, he tore out a loudspeaker in his classroom. He referred to the school’s bell system as sounding like a worn-out phonograph in a whorehouse and made numerous references throughout the year to whores and whorehouses. He addressed Mexican-American students in the presence of the rest of the class and warned them of super-syphilis in a town on the Mexican border. He stated to his philosophy class that the district superintendent spent too much time licking up the board and in connection with the statement simulated licking the classroom wall with his tongue in an up and down manner. Although he explained that he meant “face licking,” the expression means in common parlance licking an entirely different portion of the anatomy and was obviously so intended. He also referred to the school walls looking as though someone had peed on them and then smeared them with baby crap. The court stated “while it could be assumed that both male and female students of that age were familiar with the words used, a classroom, even on a junior college level, is not the time or the place for the use of such language.” (*Hensey, supra*, 9 Cal.App.3d at 975.) The different actions and statements were described as creating a dangerous situation (loudspeaker), bearing on his fitness to teach (whorehouse), humiliating and embarrassing to the Mexican-American students and showing a lack of restraint and a tendency to vulgarity and bad taste (super-syphilis), and disruptive conduct, an impairment of the teaching process, and not an example of the responsible dissent which should be fostered in the classroom (licking). “All of the incidents taken in the aggregate serve as a substantial basis for the trial court’s determination that the charges of ‘immoral conduct’ and ‘evident unfitness for service’ were true and constituted cause for dismissal.” (*Ibid.*)

9. In *Weiland*, a teacher of an evening class was aware that when the number of students in a class went down to 15 participants on three successive evenings, the class would be automatically dropped off the roll and the teacher would lose her position. Appellant testified that she falsified records to the extent, at least, of adding the names of three persons who were absent. Although the teacher argued that other teachers did the same and she did so “to expose the situation,” nevertheless her conduct was not justified and the evidence was “that the purpose of the falsification was to secure appellant’s continued employment. The evidence was clearly sufficient to support the findings” of immoral conduct. (*Weiland, supra*, 179 Cal.App.2d at 811.)

10. A teacher's anonymous internet ad for sex partners, including a picture of his face and other body parts, constituted evident unfitness for service and immoral conduct, over the teacher's objection that it was personal conduct undertaken on personal time. The court ruled the activity impaired the teacher's ability to do his job by damaging his reputation among colleagues. (*San Diego Unified School Dist. v. Comm'n on Prof. Competence* (2011) 194 Cal.App.4th 1454.)

11. "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.)

12. Even where immoral conduct or evident unfitness for service are established, it must also be established that such immoral conduct or evident unfitness renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*); *Woodland, supra*, 4 Cal.App.4th at 1444-1445.)

In general, the determination of fitness requires an analysis based on the criteria set forth in *Morrison*, to determine whether, as a threshold matter, the questioned conduct indicates unfitness for service. In the *Morrison* case, the Supreme Court of California held that the determination whether a person is fit to teach must be based on an objective and analytical approach. Under the facts of that case, discussed in more detail below, the Court reviewed the teacher's conduct and determined that a school board may consider such specific criteria as: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

Analysis of the *Morrison* factors indicates that the Commission has broad discretion in disciplinary matters. The role of the Commission is not merely to determine whether the charged conduct in fact occurred, but to decide whether the conduct, as measured against the *Morrison* criteria, demonstrates unfitness to teach. (*Fontana, supra*, 45 Cal.3d at 220.)

13. In *Morrison*, the Supreme Court faced a scenario where the state Board of Education had revoked a teacher's life diplomas for immoral and unprofessional conduct and acts involving moral turpitude. (In the context of present day licensing, this is the equivalent of a revocation of a teaching credential by the Commission on Teaching Credentials.) Marc Morrison was licensed to teach in public secondary schools. In April 1963, while away from school, he had a physical but non-criminal homosexual relationship with another teacher, who reported it one year later to the school district. The Supreme Court determined that the

legal grounds for revocation were not unconstitutionally vague as long as the conduct indicated unfitness to teach. In examining and interpreting the law concerning these grounds for revocation, the Court determined that the licensing agency “may consider such matters as” the factors now known as the *Morrison* factors. (*Morrison, supra*, 1 Cal.3d at 229.) In applying the facts before it to those factors, the Supreme Court concluded that the record contained no evidence that Morrison’s conduct indicated his unfitness to teach.

14. Applying the facts of this case to the *Morrison* factors leads to the conclusion that Respondent is unfit to teach.

(a) *Morrison* Factor: The likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity. Respondent’s conduct had an adverse effect on other teachers, as established by Ollerenshaw. Although there was no evidence of an actual adverse effect on students, several witnesses established that Respondent could not function as an effective role model for students. In *Board of Education v. Swan, supra*, 41 Cal.2d at 552, the Court stated: “A teacher, and more particularly a principal, in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection. (Citation.)” In *Goldsmith v. Board of Education* (1924) 66 Cal.App. 157, 168, the Court noted: “[T]he teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands, are of major concern in a teacher’s selection and retention. . . .”

To be sure, teachers are not required or expected to act with perfection and rectitude in every aspect of their personal and professional lives. Nevertheless, as noted in the Code of Ethics: “Everything we do has an impact in the classroom.” (See Factual Finding 25 and the Code of Ethics, Exhibit 16, p. LAUSD 254, section A.)

There was evidence that parents would be adversely affected, and it was clear that District administrators were as well. Although *Morrison* analyzed the adverse effects on students and fellow teachers only, there is no basis in logic to limit the analysis strictly to these two categories. Evidence in this matter of the adverse effects on parents and administrators can, and should, be considered as they are also requisite parts of the school community within which teachers act.

(b) *Morrison* Factor: The proximity or remoteness in time of the conduct. The *Morrison* court applied this factor by concluding it was very attenuated when the complaint of Morrison’s activity was made one year after the fact, Morrison resigned the next month, 19 months later the State Board held its hearing, the revocation was three years after the fact, and by the time of the Supreme Court decision, the “incident had receded six years into the past.” (*Id.* at p. 237.) Here, the District removed Respondent from the classroom the day after the incident occurred and served the Notice of Unsatisfactory Acts six months later (four and one-half months after Respondent’s conviction). The formal charges were served

17 months after the incident and this hearing concluded 13 months after the charges were served, a total of 30 months after the incident.

(c) *Morrison* Factor: The type of teaching certificate held by the teacher. Respondent holds a Multiple Subject teaching credential, which entitles him to teach in classes typically found at the elementary school level.

(d) *Morrison* Factor: The existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct. Extenuating circumstances are Respondent's desire to make a social connection. Aggravating circumstances are that he did so in a highly inappropriate manner by exposing his erect penis, and masturbating, in a public park, exhibiting an extreme lack of both good judgment and situational awareness. Although there was no evidence of publicity in the nature of media coverage, there was evidence that some teachers were aware of some of the details of the arrest and conviction, and many teachers were certainly aware that Respondent was not present at school. Also, numerous District administrators were aware of Respondent's conduct.

(e) *Morrison* Factor: The praiseworthiness or blameworthiness of the motives resulting in the conduct. Respondent's desire to make a social connection is praiseworthy. Blameworthy circumstances are that he did so in a highly inappropriate manner by exposing his erect penis, and masturbating for self-gratification, in a public park, exhibiting an extreme lack of both good judgment and situational awareness.

(f) *Morrison* Factor: The likelihood of recurrence of the questioned conduct. Many District witnesses testified to their concerns that Respondent, having exercised such poor judgment under the circumstances surrounding the incident in the park, could not be trusted in a classroom to exercise the judgment necessary under his responsibility to properly interact with his young students. To be sure, one of the motives underlying Respondent's actions was the desire to make a social connection to an adult male, and there was no evidence to support a conclusion that Respondent has any other interest in his students other than to see them succeed in their education.

(g) *Morrison* Factor: The extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher. Respondent has the constitutional right to associate with whomever he pleases and a right to privacy. Any termination of Respondent from employment with the District will not adversely affect these or other constitutional rights he may have.

15. Respondent's contention that the District did not establish that he was unfit to teach is rejected. The Commission has considered the following two cases cited by Respondent on this issue.

(a) *Newland v. Board of Governors of the California Community Colleges* (1977) 19 Cal.3d 705 (*Newland*) and *Board of Education v. Jack M.* (1977) 19 Cal.3d 691 (*Jack M.*). These cases are cited by Respondent in his trial brief (Exhibit J) to support the proposition

that teachers charged with sexual offenses or lewd conduct were not unfit to teach. In *Newland*, an applicant for a Community College credential had been convicted of lewd conduct. The Supreme Court determined that the Board had improperly relied on a statute barring issuance of a credential to anyone convicted of lewd conduct, with no hearing involved, because that statute had been amended to remove the mandatory bar. The case was remanded for the Board to decide whether to issue the credential or provide a fitness hearing.

(b) In *Jack M.*, an elementary school teacher was arrested for lewd conduct under Penal Code section 647, subdivision (a), after allegedly soliciting a homosexual act in a public restroom. No criminal charges were brought. The teacher denied the acts occurred, but the trial court upheld the arresting officer's version of events. The school district presented evidence by two school principals, testifying as experts, that the teacher did not have the qualifications to teach, and was unfit to teach. To counter this evidence, the teacher offered the expert testimony of a psychiatrist who was experienced in examining persons who had been convicted of sexual offenses and who examined the teacher and reviewed his history. The psychiatrist concluded, among other things, that the teacher was not a homosexual and had engaged in an isolated act precipitated by unusual pressure and stress. Assuming the act had occurred, it was his expert opinions that there was no danger of recurrence, no danger to pupils or associates of the teacher, and because there was no evidence of a pattern, the conduct attributed to the teacher would not be consistent with acts endangering children or associates. (*Jack M.*, *supra*, 19 Cal.3d at 696.) On these facts, among others, the Supreme Court determined that there was sufficient evidence to support the trial court's resolution of this conflicting evidence in favor of the teacher. It rejected the argument that the arrest established, *per se*, that the teacher was unfit to teach. Rather, a hearing was necessary to gather the relevant evidence relating to fitness to teach.

(c) The effect of *Newland* and *Jack M.* on the present proceeding is that a hearing was provided for the District and Respondent to present the relevant evidence relating to fitness to teach. Having heard and considered that evidence, the Commission has concluded that the District established that Respondent is not fit to teach.

16. Another significant aspect of the evidence was that Respondent carefully restricted his taking of responsibility by limiting it to his bad judgment in exposing his penis for purposes of urinating. As noted above, the Commission finds Respondent's version of events is not supported by the evidence. Respondent made no expression of responsibility or remorse for the acts actually found by the Commission to have taken place. Respondent's version of events was considered to be rationalization and justification. This was also considered as supporting the conclusion that Respondent is not fit to teach.

17. The acts which were proven demonstrate that Respondent is not fit to teach. The acts that were proven amount to cause for dismissal of Respondent under each of the legal bases charged by the District.

18. There is cause to dismiss Respondent for immoral conduct, pursuant to Education Code sections 44932, subdivision (a)(1), and 44939, for the reasons set forth in Factual Findings 6 through 33.

19. There is cause to dismiss Respondent for evident unfitness for service, pursuant to Education Code section 44932, subdivision (a)(5), for the reasons set forth in Factual Findings 6 through 33.

20. There is cause to dismiss Respondent for unprofessional conduct, pursuant to Education Code section 44932, subdivision (a)(1), for the reasons set forth in Factual Findings 6 through 33.

21. In reaching these Conclusions, the determinations that there is cause to dismiss Respondent from his employment with the District were made by unanimous vote of the Commission.

ORDER

The Accusation against Respondent Jesus Rodriguez is sustained and the District may proceed with its dismissal of Respondent as an employee of the Los Angeles Unified School District.

DATED: May ___, 2013.

JULIE GAUTREAU, Member
Commission on Professional Competence

DATED: May ___, 2013.

JOYCE ABRAMS, Member
Commission on Professional Competence

DATED: May ___, 2013.

DAVID B. ROSENMAN
Administrative Law Judge, Member,
Commission on Professional Competence