

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

In the Matter of the Accusation Against,

ANA GARCIA,

Respondent.

OAH No. 2014030267

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on April 21, 22, 23, and 24, 2014. The Commission consisted of Virginia Escobar, Jeffrey Jacobs, and Administrative Law Judge Carla L. Garrett, Office of Administrative Hearings, State of California, who presided.

Rupert A. Byrdsong, Attorney at Law, represented the Los Angeles Unified School District (District).

Rosty G. Gore, Attorney at Law, represented Respondent Ana Garcia (Respondent).

The parties submitted the matter for decision on April 24, 2014, and subsequently agreed to extend the Decision's due date to August 8, 2014.

Respondent is a permanent certificated employee of the District assigned to Haskell Elementary School. District alleged that Respondent demonstrated unprofessional and immoral conduct (sections 44932, subdivision (a)(1) and 44939),¹ evident unfitness for service (section 44932, subdivision (a)(5)), persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing her (section 44932, subdivision (a) (7)), and willful refusal to perform regular assignments without reasonable cause, as described by reasonable rules and regulations of the employing district (section 44939), all arising out of Respondent's alleged abusive or inappropriate behavior against four students. District seeks Respondent's dismissal.

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FACTUAL FINDINGS

1. On March 17, 2014, District served Respondent with an Accusation and Statement of Charges executed by Justo H. Avila, Interim Chief Human Resources Officer, acting in his official capacity. On March 19, 2014, Respondent served her Notice of Defense.

2. Respondent began teaching school with the District with an emergency credential in July 1994, and continued in that capacity until June 1998. She subsequently became a permanent certificated employee of the District and in September 1998, began teaching at Haskell Elementary School (Haskell). During her period at Haskell, in addition to teaching, Respondent served as an in-class bilingual coordinator for two years, marathon kids lead teacher for three years, intervention teacher, and has served as a volunteer at a number of school activities.

3. The 2012-2013 school year began on August 14, 2012. Respondent was assigned to teach first grade. Respondent's first grade class consisted of primarily six-year-old students, including a student named L [REDACTED], who had just enrolled at Haskell. Pursuant to District protocol, Respondent, during the first week of school, distributed permission slips to parents seeking their consent to photograph or videotape their children.

4. On August 20, 2012, L [REDACTED], after returning home from school, expressed to his mother he no longer wished to attend school. When his mother asked why, L [REDACTED] explained that, earlier that day, after issuing multiple warnings requesting him to pay attention, Respondent grabbed L [REDACTED]'s neck and forcibly turned his head to face the board. L [REDACTED] further advised his mother that Respondent had engaged in the same conduct against him on three other occasions since the commencement of school.

5. On the following day, August 21, 2012, L [REDACTED]'s mother, who testified at hearing, complained to Dr. Thompson about Respondent's treatment of L [REDACTED]. L [REDACTED]'s mother requested that L [REDACTED] be removed from Respondent's classroom. At hearing, L [REDACTED]'s mother explained that she felt L [REDACTED] was being truthful when he told her about Respondent's actions. She also added she could not recall L [REDACTED] ever telling her a lie, and that he had no reason to lie.

6. On the same day, Dr. Thompson, who testified at hearing, talked to Respondent about the statements made by L [REDACTED]. Respondent denied touching L [REDACTED] on the back of the neck and squeezing it or otherwise hurting L [REDACTED], irrespective L [REDACTED]'s misbehavior at school. Specifically, Respondent advised Dr. Thompson that in the six days since the commencement of school, L [REDACTED] had been noncompliant and disruptive. During her conversation with Dr. Thompson, Respondent retrieved her cell phone and showed Dr. Thompson a videotape she filmed of L [REDACTED], approximately 15 seconds in length, showing L [REDACTED] rolling on the ground with his fingers in his mouth, protesting Respondent's directive to the class that they return to their desks and begin working in their workbooks. Respondent advised Dr. Thompson that she filmed L [REDACTED] for the sole purpose of showing his parents how

L [REDACTED] had been misbehaving and acting immaturely. Dr. Thompson had not given Respondent prior approval to videotape L [REDACTED] or any other student, and L [REDACTED]'s mother had not yet returned an executed permission slip granting District authority to photograph or videotape L [REDACTED].

7. Dr. Thompson immediately removed Respondent from her classroom assignment, pending an investigation.

8. On August 21, 2012, Dr. Thompson interviewed L [REDACTED] L [REDACTED], who testified at hearing, explained that he was talking to one of his friends in class, which prompted Respondent to put her hand on the back of his neck, turn his head to face the board, and tell him to get to work. When Respondent grabbed his neck, it hurt him. L [REDACTED] testified that everyone in the class witnessed Respondent grab his neck. He did not want to return to Respondent's class after she squeezed his neck.

9. Dr. Thompson reported L [REDACTED]'s allegations to the District, and then interviewed all of the other students in Respondent's class. According to Dr. Thompson, Respondent's class consisted of 16 to 24 students. No student corroborated L [REDACTED]'s account.

10. Dr. Thompson interviewed Mary Lou Casillas, a special education assistant assigned to provide additional classroom support to Respondent's class. Ms. Casillas, who testified at hearing, worked mornings in Respondent's classroom from August 14, 2012 to August 17, 2012, from 8:10 a.m. to 11:00 a.m. Ms. Casillas never saw Respondent grab L [REDACTED]'s neck or touch his head, or have any inappropriate physical contact with L [REDACTED]. Ms. Casillas described L [REDACTED] as requiring a lot of attention and redirection, and who often got out of his seat, but Respondent always remained calm and patient when dealing with L [REDACTED].

11. At hearing, Ms. Casillas explained she had provided classroom assistance for Respondent on and off for 10 years, had never heard Respondent speak to any student in a threatening manner, never heard Respondent raise her voice at students, never heard parents complain about Respondent, and only witnessed Respondent speaking to students in a calm, patient, and slow manner.

12. On August 30, 2012, Debra Bryant and Howard Yao, operations coordinators from the District, came to Haskell and conducted interviews of Respondent's students. Ms. Bryant and Mr. Yao, who testified at hearing, asked each of the students the following questions, and then scribed their responses, though not always word for word: "(1) What do you like about [Respondent]?; (2) How does [Respondent] reward good behavior?; (3) What happens when students do not behave in [Respondent's] class?; (4) How does [Respondent] get your attention when you are not following directions?; and (5) Has [Respondent] ever made you feel bad?"

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13. Ms. Bryant and Mr. Yao found that the students generally liked Respondent and said she was nice. None of the students corroborated L [REDACTED]'s account, or reported any incidents of inappropriate physical touching. Ms. Bryant and Mr. Yao submitted their handwritten notes, which included the students' answers to the questions posed to them, to the staff relations department of the District.

October 9, 2012 Conference

14. On October 9, 2012, Dr. Thompson held a conference with Respondent so that she could discuss the allegations of inappropriate treatment related to L [REDACTED]. Dr. Thompson memorialized the substance of that conference in a memorandum dated October 10, 2012, and summarized the allegations made by L [REDACTED]'s mother on August 21, 2012, of purported inappropriate conduct committed by Respondent on August 20, 2012. Specifically, Dr. Thompson stated that Respondent, in response to L [REDACTED]'s bad behavior, engaged in the following acts: (1) placed her hand on the back of L [REDACTED]'s neck, squeezed it hard enough to hurt him, and forced him to turn his head toward the front of the class; (2) on another occasion, grabbed the top of L [REDACTED]'s head and forced him to pay attention; and (3) used her cell phone to videotape L [REDACTED] to share evidence of his behavior with his parents.

15. During the conference, Dr. Thompson instructed Respondent that students must always be treated in a respectful and appropriate manner, and that school personnel must never touch students. Dr. Thompson then gave Respondent a copy of Education Code section 51512, prohibiting anybody from using a recording device in the classroom to promote an educational purpose without prior consent from the principal.

16. In addition, Dr. Thompson gave Respondent a copy of the LAUSD District's Ethics Policy Statement, which included language stating that "employees shall treat students with respect and care and be aware of their proper role as public servants, role models, and contributors to student development. Employees shall not exploit, harass, or discriminate against any student"

17. Dr. Thompson also gave Respondent a copy of the Board Resolution "Commitment to the Respectful Treatment of All Persons," which included language stating that "The Los Angeles Unified School District reaffirms its policy that students and adults in both schools and offices should treat all persons equally and respectfully and refrain from the willful and negligent use of slurs against any person on the basis of race, language spoken, color, sex, religion, handicap, national origin, immigration status, age, sexual orientation or political belief"

18. In addition, Dr. Thompson gave Respondent a copy of Bulletin 1347.2 entitled "Child Abuse and Neglect Reporting Requirements," which defined child abuse as "willful cruelty or unjustifiable punishment (a situation where any person willfully causes, inflicts or permits unjustifiable physical pain or mental suffering, or a caregiver willfully causes or permits the child to be placed in a situation in which the child's person or health is endangered. Endangerment and cruel punishment are both reportable categories of child

abuse which do not require that injury be sustained) or mental suffering, emotional well-being (when suffering has been inflicted upon a child or his and her emotional well-being is endangered in any other way)."

19. Dr. Thompson also gave Respondent a copy of the Code of Conduct With Students, which included language in paragraphs three and six prohibiting the following: "(3) Engaging in any behaviors, either directly or indirectly with a student(s) or in the presence of the student(s), that are unprofessional, unethical, illegal, immoral, or exploitative . . . (6) Touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee's/individual's responsibilities and/or duties."

20. In addition, Dr. Thompson gave Respondent a copy of Bulletin 5046.0 entitled "Abolition of Corporal Punishment," which stated that the "Superintendent encourages the use of positive approaches to discipline and classroom management to ensure that students conform to proper standards of behavior permitting them to derive greater benefits from the educational program."

21. Dr. Thompson also gave Respondent a copy of the California Standards for the Teaching Profession, in particular, Standard 2.2, that discussed establishing a climate that promoted fairness and respect.

22. Respondent told Dr. Thompson that she would prepare a written response concerning the allegations discussed during their October 9, 2012 conference, which she did. Specifically, on October 21, 2012, Respondent submitted a written response denying the allegations. Respondent denied grabbing L [REDACTED]'s head at any time to redirect his attention towards the board. Respondent further stated that she had not ever used corrective measures that have hurt any student.

23. As for the videotape, Respondent admitted in her written statement that she had taken a picture of L [REDACTED].² She used it as a way of getting L [REDACTED] to follow her request. Specifically, she told L [REDACTED] she was going to take a picture and show his mom how he was behaving; however, there is no evidence that Respondent made the statement "in a threatening manner," as set forth in the Accusation. L [REDACTED] immediately stopped rolling on the ground, stood up, and then Respondent placed her arm lightly over his shoulder and walked him back to his seat. Respondent stated that she understood the District's policy regarding pictures taken at school by teachers. She recalled that Haskell had just distributed permission slip forms, and she had received some signed forms from parents, but determined, after her discussion with Dr. Thompson, she had not received a signed permission slip from L [REDACTED]'s parents.

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² At hearing, Respondent interchanged the words "videotape" and "picture" when describing her filming of L [REDACTED].

24. On December 12, 2012, Dr. Thompson issued to Respondent a Notice of Suspension, as well as a Notice of Unsatisfactory Act(s) of Certificated Employee, charging that Respondent had (1) grabbed the top of L [REDACTED]'s head and forced him to pay attention; (2) placed her hand on L [REDACTED]'s neck, squeezed it hard, and forced him to turn his head toward the front of the class; and (3) told L [REDACTED] in a threatening manner that she was going to take his picture and show his mother.

25. The staff relations department of the District determined that further investigation was necessary, and directed Ms. Bryant and Mr. Yao to return to Haskell to interview Respondent's students from previous school years.

26. On April 15, 2013 and May 1, 2013, Ms. Bryant and Mr. Yao randomly interviewed students who were enrolled in Respondent's 2009-2010 and 2010-2011 classes, and asked these students the same questions as they had asked the students in August 2012. The 2009-2010 school year began in August or September 2009 and ended in June 2010. The 2010-2011 school year began in August or September 2010 and ended in June 2011. Many of the students said Respondent was nice, creative, and fun. However, a few students offered some negative comments about Respondent, according to Ms. Bryant and Mr. Yao. Specifically, these students reported that Respondent tapped their heads with a marker or yard stick, yelled, and grabbed students. A few students reported Respondent frequently engaged in such behavior with a student named S [REDACTED], and additionally required him to go outside unsupervised and count to 100.

27. At hearing, Ms. Bryant and Mr. Yao reported that a student named R [REDACTED] told them that Respondent tapped his classmate, S [REDACTED], on the head and told him to pay attention. R [REDACTED], who testified at hearing, and now in sixth grade, testified he was a student in Respondent's second grade class.³ He said Respondent, on one or two occasions,

³ It is unclear whether R [REDACTED] was in Respondent's 2009-2010 class or in her 2010-2011 class. However, assuming R [REDACTED] was correct when he stated he was in Respondent's second grade class, one can deduce that R [REDACTED], who was in sixth grade at the time of his testimony, was in Respondent's second grade class during the 2009-2010 school year, barring any "skipping" of grade levels. Following this logic, if R [REDACTED] attended Respondent's first grade class, he would have done so in 2008-2009 school year, a period clearly barred by the statute of limitations in this matter. Therefore, for the purpose of this Decision, the Panel will assume R [REDACTED] was not in Respondent's class during the 2008-2009 school year, but rather attended Respondent's class in a subsequent school year. The problem is, District called R [REDACTED] as a witness to describe Respondent's purported actions as they pertained to his classmate, S [REDACTED]. However, the Accusation stated S [REDACTED] was in Respondent's first grade classroom during the 2010-2011 school year, a period in which R [REDACTED] would have been in the third grade, assuming R [REDACTED] neither skipped any grades levels or was retained in any grades. It is unclear whether the District mistakenly listed the incorrect school year in its Accusation, or whether R [REDACTED] was mistaken, or whether there were other factors in effect that neither party introduced on the record, but in an abundance

hit him softly on the head with some kind of stick that resembled a yard stick, and he said he witnessed her hit S [REDACTED] on the head one or two times. R [REDACTED] further testified that Respondent engaged in such behavior when students were loud, noisy, goofing off, or when they were not paying attention. On those occasions when Respondent tapped R [REDACTED] with a yard stick, it did not hurt him. R [REDACTED] did not specify when during the school year Respondent engaged in such behavior toward him or S [REDACTED]. The Accusation did not include any reference to R [REDACTED]'s allegations of physical abuse against him purportedly perpetrated by Respondent.

28. Ms. Bryant and Mr. Yao testified that a student named J [REDACTED], who attended Respondent's class during the 2009-2010 school year, told them that Respondent had gotten angry with her, grabbed J [REDACTED]'s head with both of Respondent's hands, turned J [REDACTED]'s head toward the board, and told her to pay attention. J [REDACTED], who is now in sixth grade, testified at hearing, and explained that Respondent's actions occurred when J [REDACTED] was in Respondent's second grade class.⁴ J [REDACTED] further explained that Respondent's conduct upset her and made her cry. J [REDACTED] testified that Respondent had engaged in such physical action against her on two occasions, and had witnessed her engaging in the same conduct with other students in her class, including one named A [REDACTED]. J [REDACTED] did not specify when during the 2009-2010 school year Respondent purportedly engaged in such behavior toward her or anybody else.

29. At hearing, Ms. Bryant and Mr. Yao testified they interviewed S [REDACTED], who reported that Respondent had tapped him on the head with a yard stick, which resulted in a bump on his head. Neither Ms. Bryant nor Mr. Yao ascertained when during the school year Respondent engaged in such action. S [REDACTED] did not testify at hearing.

30. Ms. Bryant and Mr. Yao also testified that a student named A [REDACTED], who attended Respondent's class during the 2009-2010 school year, reported that Respondent put

of caution, the Decision will include analysis regarding S [REDACTED] and R [REDACTED] for both school years.

⁴ In its Accusation, the District states that J [REDACTED] was in Respondent's class during the 2009-2010 school year, but that J [REDACTED] was in Respondent's first grade class. If J [REDACTED], who is now in sixth grade, was correct when she testified she was in Respondent's second grade class, assuming she matriculated on time, then J [REDACTED] would have been in the first grade during the 2008-2009 school year, a period clearly outside of the statute of limitations. It is unclear whether the District was mistaken, whether J [REDACTED] was mistaken, or whether there were other factors in effect that neither party presented on the record. However, for the purposes of this Decision, the analysis will not focus on whether J [REDACTED] was in the first grade or in the second grade during the 2009-2010 school year, but rather whether the District met its burden of showing Respondent engaged in misconduct toward J [REDACTED] during the 2009-2010 school year, within the statutory period.

both hands on the sides of his head, and turned his head toward the board. A [REDACTED], who is now 11-years-old and in sixth grade, testified at hearing, and explained that Respondent's actions occurred when he was in Respondent's second grade class.⁵ He and J [REDACTED] were in the same class. A [REDACTED] did not specify when during the 2009-2010 school year that Respondent engaged in such behavior.

31. Respondent's teacher's assistant for the 2008-2009 and 2009-2010 school years, Lorena Franco-Lomelli, testified at hearing. During those school years, Ms. Franco-Lomelli worked in Respondent's class for three and one-half hours a day. Ms. Franco-Lomelli never witnessed Respondent engaging in any inappropriate physical contact with students. In addition, she never witnessed Respondent scream at students or grab, hit, or shake students. She also never saw Respondent exhibit unkindness to students, or do anything to make them cry. Ms. Franco-Lomelli never witnessed Respondent leave students unsupervised, or send any student out of the classroom and close the door. Respondent had an open door policy and rarely closed the classroom door.

May 15, 2013 Conference

32. On May 15, 2013, Dr. Thompson held a conference with Respondent so that she could discuss the results of the April 15, 2013 and May 1, 2013 investigations. Dr. Thompson advised Respondent that, pursuant to the April 15, 2013 investigation, she concluded that Respondent had engaged in multiple acts of inappropriate treatment of S [REDACTED]. Specifically, Dr. Thompson advised that students had reported that Respondent had (1) pushed S [REDACTED] in the back because he was not behaving; (2) left S [REDACTED] outside of the classroom unsupervised for at least five minutes as a consequence for misbehaving; (3) rapped S [REDACTED] on the head with a yardstick on more than one occasion to get his attention; (4) screamed at S [REDACTED] and other students to get their attention, which made them afraid; (5) grabbed S [REDACTED] by the shirt and yanked on it to get his attention; (6) used a marker to tap S [REDACTED] on the head; and (7) rapped S [REDACTED] on the head with her knuckles.

33. Dr. Thompson also advised Respondent that she learned, pursuant to the interviews conducted on May 1, 2013, that on one occasion, in front of the class, Respondent screamed at J [REDACTED], and then grabbed J [REDACTED]'s head with both hands, shook it, and told

⁵ In its Accusation, the District states that A [REDACTED] was in Respondent's class during the 2009-2010 school year, but that A [REDACTED] was in Respondent's first grade class. If A [REDACTED], who is now in sixth grade, was correct when he testified he was in Respondent's second grade class, assuming he matriculated on time, then A [REDACTED] would have been in the first grade during the 2008-2009 school year, a period clearly outside of the statute of limitations. It is unclear whether the District was mistaken, whether J [REDACTED] was mistaken, or whether there were other factors in effect that neither party presented on the record. However, for the purposes of this Decision, the analysis will not focus on whether A [REDACTED] was in the first grade or in the second grade during the 2009-2010 school year, but rather whether the District met its burden of showing Respondent engaged in misconduct toward A [REDACTED] during the 2009-2010 school year, within the statutory period.

J [REDACTED] to pay attention. J [REDACTED] also reported that on another occasion, Respondent grabbed another student, A [REDACTED], by the head with both hands and shook it to get his attention.

34. Dr. Thompson instructed Respondent that students must always be treated in a respectful and appropriate manner, and that school personnel must never touch students. Dr. Thompson then gave Respondent another copy of (1) LAUSD District's Ethics Policy Statement; (2) Board Resolution "Commitment to the Respectful Treatment of All Persons;" (3) Bulletin 1347.2 entitled "Child Abuse and Neglect Reporting Requirements;" (4) Code of Conduct With Students; (5) Bulletin 5046.0 entitled "Abolition of Corporal Punishment;" and (6) California Standards for the Teaching Profession.

Respondent's Testimony

35. At hearing, Respondent emphatically declared untrue the charges levied against her. Specifically, in reference to L [REDACTED], who was in Respondent's class for approximately five days prior to her removal from the classroom, Respondent described him as requiring constant redirection, because he had difficulty paying attention and remaining seated. Consequently, Respondent determined L [REDACTED] should sit at the front of the class, in hope it would keep him more focused. Despite how challenging L [REDACTED] could be, Respondent never grabbed L [REDACTED]'s neck, squeezed his neck, turned his head, or did anything of the sort, and always addressed L [REDACTED] in a calm manner.

36. Respondent also vehemently denied the allegations levied by J [REDACTED] and A [REDACTED] as she has never screamed or shaken any child. While she conceded that sometimes she had to raise her voice slightly to get the group's attention, depending on the activity, she has never used yelling or screaming as a form of discipline.

37. Similarly, Respondent denied the allegations concerning S [REDACTED]. Specifically, Respondent denied having any inappropriate physical contact with S [REDACTED], such as tapping him on the head, and never left him unsupervised. Respondent testified S [REDACTED] was always in her line of sight, even on those occasions when he had been disruptive, prompting her to ask him to stand outside the threshold of the classroom (approximately two inches) and count to 100. Her rationale for telling S [REDACTED] to count to 100 was to give S [REDACTED]'s mind, which "ran a mile a minute," something else on which to focus. Respondent found that when she had given S [REDACTED] the task of counting, the act often calmed him down and readied his mind for learning. Respondent always had to keep a visual on S [REDACTED] because he was so active and impulsive. At no time was S [REDACTED] more than eight feet away from Respondent, whether S [REDACTED] was in the classroom, or standing two inches outside the threshold of the classroom.

38. Respondent concluded her testimony by reiterating she had not engaged in any inappropriate physical contact with students, or any contact that was outside her purview as a teacher. No parent had ever complained to Respondent about her treatment of their children.

Character Testimony

39. When Ms. Casillas and Ms. Franco-Lomelli served as assistants in Respondent's class, they found Respondent to be a good teacher. Ms. Casillas, who had been a teacher's assistant for approximately 15 years, could not picture Respondent doing the acts set forth in the Accusation, and Ms. Franco-Lomelli, who had worked as a teacher's assistant for six years, had a similar view. Ms. Casillas wrote a letter stating that Respondent had worked professionally with all of her students, and provided extra assistance for those in need. Ms. Casillas indicated that there were two students in the 2012-2013 class that required additional support, assistance, and constant redirection, and that Respondent would assist those students, and, despite the difficulty Respondent experienced in presenting her lessons as a result of the two students' constant disruptions, always demonstrated patience. Ms. Casillas further stated that she had worked with Respondent in previous school years, and found that Respondent had a wonderful work ethic, was dedicated and caring, and stated that it was always her pleasure to work with Respondent.

40. Ms. Franco-Lomelli considered her time in Respondent's class as the best in her career, because she witnessed how Respondent treated the students as Respondent's own children. She also witnessed Respondent's professionalism, dedication, and how welcoming Respondent was of her students. In that regard, Ms. Franco-Lomelli wrote a character letter on Respondent's behalf, and expressed that Respondent made students feel comfortable, special, and heard.

41. Deirdre Jean McDermott, who was Respondent's co-worker at Haskell beginning in 1999, provided character testimony at hearing. Ms. McDermott has observed Respondent in her classroom, and found Respondent a very effective teacher, particularly with English language learners and low achieving children. Respondent maintained an open classroom, and only closed the door in bad weather. Ms. McDermott considered Respondent a good teacher, and never witnessed or heard anything about Respondent using inappropriate physical contact or screaming at students.

42. In addition to the letters by Ms. Casillas, Ms. Franco-Lomelli, and Ms. McDermott, Respondent submitted more than 30 other character letters from colleagues and parents.⁶ Like Ms. Casillas, Ms. Franco-Lomelli, and Ms. McDermott, the colleagues and parents considered Respondent to be very conscientious, dedicated, and professional, and believed her to be an invaluable asset to the Haskell community.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of*

⁶ Some letters were written in Spanish without translation. Those letters were not considered during deliberations or in this Decision.

Fountain Valley (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The “burden of proof” means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; Evid. Code, § 115.) “The phrase ‘preponderance of evidence’ is usually defined in terms of probability of truth, e.g., ‘such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.’ (BAJI (8th ed.), No. 2.60.)” (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

3. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Sections 44932, 44934, and 44944.)

4. Under section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

5. When a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (Section 44944, subdivision (c)(1)(3).)

6. Section 44932 provides in part:

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

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(3) Dishonesty.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

[¶] . . . [¶]

7. Section 44932, subdivision (b) provides that a district may suspend a permanent employee without pay for a specific period of time if it follows the same procedures as for dismissal of a permanent employee.

8. Section 44939 provides in part:

Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, . . . with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

9. Section 44944, subdivision (a)(5), provides that no testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice. As such, in the instant matter, the statute of limitations began running on January 22, 2010.

10. The District's Code of Conduct provides in part:

While the District encourages the cultivation of positive relationships with students, employees and all individuals who work with or have contact with students are expected to use good judgment and are cautioned to avoid situations including, but not limited to, the following:

[¶] . . . [¶]

(3) Engaging in behaviors, either directly or indirectly with a student(s) or in the presence of a student(s), that are unprofessional, unethical, illegal, immoral, or exploitative.

[¶] . . . [¶]

- (6) Touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee's/individual's responsibilities and/or duties.

11. Section 5152 prohibits the use by any person of any electronic listening or recording device in any elementary or secondary school classroom without the prior consent of the teacher and the principal, as the Legislature finds the use of electronic listening or recording devices disrupts and impairs the teaching process.

12. Here, District failed to prove by a preponderance of the evidence that Respondent demonstrated unprofessional conduct (section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), evident unfitness for service (section 44932, subdivision (a)(5)), persistent violation of or refusal to obey reasonable regulations (section 44932, subdivision (a)(7)), and willful refusal to perform regular assignments without reasonable cause. As set forth in more detail below, District failed to sustain its burden of demonstrating Respondent committed the acts described in the Accusation. Accordingly, District's Accusation is dismissed.

13. The majority of District's charges stem from allegations of physical abuse or inappropriate physical contact with four students: S [REDACTED], J [REDACTED], A [REDACTED] and L [REDACTED]. In addition, District alleges Respondent left S [REDACTED] outside the classroom unsupervised for approximately five minutes. District also alleges Respondent stated "in a threatening manner" to L [REDACTED] that she was "going to take a picture, and show it to [his] mom." This Decision will address each student individually.

S [REDACTED]

14. District failed to sustain its burden of demonstrating that Respondent engaged in any inappropriate physical contact with S [REDACTED]. Although District alleged in the Accusation that Respondent pushed S [REDACTED] (Charge 1(a)), screamed at him (Charge 1(d)), grabbed his shirt and yanked it (Charge 1(e)), and rapped S [REDACTED] on the head with her knuckles or a marker (Charges 1(f) and (g)), District presented absolutely no credible documentary or testimonial evidence that corroborated or supported these allegations, including any testimony from S [REDACTED].

15. Additionally, with respect to District's allegation that Respondent left S [REDACTED] outside the classroom unsupervised for approximately five minutes (Charge 1(b)), the evidence did not demonstrate this. District presented no witness or documentary evidence setting forth District rules or policies describing or defining what it meant by "unsupervised," however, according to Webster's Dictionary, "unsupervised" means to not have "the oversight or direction of."⁷ Here, While Respondent admitted to sending S [REDACTED] just outside the threshold of the classroom (approximately two inches) to count to 100, she

⁷ Webster. Dictionary.com. *Dictionary.com Unabridged*. Retrieved August 4, 2014, from Dictionary.com website: <http://dictionary.reference.com/browse/webster>.

presented credible, uncontroverted testimony that S [REDACTED] never left her line of vision, and that she was never more than eight feet from him at any given time. Additionally, Respondent's uncontroverted testimony established that S [REDACTED] remained outside the classroom's threshold for a maximum of one to one and one-half minutes, and not five minutes as alleged in the Accusation. Given these factors, District failed to sustain its burden of proof concerning Charge 1(b).

16. With respect to the allegation that Respondent rapped S [REDACTED] on the head with a yardstick (Charge 1(c)), District proffered no testimony from the alleged victim himself, S [REDACTED]. Rather, District proffered testimony from R [REDACTED] who said that Respondent committed such acts against him and S [REDACTED]. Notwithstanding the lack of mention in the Accusation that Respondent committed such acts against R [REDACTED], District seemed to insinuate that because Respondent purportedly committed those acts against R [REDACTED], Respondent must have committed such acts against S [REDACTED] too. However, R [REDACTED]'s testimony was neither credible nor persuasive, as he testified to events that occurred more than four years ago, when he was six or seven years old, and provided no clarity when the purported abuse occurred. If such acts occurred during the 2008-2009 school year, then the acts occurred outside of the statute of limitations (i.e., all acts prior to January 22, 2010). If such acts occurred during the 2009-2010 school year, the District needed to establish that such acts occurred after January 22, 2010 in order for them to be relevant for this proceeding. District failed to do so, as R [REDACTED] recounted no specific time period or date in which Respondent purportedly committed such acts. Given these factors, District failed to sustain its burden of establishing Respondent rapped S [REDACTED] on the head with a yardstick.

17. In sum, District failed to meet its burden of proving all the charges in the Accusation related to S [REDACTED].

J [REDACTED] and A [REDACTED]

18. District failed to sustain its burden of demonstrating that Respondent screamed at J [REDACTED] (Charge 2(a)), grabbed J [REDACTED]'s head (Charge 2(b)), and grabbed and shook A [REDACTED]'s head (Charge 3), as set forth in the Accusation. Both J [REDACTED]'s and A [REDACTED]'s testimony failed to establish when the purported abuse occurred. If such acts occurred during the 2008-2009 school year, the acts occurred outside of the statute of limitations (i.e., all acts prior to January 22, 2010). If such acts occurred during the 2009-2010 school year, the District needed to establish that such acts occurred after January 22, 2010 in order for them to be relevant for this proceeding. District failed to do so, as neither J [REDACTED] nor A [REDACTED] recounted any specific time period or date in which Respondent purportedly committed such acts against them. Given these factors, District failed to sustain its burden of establishing Respondent screamed at J [REDACTED] or engaged in any inappropriate physical contact with J [REDACTED] or A [REDACTED].

///

L [REDACTED]

19. District failed to sustain its burden of demonstrating that Respondent engaged in any inappropriate physical contact with L [REDACTED] (Charges 4 and 5). Specifically, Respondent failed to proffer credible evidence that Respondent grabbed the top of L [REDACTED]'s head and forced him to pay attention (Charge 4), or squeezed his neck and forced him to turn his head to the front of the class (Charge 5). While District presented L [REDACTED] at hearing, L [REDACTED] offered no testimony concerning Charge 4. As for Charge 5, while L [REDACTED] testified that Respondent had, indeed, grabbed his neck and forced him to turn his head, and that everyone in the classroom witnessed Respondent's actions, the evidence did not support L [REDACTED]'s testimony. The evidence demonstrated that after L [REDACTED]'s mother levied the allegations against Respondent, Dr. Thompson conducted an investigation immediately thereafter, which consisted of interviewing each student enrolled in Respondent's classroom. Yet, the results of the investigation showed no corroboration of L [REDACTED]'s account. Additionally, Respondent credibly testified that she perpetrated no such acts.

20. In regard to Charge 6, which alleges that Respondent told L [REDACTED] "in a threatening manner" that she was "going to take [his] picture, and show [his] mom," District failed to show that such action constituted an act of unprofessional conduct, immoral conduct, evident unfitness for service, persistent violation or refusal to obey school laws or the laws of the state, or a willful refusal to perform regular assignments without reasonable cause. While the District spent an inordinate amount of time establishing that Respondent had videotaped L [REDACTED] without permission from his parents or from the principal, in violation of Education Code section 51512, the Accusation included no such charge. Rather, the Accusation focused primarily on the manner in which Respondent made the statement (i.e., a "threatening" one), but failed to establish with specificity what it meant by "threatening." Webster's Dictionary defines threatening as "tending or intended to menace." The evidence did not demonstrate such action on the part of Respondent. Rather, the evidence showed that Respondent, according to her uncontroverted testimony, always spoke to L [REDACTED] in a calm manner, a character trait echoed in the testimony of Ms. Casillas and Ms. Franco-Lomelli, and that she simply made the statement to encourage L [REDACTED] to cooperate. Neither Respondent's statement nor the manner in which she delivered it demonstrated any unprofessional, immoral, or unfit conduct, and did not show a persistent refusal to obey school rules or perform regular assignments. Given these factors, District failed to sustain its burden its burden of proof concerning Charge 6.

21. In sum, District failed to meet its burden of proving all the charges in the Accusation related to S [REDACTED], J [REDACTED], A [REDACTED], or L [REDACTED].

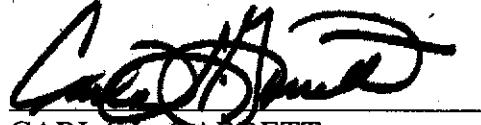
22. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The court concluded that a teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the

conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness. However, as it has been determined that the conduct was not proven as alleged, it is not necessary to discuss the “*Morrison* factors” as they relate to that conduct.

ORDER

The Accusation is dismissed.

DATED: August 11, 2014



CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: August __, 2014

VIRGINIA ESCOBAR
Commission Member

DATED: August __, 2014

JEFFREY JACOBS
Commission Member

ORDER

The Accusation is dismissed.

DATED: August __, 2014

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: August __, 2014

VIRGINIA ESCOBAR
Commission Member

DATED: August 6, 2014


JEFFREY JACOBS
Commission Member

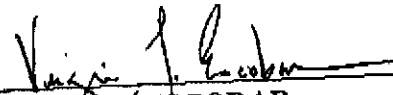
ORDER

The Accusation is dismissed.

DATED: August __, 2014

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: August 7, 2014


VIRGINIA ESCOBAR
Commission Member

DATED: August __, 2014

JEFFREY JACOBS
Commission Member