

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

In the Matter of the Accusation Against,

BETTY BEN-NISSAN,

Respondent.

OAH No. 2013040757

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on February 3, 4, and 5, 2014. The Commission consisted of Charlene Shimada, Luciano Ortiz, and Administrative Law Judge Carla L. Garrett, Office of Administrative Hearings, State of California, who presided.

Bryan J. Park, Attorney at Law, represented the Los Angeles Unified School District (District).

Joseph Y. Avrahamy, Attorney at Law, represented Respondent Betty Ben-Nissan (Respondent).

The parties submitted the matter for decision on February 5, 2014.

Respondent is a permanent certificated employee of the District assigned to teach third grade at Erwin Elementary School (Erwin). District alleged that Respondent demonstrated unprofessional and immoral conduct (sections 44932, subdivision (a)(1) and 44939),¹ dishonesty (sections 44932, subdivision (a)(3)), evident unfitness for service (section 44932, subdivision (a)(5)), and willful refusal to obey reasonable regulations (section 44932, subdivision (a)(7)), all arising out of alleged improprieties relating to Respondent's administration of the California State Test (CST) in May 2012. The essence of the charging allegations is that Respondent violated state and District testing policies during the administration of the 2011-2012 CST by (1) telling one of her students that he marked the correct answers on his test; (2) checking to see if students underlined key words and distributing Tic-Tacs and/or praise to those students; (3) helping and/or providing clues to students; and (4) reading questions or passages to several students and/or helping underline key words. District seeks Respondent's dismissal.

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

As more fully set forth below, District failed to sustain its burden of demonstrating Respondent committed the acts described in the Accusation. Accordingly, District's Accusation is dismissed.

FACTUAL FINDINGS

1. On April 25, 2013, District served Respondent with an Accusation and Statement of Charges executed by Vivian K. Ekchian, Chief Human Resources Officer, acting in her official capacity. On April 4, 2013, Respondent executed a request for hearing, and on May 22, 2013, served her Notice of Defense.

2. Respondent is a certificated permanent employee of the District. She began teaching school in 1992 at El Dorado Elementary school, where she taught first grade, second grade, and combination first and second grade classes. In 2006, Respondent left the classroom to become an instructional math coach and to teach teachers how to instruct students how to learn math conceptually. In 2009 Respondent began working at Erwin where she taught second grade.

3. During the 2009-2010 school year, in addition to CST training provided by District, the principal at Erwin invited Dennis Parker to provide a full day of mandatory training to second through fifth grade teachers for the preparation and administration of the CST, which Respondent attended. Mr. Parker was not an employee of the District. Rather, Mr. Parker was an independent educational consultant. The training consisted of an oral presentation and written material. One handout, entitled "CST Homestretch: Six Last Minute Strategies," discussed a strategy called "Priming," which was designed to help students achieve a positive mindset. Specifically, the strategy included teachers telling their students "before and during the CST" that he or she believed in them, that they were going to do really well, and that all they had to do was to take their time and think.

4. A second strategy addressed proctoring, which suggested that teachers actively proctor the CST by walking around to "(1) encourage and praise students, (2) ask students to try their best if they [were] seen . . . marking just any answer, (3) alert students to get back on track if . . . off by one answer on the answer sheet (i.e., they [were] working on #13 but bubbled in #14), and (4) encourage students to close their eyes and take a deep breath if they beg[a]n to act fatigued or panicked."

5. The handout also discussed other strategies. One strategy was entitled "Test Chats," which consisted of meeting with students who had taken the CST in the previous year and inquiring about their performance and what they could do to improve it. Another strategy focused on rewarding or celebrating students who scored high or made a gain on the previous year's CST by holding an awards assembly. The handout also discussed holding "Saturday School" for those who had scored in the "basic," "below basic," and "far below basic" categories on the previous CST, to provide additional support and practice for those students. The final strategy was entitled the "Hit List," which suggested that the teachers develop a list of standards or concepts their students had difficulty grasping and carve out

about 30 minutes per day to use released questions from the CST or homemade mini-lessons to ensure that students learn or at least become familiar with those concepts and skills.

6. Respondent implemented the strategies taught by Dennis Parker to her second grade class, including active proctoring, during her 2010 administration of the CST

7. For the 2010-2011 school year, Erwin's new principal, Dr. Helen Kim, asked Respondent to teach third grade. Dr. Kim, who served as Erwin's principal through 2013, explained at hearing that she asked Respondent to teach third grade because third grade was "experiencing problems," and Respondent "was a great teacher" based on her observations of Respondent during her classroom visits. When Respondent began teaching third grade, Dr. Kim often sent other third grade teachers into Respondent's class to learn good practices and strategies to use in their own classrooms.

8. For the CST administered for the 2010-2011 school year, Respondent implemented the strategies taught by Dennis Parker to her third grade class, including active proctoring.

9. For the 2011-2012 school year, as in previous years, District provided training to teachers on how to administer the CST. Specifically, Dr. Kim arranged for the teaching staff to receive mandatory training from Zeida Cuellar who was the categorical program advisor at Erwin. Dr. Kim attended the training as did Respondent. Ms. Cuellar, who had administered the CST two or three times herself, provided training which required the teachers to view a video and to review written material. At hearing, Dr. Kim explained that teachers were instructed not to provide assistance or guidance to the students in answering questions and were not allowed to talk to students on an individual basis, such as whispering to them, highlighting anything, or pointing out anything. According to Dr. Kim, the teachers were precluded from saying anything to the students at all during the administration of the test, even praise. Ms. Cuellar's testimony differed in this regard, as she stated that the teachers could make general comments to the students during the administration of the CST, like, "Boys and girls, you're doing a good job," instead of directing comments to individual students. In addition, Ms. Cuellar stated that a teacher could tell an individual student to stay on task if he or she saw the student struggling to remain focused.

10. The official written CST instructions distributed to the teachers stated that, during the testing, teachers could "encourage students to do their best." The written CST instructions also provided, "if necessary" during the test, a teacher could "explain the directions," but could "not give help on specific test questions." The instructions also provided that "if students ask for help reading a word," the teacher was to "encourage them to sound it out," but precluded the teacher from reading the words for them. In addition, during the test, the teachers could "remind students to handle their test booklets with care, to record their answers with heavy, dark marks, and to avoid making extra marks on the test booklets." The instructions did not specify how the teacher was required to make these communications, whether individually or collectively. Finally, the written CST instructions

provided that teachers could “check periodically to make sure that students [were] working on the correct test part and following instructions.”

11. During the training provided by Ms. Cuellar, the teachers learned that they were to ensure the students bubbled the answer sheets properly because they were now precluded from erasing stray marks which was a change from previous testing years.

12. At the end of the training session, one of the teachers asked if it was permissible to give the students a treat. At hearing, Dr. Kim testified that she advised the teachers they could issue Tic Tacs to the students as a treat before the test as long as they gave each student the same amount of Tic Tacs. Dr. Kim explained the teachers were not allowed to distribute treats after the distribution of the test booklets. In addition, Ms. Cuellar distributed a handout regarding the CST which included information about daily treats, among other things. The handout stated as follows: “Every day before test begins, give students one or two Hershey Kisses or peppermint candy that they may munch on during the test.” (Emphasis included).

13. Ms. Cuellar’s testimony differed greatly from Dr. Kim’s. Ms. Cuellar, though she remembered distributing the handout to the teachers, did not recall Dr. Kim verbally instructing the teachers to distribute Tic-Tacs before the test only, and not during the test. Ms. Cuellar explained that the purpose of the Tic-Tacs was to keep the students alert, so it would not have been improper for teachers to distribute Tic-Tacs during the middle of the test, as long as all of the students were given the Tic-Tacs. In addition, Ms. Cuellar testified that if a teacher had given students Tic-Tacs for using good test taking strategies, such as underlining key words,² and refrained from saying anything to the students while distributing the Tic-Tacs, the action would not be considered a violation of testing protocols. However, if the teacher had given some students more Tic-Tacs than other students, that action would be considered a violation of testing protocol. One exception, according to Ms. Cuellar, involved a scenario where a student was having a “meltdown” and crying. In such a case, the teacher would be permitted to use his or her discretion to give the distressed student an additional Tic-Tac.

14. Neither Dr. Kim nor Ms. Cuellar advised the teachers that they should not apply any previous trainings they had received from District concerning the administration of the CST, including the training presented by Dennis Parker.

15. After receiving the training for the 2011-2012 CST, Respondent signed a security affidavit acknowledging that she had been trained and would protect the security of the testing materials by (1) not divulging the contents of the tests; (2) not copying any part of the tests; (3) keeping the tests secure; (4) limiting access to the tests to the actual testing periods; (5) collecting and accounting for testing materials; (6) not reviewing any test questions, passages, or other test items independently or with students or any other person,

² Ms. Cuellar explained that underlining key words was a testing strategy for reading comprehension passages.

before, during, or following testing; (7) not developing scoring keys, review students' responses, or prepare answer documents; (8) returning all testing materials to the designated test site coordinator; (9) keeping assessment materials in a secure locked storage except when administering or observing the administration of the assessments; and (10) administering the tests in accordance with the directions for test administration and test administration manuals.

16. On the morning of the first day of CST testing, May 8, 2012, Respondent had her students exercising on the yard. After Respondent received the test booklets, she brought her students inside the classroom, gave them a cheese snack, and then held a pep rally. During the pep rally, Respondent reminded her students to underline key words, re-read passages, never give up, and offered other encouraging words.

17. Respondent administered the CST to her students. Respondent proctored the test with Humberto Solis, who was a paraprofessional at Erwin. Mr. Solis, who testified at hearing, had never worked with Respondent prior to his assignment to proctor her class for the CST. He had received CST training approximately one week prior to the administration of the test, separate from the teachers. From this training, he learned, among other things, that it was his duty to walk around the class to make sure the children bubbled the answer sheets properly and to report any testing irregularities to the testing coordinator (Ms. Cuellar).

18. Mr. Solis arrived to Respondent's classroom at 8:15 or 8:30, prior to Respondent's administration of the CST, and observed Respondent standing in front of the class and reciting rules of what they could and could not do during the CST. According to Mr. Solis, Respondent reminded the students that they should underline key words and passages in their test booklets, and said, "I will not tell you what you need to do, but I will give you a Tic-Tac if you are underlining and remembering what I taught you." Mr. Solis also heard Respondent warning the students that if they did not underline, she would be mad at them.

19. During the test, Mr. Solis observed Respondent, on two occasions, pick up a booklet from a student's hand, review the booklet, and then put it back on the student's desk. Respondent then pointed to something on the booklet which prompted the student to erase where Respondent had pointed. Mr. Solis also observed, on two occasions, Respondent whisper to students, but did not hear what she had said. Mr. Solis observed Respondent give Tic Tacs to two or three students during the test, but not to every student during the time in which he was in the classroom. Mr. Solis left Respondent's room approximately five minutes before recess, while testing was still in progress, purportedly to attend yard duty. However, Mr. Solis walked directly to Ms. Cuellar's office and reported his observations, because he believed teachers were not permitted to pick up test booklets during the testing. Ms. Cuellar testified that she was unaware of any rule that prohibited a teacher from flipping through a student's test booklet to ensure the bubbles were bubbled correctly. In addition, Ms. Cuellar explained that if a teacher observed a student bubbling incorrectly, the teacher

was permitted to remind the student to bubble correctly and make a general statement to the class to bubble correctly.

20. During cross examination, Mr. Solis conceded he did not see whether any students erased incorrect answers at Respondent's prompting. He also did not observe Respondent reviewing test questions or passages with students during testing and did not see her indicating to students whether their answers were correct or not.

21. After Mr. Solis made his report to Ms. Cuellar, Ms. Cuellar immediately contacted Dr. Kim. Dr. Kim directed Mr. Solis to write a statement describing what he had observed, which he did. Dr. Kim also instructed Ms. Cuellar to contact the testing center and report the incident, which she did. Ms. Cuellar also prepared an irregularity report reciting Mr. Solis' account and submitted it to the District.

22. Dr. Kim conducted an immediate investigation, which initially consisted of her randomly selecting four or five students from Respondent's class and interviewing them. However, after interviewing those students, Dr. Kim, with the assistance of two administrators, interviewed all 21 of Respondent's students. Dr. Kim prepared three questions to which she requested the students respond: "(1) What was the teacher doing during the test? (2) Did the teacher help you, or any other student, during the test? No/Yes—Tell me more; and (3) Did someone talk or whisper to you during the test? No/Yes—Who?"

23. Based on Mr. Solis' report and some of the answers provided by the students, Dr. Kim concluded that there had been testing irregularities related to Respondent's administration of the CST. Specifically, Dr. Kim found ten problems: (1) Respondent told her students that she would give them a Tic-Tac if they were underlining, and if they had failed to underline, Respondent would be mad at them; (2) Respondent checked student test booklets during the test and rewarded students with a Tic-Tac if they had gotten the answer correct; (3) During the test, Respondent walked around specific students, flipped through their test booklets, and pointed out certain items in the test booklet. Respondent also whispered to students, and afterwards, the students erased their test booklets; (4) During the test, Respondent had looked through test booklets and said, "good job," while telling other students, who failed to answer questions correctly, "check your answer;" (5) Respondent told some students "good job," but did not tell all her students "good job;" (6) Respondent gave some students, who had raised their hands, clues, as well as a directive to "go back and correct;" (7) Respondent gave Tic-Tacs to students when they got answers correct, and that Respondent had gone over the answers with one student, and advised the student that the student had gotten all of the answers right; (8) Respondent continued to say, "check the page" repeatedly to students who had gotten answers wrong; (9) Respondent patted some students on the head and said, "good job" when they answered questions correctly; and (10) Respondent read a little bit of the question to a few of her students.

24. On May 18, 2012, Dr. Kim conducted a conference with Respondent concerning Respondent's administration of the CST, and prepared a memorandum

summarizing the conference. Respondent advised Dr. Kim that she disagreed with the allegations, and advised that she would respond to Dr. Kim's allegations in writing.

25. On May 30, 2013, in reference to the irregularity report submitted by Ms. Cuellar, Cynthia Lim from the District's Office of Data and Accountability sent Dr. Kim a letter stating that Respondent had engaged in testing irregularities by providing inappropriate assistance to her students, by checking students' answers, and by instructing students to check their answers. Consequently, Ms. Lim determined the students' scores would not be included in the school's scores. The letter did not mention anything about Respondent's distribution of Tic-Tacs. Ms. Lim did not testify at hearing, and there is no evidence that she conducted an investigation or interviewed any students, Mr. Solis, Respondent, or anyone else. In addition, her one-page letter included no language setting forth the evidence upon which she relied when concluding that Respondent had engaged in testing misconduct.

26. On May 31, 2012, Respondent prepared a written response to the allegations set forth in Dr. Kim's May 18, 2012 memorandum. Respondent explained that she had implemented the strategies she learned in the Dennis Parker training to improve the performances of the students on the CST and did not violate any CST testing protocols. Specifically, Respondent denied telling her students that she would give them a Tic-Tac if they underlined correctly, and that she would be mad at her students. Rather, she had told her students during the pretest "pep rally" that she would give them a Tic-Tac if she saw they were on task, taking time to read the passages bubbling correctly, and not skipping pages. Respondent also denied checking test booklets and rewarding students with a Tic-Tac if they got answers correct. Rather, she had given Tic-Tacs to students for remaining on task, and had given all students Tic-Tacs half-way through the assessment.

27. Respondent admitted to flipping through test booklets to make sure students were on task, and to ensure that the bubbles were complete, which was how she was trained by District, including the Dennis Parker training. Respondent denied, at any time, whispering to any students to have them change their answers, but admitted whispering to students that they were doing a good job, which was consistent with her training that she should encourage her students. She made it a point to encourage the whole class out loud and to students individually, randomly and quietly. Respondent also told students to go back and check their work if she observed them off task or bubbling recklessly, but she did not give that directive for the purpose of students correcting wrong answers. Respondent denied giving clues to students at any time, or repeatedly telling students to check the page to get them to change incorrect answers. Respondent also denied checking answers with a student and telling him that he had gotten all of the questions right. Finally, she denied reading any part of the questions to any student.

28. On June 15, 2012, Dr. Kim issued Respondent a Notice of Unsatisfactory Acts and Notice of Suspension for the reasons set forth in Dr. Kim's May 18, 2012 memorandum.

29. Four students testified at hearing on behalf of District. D. [REDACTED] N., who is 11 years old and now in fifth grade, was in Respondent's third grade class during the 2011-2012

school year and took the CST in Respondent's class. D[REDACTED] recalled Respondent giving her and other students Tic-Tacs for underlining key words during the test and remembered her giving all students the same amount of Tic-Tacs. When students needed help, Respondent told them to do their best. She saw Respondent whisper to students, but could not hear what Respondent said. Denise did not see Respondent give students any answers, but did observe her tell students "good job" when they finished their test.

30. D[REDACTED] G., who is 11 years old and now in fifth grade, was also in Respondent's third grade class. D[REDACTED] recalled Respondent telling the class to underline key words and to go back to the story to try to find answers. Respondent gave them Tic-Tacs when they underlined key words. Everybody received the same amount of Tic-Tacs. When students asked Respondent a question during the test, Respondent told them she could not help them and encouraged them to go back to the story to try to find the answer. Respondent told everybody to do their best.

31. J[REDACTED] R., who is 10 years old and now in fifth grade, was in Respondent's third grade class. J[REDACTED] recalled Respondent telling the students before the test to underline key words and to do their best. During the test, Respondent walked around the class to make sure no one was cheating. Respondent gave all of the students Tic-Tacs approximately half way through the test, by putting the Tic-Tacs right on their desks next to their test booklets. All students received the same amount of Tic-Tacs. When some students finished their test early, Respondent told them to go back and check their work and to make sure they filled in the bubbles correctly. J[REDACTED] said that when some students raised their hands and asked Respondent what a word was, Respondent reminded them to sound out the word and to use syllables to figure out the word.

32. P[REDACTED] V., who is 10 years old and now in fifth grade, was in Respondent's third grade class. P[REDACTED] recalled Respondent told them before the test to underline key words and to read passages twice. During the test, Respondent told him in a low voice to underline key words and believes she said the same thing to two other students, E[REDACTED] and Z[REDACTED]. During cross-examination, P[REDACTED] stated he did not hear what Respondent said to E[REDACTED] and Z[REDACTED]. P[REDACTED] recalled having a difficult time taking the test, and that he had gotten upset during the test. Respondent told him not to be afraid, and that it was only a test. During his testimony, P[REDACTED] seemed confused, scared, and sometimes appeared to be making up answers. Often times during questioning he stared blankly and did not produce an audible response. For these reasons, P[REDACTED]'s credibility was considered questionable, and his testimony was afforded very little weight.

33. Respondent, who had been teaching for 18 years at the time of the CST in question, testified at hearing, and reiterated her denial of each of the charges. Respondent told students before the test that she would distribute Tic-Tacs when they reached number 20 on the exam and reminded them to follow test strategies such as underlining key words. During the test, she walked around the class, complimented students individually throughout the test, and made sure students bubbled properly. When she saw any students bubbling improperly, she would tell them in a low voice to bubble properly or to erase stray marks.

When students finished before the allotted time, Respondent would tell them to go back and check their work. Prior to the 2012 CST, Respondent had never been accused of committing testing irregularities.

34. July Hall provided character testimony on Respondent's behalf. Ms. Hall became a teacher in 1977 and then served as a principal from 2004 to 2009 for District at El Dorado Elementary School (El Dorado). Ms. Hall worked with Respondent at El Dorado and found her to be very dedicated to her students. Respondent went above and beyond the call of duty and was very skilled as a teacher and leader at the school. Ms. Hall often used Respondent as a model teacher and appointed Respondent as a temporary literacy coach. Ms. Hall considered Respondent a very ethical, child-centered person, who always sought ways for her students to be successful. As a teacher at El Dorado, Ms. Hall never had reason to question Respondent's honesty or integrity.

35. Karina Murillo, who served as Respondent's assistant from February 2012 to June 2012, provided character testimony. Prior, Ms. Murillo had served as proctor in Respondent's class for the CST she administered in May 2011. During the time in which she proctored Respondent's class, Ms. Murillo never observed Respondent engage in any inappropriate conduct or witnessed her help students cheat. Ms. Murillo considered Respondent a "fantastic" teacher.

36. Bobbie Zwick, who has been a third grade teacher at Erwin for 15 years, provided character testimony on Respondent's behalf. Ms. Zwick has observed Respondent in her classroom and found her impressive. Respondent developed a lot of additional practice and strategies for fellow third grade teachers to help students reach their full potential. Because of Respondent's contributions, the third grade scores improved on the past CSTs. For the 2011-2012 CST, Ms. Zwick did not recall receiving a directive not to distribute Tic-Tacs during the test or not to speak to students during the test. In fact, she did distribute Tic-Tacs during the test, and encouraged students individually and collectively during the test by saying, "You can do it." In addition, she told her students to erase stray marks and walked around to ensure students bubbled their answer sheets correctly. After learning about the charges against Respondent Ms. Zwick was frightened and believed it scared the other third grade teachers as well, because the charges made against Respondent could have been made against any one of them.

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 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. 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), dishonesty (section 44932, subdivision (a)(3)), evident unfitness for service (section 44932, subdivision (a)(5)), or willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)). All of District's charges stem from allegations of testing misconduct, as set forth in Dr. Kim's May 18, 2012 memorandum, which were, in essence, mirrored in the Accusation and Statement of Charges. Dr. Kim based these allegations on information provided by Mr. Solis, as well as by some students in their responses to her interview questions.

10. District failed to present credible evidence to support these allegations Dr. Kim made as set forth in Finding 23. None of the student witnesses proffered by the District corroborated Mr. Solis' account that Respondent would be mad at them if they had failed to underline key words. In addition, none of the student witnesses testified that Respondent rewarded them with Tic-Tacs if they had gotten answers correct, but rather that all students received an equal amount of Tic-Tacs. In addition, none of the student witnesses had changed any of their answers, or witnessed other students change their answers, pursuant to any purported prompting on Respondent's part. Moreover, none of the student witnesses, with the exception of Pablo, whose testimony was deemed not credible, testified they were given any clues of any sort. While Julissa testified that when some students raised their hands and asked Respondent what a word was, which prompted Respondent to remind them

to sound out the word, such action was sanctioned by the official written CST instructions described in Finding 10. In addition, contrary to the allegations, none of the students testified that Respondent had gone over answers with any students, read any questions to any students, or told students to go back and correct answers.

11. On the contrary, the student witnesses established that Respondent had followed proper testing protocol. Specifically, each of the students testified that Respondent had said "good job" during the test, which was consistent with the District's training she had received from Dennis Parker concerning active proctoring and was in line with the official written CST instructions permitting teachers to "encourage students to do their best" during the test. In addition, according to the testimony of Julissa, when some students finished their test early, Respondent told them to go back and check their work and to make sure they filled in the bubbles correctly. Such action was consistent with the official written CST instructions as well as the District training provided by Ms. Cuellar.

12. To the extent that Dr. Kim took issue with Respondent for talking to students during the administration of the CST, which Dr. Kim believed was prohibited, the evidence does not support this belief. Specifically, the official written CST instructions clearly permitted teachers to talk to students during the test, by giving students words of encouragement, or by reminding them to bubble their answers properly, for example. In addition, Ms. Cuellar testified that teachers could make general comments to students during the CST, and could tell individual students to stay on task if necessary.

13. To the extent that Dr. Kim took issue with Respondent for distributing Tic-Tacs during the test, instead of before the test only, neither Ms. Cuellar nor Ms. Zwick recalled Dr. Kim verbally instructing the teachers not to distribute Tic-Tacs during the test. Indeed, Ms. Cuellar credibly explained that the purpose of the Tic-Tacs was to keep the students alert, so, according to Ms. Cuellar, it would not have been improper for teachers to distribute Tic-Tacs during the middle of the test.

14. Finally, to the extent Dr. Kim took issue with Respondent for flipping through test booklets during the test, the evidence showed that such action was sanctioned by the official written CST instructions. Specifically, the CST instructions provided that teachers could "check periodically to make sure that students [were] working on the correct test part and following instructions."

15. Notwithstanding Dr. Kim's concerns about Respondent's administration of the 2012 CST, Dr. Kim firmly established that Respondent was a conscientious and effective teacher, evidenced by Dr. Kim sending other third grade teachers to Respondent's class to learn good practices and strategies to use in their own classrooms. This belief was shared by Ms. Hall, Ms. Murillo, and Ms. Zwick who had worked closely with Respondent and considered Respondent a "fantastic" teacher. During the 18 years Respondent had been teaching, which required her to administer the CST on a number of occasions, she had never been accused of committing any testing irregularities. The evidence does not show she committed any in this matter either.

16. 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: May 9, 2014



CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: May __, 2014

CHARLENE SHIMADA
Commission Member

DATED: May __, 2014

LUCIANO ORTIZ
Commission Member

16. 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: May __, 2014

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: May 9, 2014

Charlene Shimada
CHARLENE SHIMADA
Commission Member

DATED: May __, 2014

LUCIANO ORTIZ
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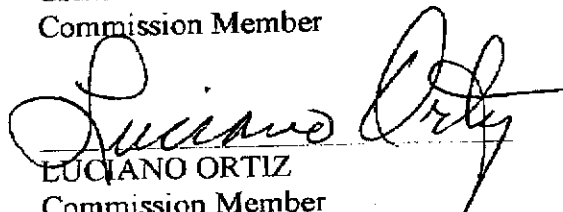
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