

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
SWEETWATER UNION HIGH SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of

DAVID PIERGROSSI,

A Permanent Certificated Employee,

Respondent.

OAH No. 2010050812

**DECISION OF THE  
COMMISSION ON PROFESSIONAL COMPETENCE**

On October 25 and 26, 2010, a Commission on Professional Competence heard this matter in San Diego, California. The Commission consisted of Donald P. Cole, Administrative Law Judge, Kathy Oxford, and Jon Alota.

Gil Abed, Attorney at Law, represented complainant Jesus M. Gandara, Superintendent, Sweetwater Union High School District.

Jon Y. Vanderpool, Attorney at Law, represented respondent David Piergrossi, a permanent certificated employee of the Sweetwater Union High School District, who was present throughout the administrative hearing.

On October 26, 2010, the matter was submitted. On November 23, 2010, Administrative Law Judge Donald P. Cole signed the decision on behalf of the Commission, whose vote in the matter was unanimous.

**ISSUES**

1. Did respondent David Piergrossi demonstrate evident unfitness for service as a teacher in the Sweetwater Union High School District by virtue of: (i) Giving a student access to his personal laptop computer, which contained obscene or otherwise inappropriate images; or (ii) accessing, displaying, or viewing obscene or otherwise inappropriate images on district-issued desktop computers in respondent's classroom?

2. Did respondent David Piergrossi engage in immoral conduct by virtue of: (i) Giving a student access to his personal laptop computer, which contained obscene or

otherwise inappropriate images; or (ii) accessing, displaying, or viewing obscene or otherwise inappropriate images on district-issued desktop computers in respondent's classroom?<sup>1</sup>

## SUMMARY OF DECISION

On one occasion during the late fall of 2009, respondent permitted a special education high school student to use respondent's personal laptop computer to download materials onto the student's iPod, even though respondent knew there were images on the computer that depicted respondent and another male in the nude. The student came across these images during his use of the computer. In permitting the student to use his computer under these circumstances, respondent exercised very poor judgment. However, respondent's conduct was not so egregious or extensive as to demonstrate an evident unfitness to teach or as to constitute immoral conduct.

On about ten occasions during the fall of 2009, respondent accessed web pages on a district-issued desktop computer while he was in his classroom. Most of these images were located in temporary internet files that were saved automatically onto the computer's hard drive, not manually by any deliberate action. The images included several of nude males and several of females wearing bikinis or similar attire. On one occasion during the fall of 2009, respondent permitted his partner to use a second district-issued desktop computer in his classroom. Respondent's partner accessed web pages that contained several images of nude males, or of males in their underwear, and several images depicting women in bikinis or similar attire. All images were contained in temporary internet files that were saved automatically onto the computer hard drive. However, respondent's conduct was not so egregious or extensive as to demonstrate an evident unfitness to teach or as to constitute immoral conduct.

Accordingly, cause does not exist to dismiss respondent from his teaching position with the Sweetwater Union High School District.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On May 7, 2010, Rita Sierra Beyers, Assistant Superintendent, Human Resources, signed the dismissal charges against respondent. On May 11, 2010, the district notified respondent in writing of its intention to terminate his employment. On May 17, 2010, respondent requested a hearing. On July 19, 2010, Dr. Jesus M. Gandara signed the

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<sup>1</sup> At the outset of the hearing, the administrative law judge granted respondent's motion in limine to exclude as an issue respondent's alleged unprofessional conduct, on the ground that the notice required by Education Code section 44938 had not been given.

dismissal accusation. The dismissal accusation and other required jurisdictional documents were served on respondent, who timely filed a notice of defense.

2. The district nominated Kathy Oxford to serve on the Commission. Respondent nominated Jon Alota to serve on the Commission. Neither nominee was related to respondent, neither was employed by the district, each held a valid credential, and each had served at least five of the preceding ten years as a secondary school teacher under a special education credential.

3. At the hearing, the parties stipulated that all jurisdictional requirements had been met.<sup>2</sup>

4. On October 25, 2010, the record was opened and opening statements were given. On October 25 and 26, 2010, sworn testimony and documentary evidence were received. On October 26, 2010, closing arguments were presented, the record was closed, the matter was submitted, the Commission met in closed session to determine the matter, and a unanimous decision was reached.

5. The draft of the decision was circulated between Commission members. Due to the difficulties anticipated in attempting to secure the signatures of all three Commission members on the final decision by the date on which the Decision was required by law to be issued, it was agreed that Administrative Law Judge Donald P. Cole would sign the decision on behalf of the Commission.

### *Background*

6. Respondent received his bachelor's degree in American historiography from the University of Delaware in 1992. The following year, he received a secondary social studies teaching certificate from the same institution. He has taught in the district for about 15 years, mostly at the middle school level. In the fall of 2009, respondent was assigned to the district's Eastlake High School as a special education resource specialist.

7. On December 17, 2009, respondent was placed on paid administrative leave pending the outcome of the district's investigation of his alleged misconduct.

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<sup>2</sup> After the conclusion of the hearing, and despite the parties' stipulation, the Commission received *sua sponte* Exhibits 2 through 5 for jurisdictional purposes. The Commission also received for non-evidentiary purposes as Exhibit 72, the district's trial brief and in limine motion, respondent's three in limine motions, and the parties' several oppositions to in limine motions.

*The Alleged Misconduct Relating to Respondent's Personal Laptop Computer*

8. DD, then an Eastlake special education tenth grader, testified<sup>3</sup> that during the lunch period on a Friday in the late fall of 2009, he went to respondent's classroom and asked respondent if he could use the latter's computer to import some CDs or CD album covers onto DD's iPod. Respondent let DD use his laptop computer. During the process, DD inadvertently came across a number of "naked" or "pornographic" pictures on the computer.<sup>4</sup> DD believed the photographs were of respondent and another male. At some point while DD was using the computer, respondent left the classroom for a few minutes. It was while respondent was out of the classroom that DD saw the pornographic images.

DD testified that he told a friend about the images he saw on respondent's computer. The friend in turn told others, and "word got around."

DD testified that he had used respondent's computer on several prior occasions, but had never seen any inappropriate images on those occasions.

9. Two other Eastlake students testified that they, and others, had heard about the images on respondent's computer.

10. No evidence was presented that any Eastlake students received formal psychological counseling or therapy as a result of the incident.

11. Eastlake psychologist Rienzi Haytasingh testified that he heard students discuss the inappropriate images on respondent's computer, including the fact that respondent himself was depicted in those images. Haytasingh believed that allowing students to look at these kinds of images undermines a teacher's ability to teach.

12. Respondent testified that he brought his personal computer into his classroom because the district's two desktop computers assigned to the room could not reach the media projector. Other teachers brought in their personal laptops into the classroom, and respondent was not aware of any policy prohibiting the practice.

Respondent testified that he allowed two Eastlake students access to his personal laptop. One of the two students was given access during a class discussion of current events. The other student was DD, to whom respondent gave access on two occasions. One occasion was in mid-November 2009, when DD asked respondent if he could use his computer to

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<sup>3</sup> This finding is based both on DD's testimony at the hearing and on his December 18, 2009, written statement.

<sup>4</sup> During his testimony, DD referred to at least eight "pornographic" images; in his December 18, 2009, written statement, DD referred to about 15 "naked" images.

download materials onto his iPod. Respondent permitted DD to use his laptop in an attempt to establish a closer rapport with him.<sup>5</sup>

Respondent testified that he was aware when he permitted DD to use his laptop that there were images of nude or semi-nude men, including compromising images of himself, on the computer. He permitted access to DD because he (respondent) was going to be with him while DD used the computer and because DD was only going to download tunes. It was respondent's practice never to leave students alone in his classroom. DD was in his classroom on this occasion for perhaps ten to 20 minutes. Though respondent was not continuously looking at the laptop computer screen, he checked on what DD was doing. Respondent conceded that he knew that DD had "boundary" issues.

13. On a school day in the late fall of 2009,<sup>6</sup> DD asked respondent if he could use respondent's computer to download tunes onto DD's iPod. Respondent gave DD access to his personal laptop computer for that purpose. At the time, respondent knew that there were images of nude or semi-nude men, including compromising images of respondent himself, on the computer. Respondent also knew that DD had boundary issues. Respondent's purpose in allowing DD to use his computer was not to expose DD to such images, but to try to establish a better rapport with DD. Respondent attempted to monitor DD's use of the computer, but he did not observe DD continuously. During DD's use of respondent's computer, DD came upon a number of images depicting respondent and another male in the nude.<sup>7</sup> DD told a friend about the images on respondent's computer, and word got around to other Eastlake students.

Respondent brought his laptop computer into the classroom for valid reasons, other teachers had the same practice, and the district had no policy against doing so.

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<sup>5</sup> DD had been respondent's student earlier in the semester, though not at the time of the incident.

<sup>6</sup> Greater precision as to the date is not possible. Respondent testified that the incident occurred in mid-November. DD testified that it occurred about a week before his December 18 written statement. Another student, MK, testified that DD had told him about the images on respondent's computer before Thanksgiving; MK's written statement (dated December 17) stated that DD told him about the images "3 weeks ago."

<sup>7</sup> In light of the fact that respondent was absent from the classroom on December 4, 2009 (see Finding 20, below), and DD's testimony that he saw the inappropriate images on a Friday about a week before his (December 18) written statement, and when respondent was not in the classroom, it is possible that DD saw the images on December 4, when a substitute teacher was in respondent's classroom. However, the weight of the evidence points to an earlier date, and it seems unlikely that a substitute teacher would have given a student access to respondent's personal computer.

*The Alleged Misconduct Relating to the District's Desktop Computers*

14. There were two district-issued desktop computers in respondent's Eastlake classroom. One was assigned to respondent, and the other to respondent's aide.

15. After DD came across inappropriate images on respondent's laptop computer, and this information and related rumors spread to other students, an Eastlake parent contacted school personnel, who initiated an investigation into respondent's computer use. The core of the investigation involved the retention of David Sobel, a private investigator with training and experience in computer forensics, to examine the contents of the hard drives of the two district desktop computers in respondent's classroom. Sobel was instructed to look for anything that would be inappropriate for someone in respondent's position to be looking at on his school computer. Sobel culled through thousands of images, and found 43 that he considered inappropriate — 23 on the hard drive of respondent's computer and 20 on the hard drive of the aide's computer. All 43 images were found on respondent's domain "log in," which meant that the images were each accessed and displayed on the computer while respondent was logged on as the user under his personal district account.

16. The 23 images Sobel found on the hard drive of respondent's computer were accessed and displayed on 11 separate dates between August 20 and December 15, 2009. The specific dates were August 20, September 1, 8, 24, 28, October 14, 15, 22, November 3, 19, and December 15. These were all school days. Twenty (20) of the 23 images were associated with temporary internet files. This indicated that the images were displayed on the date in question and were saved (cached) onto the computer's hard drive automatically, not as a result of a manual, deliberate saving of the image by respondent. The other three images were saved in the "my documents" area of the computer hard drive. This indicated that the individual using the computer deliberately saved the images. However, two of the three images saved into "my documents" were apparently first saved onto the hard drive in January 2010, i.e., after respondent was placed on administrative leave, suggesting that it was not respondent who manually saved those two images.<sup>8</sup>

Of the 23 images Sobel found on the hard drive of respondent's computer, nine depicted a nude male lying on his stomach on a bed or standing up, leaning against a wall, with his stomach to the wall. These nine files actually represented three distinct images, i.e.,

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<sup>8</sup> Sobel testified that the date on which an image was first saved on the computer (whether manually by a user, or automatically in a temporary internet file by the computer itself) was indicated by an entry in the "last written" column of a computer log generated during the course of his examination of the hard drive. Two of the three images saved to the "my documents" area of the hard drive had a "last written" date of January 2010; the third had a "last written" date of August 20, 2009. How any documents could have been saved to the hard drive after respondent no longer had access to the computer was not made clear at the hearing, and no explanation was given as to how, in light of the January 2010 "last written" date, it could have been respondent who manually saved the two images into "my documents."

each of the three images were found in more than one location (file) on the hard drive. Another depicted two apparently nude males in a bathtub. Three depicted females in bikinis or similar attire. Three of the photos of nude males were the images saved in the “my documents” area of the hard drive.<sup>9</sup>

17. All 20 of the images Sobel found on the hard drive of respondent’s aide’s computer were in the temporary internet files area of the hard drive. Nineteen (19) of the 20 were accessed and displayed on October 17, 2009, which was a Saturday, between 11:27 and 11:46 a.m. The last was accessed and displayed on November 23, 2009, which was a Monday when school was in session. Several of the 20 images depicted nude males, or males in their underwear; two of these depict a close-up of the male’s genitals. One appeared to depict a close up of a female’s head, with a fearful or terrified expression on her face, and possibly a gun pointed toward her mouth. Two, including the image dated November 23, 2009, depicted females in bikinis or undergarments. In several instances, more than one image bears an identical date and time of viewing, implying that all images with that time and date were on the same web page. Most of the images found on the aide’s computer were inappropriate for a teacher to have accessed on a school computer.

18. The district had issued a regulation pertaining to employee use of technology. The regulation provides that employees “are authorized to use district equipment to access the Internet or on-line services in accordance with Board of Trustees policy and the user obligations and responsibilities specified below.” Among the specified responsibilities are: (i) The employee in whose name an on-line services account is issued is responsible for its proper use at all times; (ii) Employees shall use the system responsibly and primarily for work-related reasons; and (iii) Employees shall not access, post, submit, publish or display harmful or inappropriate matter that is threatening, obscene, disruptive or sexually explicit, or that could be construed as harassment or disparagement of others based on their race/ethnicity, national origin, gender, sexual orientation, age, disability, religion or political beliefs.

19. Eastlake teachers are permitted to access private email from school computers during the workday.

20. Eastlake attendance records reflected that respondent was present on all school days during the fall 2009 semester until his December 17 administrative leave, with the exception of November 2, 2009. Eastlake’s principal testified that respondent was absent from the classroom — but not from the school — on one other date, December 4, 2009, for an English department “pull-up.” On that date, a substitute teacher was present in respondent’s classroom.

21. Respondent testified that he used his district desktop computer for school-related matters, e.g., to prepare lessons, enter grades, and check school email. He said he

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<sup>9</sup> Some of the images found by Sobel were not deemed by the Commission to be inappropriate for a teacher to have accessed or viewed on a school computer and are not described in this decision.

occasionally checked his personal email through a hotmail account during lunch or after school.

A sample hotmail login page was received in evidence at the hearing. On the page were a number of small “thumbnail” profile images of respondent’s email “contacts.” An individual’s profile images are selected and controlled by the individual himself — respondent has not control over the profile image his email contacts use. The profile image for one of the contacts who appeared on respondent’s hotmail log in page consisted of a frontal view of a nude male.

During his testimony, respondent did not seem concerned that he had accessed his personal email on his work computer, regardless of the presence on his hotmail log in web page of email contact profile pictures that were not appropriate to a school setting.

Respondent testified that he did not believe he had ever stored or downloaded images from any website onto his district desktop computer.

Respondent testified that he only used his aide’s desktop computer twice. The first occasion was the day he moved into his new classroom at Eastlake at the beginning of the 2009-2010 academic year, in order to determine whether his log in password would permit him to log into both computers in his classroom. The second occasion was to permit his partner, Roberto Zea, to use his computer on a particular Saturday when respondent went to his classroom for about an hour to catch up and prepare.

Respondent testified that on rare occasions he gave students access to his desktop computer, e.g., to finish writing an essay or to pull up an email that had an assignment attached to it. Respondent supervised student access to the computer at these times.

Respondent testified that none of the 23 images found on the hard drive of his desktop computer depicted either himself or Zea and that respondent did not take any of the photographs in question. Respondent recognized a number of the images as profile images of one of his hotmail contacts, and two of the images as from an Argentinean hotel where he stayed in 2008. He did not recognize the individuals depicted in several other photos.

Respondent testified that none of the 20 images found on the hard drive of his aide’s desktop computer depicted him (respondent), that he did not recognize any of the images, and that he did not take any of the photographs in question.

Respondent testified that he never manually (i.e., deliberately) saved any of the 43 images.

Respondent testified that he never conducted a Google search on his desktop computer for nude images, and that he never viewed pornography in his classroom.

Respondent testified that he gave substitute teachers his log in password in case they needed to use his computer and experienced difficulty logging in under the password the



school had given them. However, no evidence was adduced that a substitute teacher was assigned to respondent's classroom on any of the dates when inappropriate images were accessed and displayed on his computer.

22. Roberto Zea, respondent's partner, testified that he has known respondent for over three years. Twice on a Saturday, Zea accompanied respondent to the latter's Eastlake classroom. He used the computer assigned to respondent's aide on these occasions to check his email from a hotmail account. Respondent turned on the computer and signed in under his (respondent's) log in.

Zea testified that did not recognize any of the images Sobel culled from the two desktop computers. None of the images depicted respondent or himself. Zea denied that he viewed any pornography while using the aide's computer.

23. The evidence established that on the 11 dates between August 20 and December 15, 2009, specified above, respondent accessed web pages on his district-issued desktop computer assigned to him that contained the 23 images described above. Twenty (20) of the 23 images in question were automatically saved on respondent's hard drive as temporary internet files, without respondent having taken any deliberate steps to save them. Some but not all of these 20 images were saved automatically as a result of respondent's accessing of his hotmail account. Respondent manually saved one of the other three images in the "my documents" area of the hard drive; the other two were manually saved by someone other than respondent after respondent was placed on administrative leave. Over half of the 23 images were inappropriate for a teacher to have accessed or viewed on a school district computer.

The evidence established that on Saturday, October 17, 2009, respondent logged onto his aide's district-issued desktop computer and permitted his partner Roberto Zea to use that computer to check his (Zea's) email. Zea accessed web pages containing the 19 images described above, which were saved as temporary internet files on that date. On November 23, 2009, respondent himself accessed a webpage on his aide's computer, which contained the image described above. Most of the 20 of the images found on the aide's computer were inappropriate for an individual to have accessed or viewed on a school district computer.

## LEGAL CONCLUSIONS

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

Under Education Code 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.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (c)(1)-(3).)

2. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) This standard requires a party to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

3. A permanent employee may be dismissed based, *inter alia*, on evident unfitness for service or immoral conduct. (Ed. Code, § 44932, subds. (a)(1), (5), and (7).)

4. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, identified certain criteria to be applied when determining an individual's unfitness for service. These criteria include "such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and 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. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards." (*Id.*, at pp. 229-230.)

5. The *Morrison* criteria "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates an unfitness for service. [Citation omitted.] If the *Morrison* factors are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct was caused by a defect in temperament." (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445.)

6. The phrase "immoral conduct" within the meaning of the Education Code denotes immoral or unprofessional conduct or moral turpitude of the teacher that renders the teacher unfit to teach. (*Morrison v. State Board of Education, supra*, 1 Cal.3d at p. 225.) Accordingly, the *Morrison* factors identified above are also used to determine whether a teacher has engaged in immoral conduct. (*Governing Board of ABC Unified School District v. Haar* (1994) 28 Cal.App.4th 369, 383.)

7. By reason of Findings 1 through 23, and Conclusions 1 through 6, the evidence did not establish respondent's evident unfitness for service or immoral conduct.

*Respondent's personal laptop computer.* For respondent to have brought his personal laptop computer to school for instructional purposes was neither unusual nor inappropriate. For respondent to have let a student use his laptop during the lunch hour to download music-related materials to the student's iPod was not, in and of itself, inappropriate. It was, however, inappropriate, and involved a serious lapse of judgment, for respondent to have permitted a student to use his personal laptop in light of the images depicting himself and another male in the nude that were on the computer. There were no safeguards on the computer (such as a separate log in account) to prevent the student from coming across the objectionable images. The matter is rendered more serious by the fact that DD was a special education student with boundary issues, and respondent, an experienced, credentialed special education teacher, should have been acutely aware of the potential adverse consequences of permitting DD to use his computer. That DD had access to and viewed images of respondent in the nude quickly become known among other students, which undermined respondent's ability to maintain the appropriate relationship with his students. Finally, the incident was very recent.

On the other hand, the incident was an isolated one. Respondent had been given no prior warning. No evidence of actual psychological or other harm to any specific student was adduced at the hearing. Respondent's motivation in permitting DD to use his computer was a laudable (if under all the circumstances a misguided) one. Finally, the likelihood of recurrence seems virtually non-existent, e.g., based on the evidence presented at the hearing, respondent now knows that he can use a separate log in so that students who use his laptop computer would not have access to all parts of his computer.

Based on the entirety of the evidence, respondent's conduct did not reflect an evident unfitness to teach and did not constitute immoral conduct.

*The district-issued desktop computers in respondent's classroom.* For respondent to have accessed his email account from a school computer was not unusual and it did not violate any school policy. Again, however, respondent exercised poor judgment in accessing his email account from school, given the kinds of images that appeared on the login page of his account. The conduct was recent. Though respondent did not control the profile images of his email contacts, he certainly controlled what web sites he chose to access from his school computer. Respondent's apparent failure fully to appreciate the distinction between accessing an email account that contains no inappropriate images and one, like respondent's, that does was of further concern to the Commission.

On the other hand, the Commission felt the likelihood of recurrence to be low. Respondent had not previously been warned against accessing his hotmail account from a school computer. The number of occasions when respondent accessed web pages that contained the images in question — 12 instances<sup>10</sup> over about four months — was relatively small. Further, it appears that at least in most instances respondent did not intentionally save

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<sup>10</sup> Eleven (11) of the 12 instances related to respondent's computer; the twelfth related to the single image displayed on the aide's computer on November 23, 2009.

any of the images in question to the computer's hard drive. No evidence was presented to establish that respondent visited any clearly inappropriate websites (e.g., those of an explicitly sexual nature) in order to view the images in question. Finally, no evidence was presented that any students saw any of the images or were adversely impacted by them.

Respondent's permitting his partner to use a district-issued computer to view his personal email account constituted an inappropriate use of district resources. Further, the conduct was quite recent. However, the conduct only occurred on two occasions, and inappropriate images were accessed on only one occasion, over a 15-minute period. Respondent had not previously been warned about this, and the likelihood of recurrence seems low. The evidence did not establish that any students saw the images or were adversely impacted by respondent's conduct.

Based on the entirety of the evidence, respondent's conduct did not reflect an evident unfitness to teach and did not constitute immoral conduct.

8. By reason of Findings 1 through 23, and Conclusions 1 through 7, cause does not exist to dismiss respondent from his teaching position with the Sweetwater Union High School District.

#### DISPOSITION

The Accusation and Statement of Charges are dismissed.

DATED: \_\_\_\_\_

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DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

For the a Unanimous Commission on  
Professional Competence