

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

In the Matter of the Dismissal of:

JASON KNOPKE,

a Permanent Certificated Employee,

Respondent.

OAH No. 2021120723

DECISION

The Commission on Professional Competence (Commission) heard this matter by videoconference on June 1 and 2, 2022. The Commission consists of Kathryn Breidenthal, Los Angeles Unified School District (retired); Alan Underwood, Temecula Valley Unified School District; and Administrative Law Judge (ALJ) Ji-Lan Zang, Office of Administrative Hearings (OAH), State of California, who presided.

Kelly Kim, Assistant General Counsel II, represented complainant Los Angeles Unified School District (District).

Tamra Smith, Esq., represented Jason Knopke (Respondent), who appeared throughout the hearing.

At the hearing, the Commission was provided with Exhibit P, which are Respondent's employment records. Because the document contains confidential, private information which cannot be protected by mere redaction, entry of a protective order is appropriate. Therefore, on her own motion and good cause appearing, the ALJ ordered that, following the use of the exhibit in preparation of the Decision, Exhibit P shall be placed under seal and protected from disclosure to the public.

The parties presented opening statements and oral and documentary evidence. The record remained open for written closing argument based on the following briefing schedule: District's closing brief was due on June 10, 2022; Respondent's closing brief was due on June 24, 2022; and District's reply brief was due on July 1, 2022. The parties timely submitted their briefs, which were marked for identification as follows: District's closing and reply briefs were marked as Exhibits 21 and 22, respectively, and Respondent's closing brief and revised closing brief were marked as Exhibits U and V, respectively. Following the hearing and the submission of the parties' briefs, the Commission conducted its deliberations in executive session.

SUMMARY

The District seeks to dismiss Respondent, a middle school music teacher, for violating its policy requiring all teachers who work onsite at District facilities to be vaccinated against COVID-19 by October 15, 2021 (COVID-19 vaccination policy). Respondent applied and was approved for a reasonable accommodation under the COVID-19 vaccination policy based on his sincerely held religious belief. However, when the District offered him a reasonable accommodation to teach at an online school, Respondent refused the reassignment. By October 15, 2021, Respondent had not complied with the COVID-19 vaccination policy by either accepting the reasonable

accommodation to work remotely or having been vaccinated to work onsite at a District facility. The Commission concludes there is legal cause for terminating Respondent's employment based on his persistent violation of the COVID-19 vaccination policy, and that the factors set forth in *Morrison v. State Board of Education (Morrison)* (1969) 1 Cal.3d 214 demonstrate Respondent is unfit to act as a teacher. Thus, Respondent's dismissal is warranted.

FACTUAL FINDINGS

Jurisdictional Matters

1. The Board of Education (Board) is the duly elected, qualified, and acting governing board of the District, organized, existing, and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a certificated, permanent employee of the District and, at all times relevant, was assigned as a music teacher at Peary Middle School (Peary).

3. On November 23, 2021, a Statement of Charges against Respondent, alleging factual and legal grounds for termination of his employment with the District, was signed on behalf of Kristen K. Murphy (Murphy), Ed.D., the District's Chief of Employee Support and Labor Relations. (Ex. 1.)

4. By a letter dated December 7, 2021, Respondent was advised by Murphy that the Statement of Charges had been filed with the Board, and that, during a closed session of a Board meeting held on December 7, 2021, the Board decided to dismiss Respondent within 30 days, unless he requested a hearing. (Ex. 2, p A10.) On December 15, 2021, Respondent timely requested a hearing. (Ex. 3.)

5. On March 3, 2021, the District filed the First Amended Accusation with OAH and served it on Respondent. It includes the allegations made in the Statement of Charges. (Ex. 9.)

The COVID-19 Vaccination Policy

6. On August 13, 2021, the District issued the COVID-19 vaccination policy to all employees. The COVID-19 vaccination policy states in relevant part:

As part of Los Angeles Unified School District's efforts to provide the safest possible environment in which to learn and work, all District employees will be required to be fully vaccinated against COVID-19 no later than October 15, 2021. . . .

The purpose of this correspondence is to inform District staff of the vaccination requirement as a condition of continued employment/service, as well as the supports in place to assist with receiving the vaccination and/or verifying vaccination status, and the process for seeking a medical or religious exemption from this requirement.

[¶] [¶]

We care about our employees and we appreciate your commitment to maintaining the safest possible environment for our colleagues and the students and families we serve.

(Ex. 18, p. A231.)

7. The COVID-19 vaccination policy allows District employees to seek a reasonable accommodation from the vaccination requirement due to a disability or sincerely held religious belief. The COVID-19 vaccination policy describes the accommodation process as follows:

If the District determines that an employee cannot be vaccinated due to disability or a sincerely held religious belief, an accommodation process will commence to determine whether an accommodation can be provided which would eliminate or reduce this risk, so the unvaccinated employee does not pose a danger to the health and safety of others at the District worksite.

The accommodation process will determine whether an accommodation exists to enable an employee to perform the "essential functions" of their job. The accommodation process initiates at the work site with the immediate supervisor. Essential functions vary by job class and therefore the process shall be case by case and may result in different outcomes in different cases.

If a risk to the health and safety of others cannot be reduced to an acceptable level through a workplace accommodation, the employee may be excluded from physically entering the workplace. The District and employee will then determine if there are any available benefit time/leave provisions.

(Ex. 18, p. A235.)

8. The COVID-19 vaccination policy also warns that failure to comply may result in "disciplinary action, being placed on unpaid leave, and/or separated from District service." (Ex. 18, p. A235.)

9. On August 26 and August 27, 2021, a written copy of the COVID-19 vaccination policy was disseminated to all District employees via Blackboard Connect, the District's internal electronic message system. (Ex. 19, pp. A238-A240.)

10. On September 8, 2021, the District sent another email message via Blackboard Connect reminding its employees of the requirement to be vaccinated by October 15, 2021. Attached to this message was a written copy of the COVID-19 vaccination policy. This message also contains additional information regarding the District's policy on reasonable accommodations. Specifically, the email states, under a section entitled "Reasonable Accommodations":

Being fully vaccinated is an "essential job function." Thus, **no one** is "exempted" from the District's requirement that all employees (and other adults providing services at District facilities) be fully vaccinated by October 15, 2021. That is, **every adult** working or providing services at a District facility **MUST** be fully vaccinated no later than October 15, 2021. Where feasible, the District will reasonably accommodate employees who, based on a documented disability or sincerely held religious belief, wish to continue working without being fully vaccinated. Please be aware, however, that reasonable accommodations **do**

not include permitting employees to continue working at a District facility without being fully vaccinated.

In the event the District receives a request for a reasonable accommodation based on a documented disability or sincerely held religious belief, the District will engage with the employee in what's known as the "interactive process" to determine whether the District is able to reasonably accommodate the employee.

Although rare, some positions at the District avail themselves to remote work as a reasonable accommodation. In making its determination concerning whether to permit remote work, the District will engage with you in the interactive process and will consider multiple factors, including the availability and feasibility of remote work. However, where your essential job duties require your physical presence at a District facility, the District will be unable to offer remote work as an accommodation. Further, where **a risk to the health and safety of others cannot be reduced to an acceptable level through a workplace accommodation, the employee may be excluded from physically entering the workplace.**

(Ex. 19, pp. A238-A240, emphases in original.)

11. On September 15, 2021, the District sent another email reminder of the COVID-19 vaccination policy via Blackboard connect. This September 15, 2021

message repeats the same language about reasonable accommodations as described above (*ante*, Factual Finding 10) and sets forth a September 24, 2021 deadline to apply for a medical or religious accommodation request. It also contains the following additional information:

Remote Work as a Reasonable Accommodation for Teachers

Available accommodations for teachers **may** include, upon availability, an assignment to the District's online independent study program through City of Angels. Even if accommodated, teachers who are not fully-vaccinated by October 15, 2021 will not be permitted to continue teaching at a site other than City of Angels.

Where Reasonable Accommodations Are Not Available

Should an alternative accommodation not be available, the District and employee will then determine if there are any available benefit time/leave provisions, such as use of the employee's illness leave (if due to medical reasons), personal necessity, vacation, or unpaid leave options.

(Ex. 19, pp. A244, emphases in original.)

12. On September 16, 22, and 29, and October 6, 8, and 13, 2021, the District sent additional messages to all employees who remained unvaccinated to remind them of the COVID-19 vaccination policy. All these messages repeat the same language regarding reasonable accommodations described above. (*Ante*, Factual Findings 10 & 11.)

Respondent's Application for Reasonable Accommodation

13. Respondent has taught as a music teacher at Peary since 2007. He possesses a clear single subject teaching credential in music and an administrative services credential. (Ex. O.) From March 2020 until February or March 2021, Respondent taught his music classes remotely due to the District-wide shut down during the COVID-19 pandemic. From February or March 2021 to August 2021, Respondent returned to in person teaching. In August 2021, Respondent received the COVID-19 vaccination policy, which requires him either to be vaccinated to work onsite or to seek a reasonable accommodation.

14. On August 27, 2021, pursuant to the COVID-19 vaccination policy, Respondent submitted a Reasonable Accommodation Application to the District. (Ex. A.) His application included a letter, dated August 24, 2021, in which Respondent explained his religious objections to the COVID-19 vaccine. (*Id.* at p. B2-B3.) Respondent also included a letter from his doctor stating that Respondent had recovered from a previous infection of COVID-19. Respondent further explained that he and his family "all have fully recovered [from COVID-19] and now I have natural immunity which makes me an asset to the Los Angeles Unified School District because I am not afraid to come to work unlike some of my colleagues." (*Id.* at p. B3.)

15. On August 28, 2021, Respondent submitted to the District an additional letter from his pastor in support of his Reasonable Accommodation Application. (Exs. C & D.) On August 29, 2021, the District acknowledged receipt of Respondent's Reasonable Accommodation Application.

16. On September 19, 2021, Naomi Suenaka (Suenaka) from the District's Sincerely Held Religious Belief Committee notified Respondent by email that his

Reasonable Accommodation Application had been approved and that he would be assigned to teach at the District's online, independent study school, City of Angels. Suenaka wrote, "You will be contacted directly by the HR team to provide an assignment for City of Angels. In the event there are no available positions with the City of Angels by October 15th, any applicable benefit time may be used after that date in order to ensure payment." (Ex. E, p. B8.)

17. On September 21, 2021, Respondent, unsure if he had been approved for a reasonable accommodation, emailed the District to seek more information. He asked about the next step in the reasonable accommodation process. He also wrote, "I have heard the reasonable accommodation is teaching through City of Angels and I will not be allowed on a 'district facility?' Is this true?" (Ex. F.)

18. On September 24, 2021, Respondent emailed his principal, Christina Green, to inquire about the next step in the reasonable accommodation process and requested a meeting with Principal Green. (Ex. G.)

19. On the same day, Respondent also emailed Steven J. McCarthy (McCarthy), District's Director of Arts Education, to inquire about a possible position as a Visual and Performing Arts (VAPA) Coordinator. Respondent wrote in this email:

I have applied for a religious exemption for the covid 19 vaccine and sent a doctor's note stating that I have both contracted and fully recovered from Covid-19. My natural immunity is apparently not enough assurance to the board of education and I hear they are shipping all of us unvaccinated teachers to City of Angels, although there is

no guarantee they will pick me up. In that case, I will need to use my sick days and then . . . [Sad face emoji.]

[¶] . . . [¶]

Might you be able to inquire if CoA [City of Angels] is looking for a VAPA coordinator to oversee the many VAPA teachers they will probably be getting? I don't know how much access the students have currently, but lemonade could potentially be made from this adverse situation. . .

(Ex. H, pp. B15-16.)

20. McCarthy responded on the same day there were no plans to hire a VAPA coordinator at the City of Angels. (Ex. H, p. B15.)

21. On September 27 and September 28, 2021, Respondent sent more emails to the District inquiring about the next step in the reasonable accommodation process. (Exs. I & J.)

District's Offer of Reasonable Accommodation

22. On September 28, 2021, Michelle Palomares, on behalf of Maria Sotomayor (Sotomayor), the District's Director of Organizational Effectiveness, responded to Respondent's inquiries. Sotomayor informed Respondent that a position at the City of Angels was available effective October 5, 2021. If Respondent were to accept the reassignment to City of Angels, Respondent must notify his principal immediately. Sotomayor also warned, "Should you decide not to accept this assignment, and remain at your worksite, you will be required to be vaccinated as

every employee working or providing services at a District facility MUST be fully vaccinated no later than October 15, 2021.” (Ex. K, capitalization in original.)

23. By October 11, 2021, however, Respondent had decided to decline the District’s offer of reassignment to City of Angels. Respondent heard information from his colleagues and Principal Green that he would be required to teach multiple subjects at the City of Angeles. In an email to Woodrow Curry (Curry), Respondent’s union representative, dated the same day, Respondent wrote, “I am one of the teachers who filed for sincerely held religious beliefs, was ‘accommodated,’ but will **not** be selecting the City of Angels (CoA) option. I will be using up my full sick days and then exhausting the half days until I run out of both. . . .” (Ex. L, bold in original.)

24. At this point, Respondent was under the belief that he could use his sick days for leave because he had a meeting sometime in October with Principal Green during which he was told the use of sick time was permissible. However, this was misinformation, as the COVID-19 vaccination policy stated, “Should an alternative accommodation not be available, the District and employee will then determine if there are any available benefit time/leave provisions, such as use of the employee’s illness leave (if due to medical reasons)” (Ex. 19, pp. A244.) Thus, the use of sick days was only available to those employees who qualified for reasonable accommodations due to a medical condition. At a second meeting with Principal Green in October 2021, Principal Green corrected this misinformation and notified Respondent that he could only use personal necessity days, not sick days, to cover any leave.

25. By October 15, 2021, Respondent had refused the reassignment to City of Angels, but he also remained unvaccinated and was thus unable to work at a District facility per the COVID-19 vaccination policy.

The Disciplinary Process

26. On October 20, 2021, District Administrator Jose Posada (Posada) and District Field Director Jeanette Stevens (Stevens) held a meeting with Respondent and Curry, Respondent's union representative. At this meeting, Posada and Stevens issued to Respondent (1) a Notice of Unsatisfactory Act (NOUA), alleging that Respondent had failed to comply with the District's COVID-19 vaccination policy requiring all employees who serve at District facilities to be vaccinated by October 15, 2021; and (2) a Notice of Suspension (NOS), notifying Respondent that he has been suspended without pay for 15 days based on his violation of the COVID-19 vaccination policy. (Exs. 15 & 16.)

27. According to Respondent, he believed this October 20, 2021 meeting with Posada and Stevens was part of the "interactive process" where he would be able to discuss options for reasonable accommodation other than City of Angels. Respondent expressed to Posada and Stevens his concerns about taking the City of Angels assignment. Specifically, Respondent was worried that he would be teaching outside of his credentials because teachers at City of Angels teach multiple subjects while Respondent held a single subject credential in music. Respondent recalled that Stevens was "caught off guard" (Respondent's testimony) by this concern, but she told Respondent that his credential would allow him to teach at City of Angels. Curry suggested that Respondent reach out to Michael Thompson (Thompson), another District administrator with his questions about teaching outside of his credentials. Additionally, Respondent told Stevens and Posada that he had recovered from COVID and was willing to test twice a week to teach on campus. Respondent's recollection of Posada's response to this offer was "thank you but we are not doctors."

28. After the October 20, 2021 meeting, Respondent followed up on Curry's suggestion to email Thompson with his questions on credentialing. However, he never received a response from Thompson.

29. In an email string dated October 20, 2021, Stevens requested that Respondent sign the NOUA and the NOS. In an email dated October 21, 2021, Respondent refused to sign the NOUA and the NOS because of what he called "libelous errors" in those documents. Respondent also asserted that the District was "bearing false witness against me [Respondent] and that is a viola[ti]on of God's 9th Commandment." (Ex. 11, p. A197.) Respondent also contended in this email that given his prior COVID infection, his natural immunity was more robust than vaccinated individuals, citing to four studies by Daniel Horowitz from the Blaze.com. Respondent wrote:

I want to work at my school, Peary Middle School teaching music- I signed a contract to teach music at Peary Middle School, not anywhere else. I have been there for 14 years. I would be willing to test twice a week if the district is willing to offer that as a reasonable accommoda[ti]on. It is unreasonable for the district to remove all employees with Sincerely Held Religious Beliefs to a virtual setting when vaccina[ti]on does not prevent infec[ti]on or the spread of disease itself, it lessens the symptoms. I see no difference in a vaccinated teacher versus one like me who has natural immunity. . . .

(Ex. 11, p. A198.)

30. On October 27, 2021, Respondent emailed Lisa Fassett (Fassett) at the California Department of Education (CDE) to inquire about teaching outside of his credentials. Respondent asked three questions, the third of which states, "Is there any other scenario in which I could legally teach Math, English, Science, History, and P.E. here in the state of California in a K12 public school? Please advise." (Ex. N, p. B23.) Fassett responded, "Teacher's [*sic*] need to be properly credentialed in the subject matter and grade level they are teaching. However, in special circumstances when there [*sic*] a shortage of teachers in certain subject areas, an LEA [Local Education Agency] might have a teacher with a special permit or temporary certificate to teach those classes. For further information please contact your school district." (*Id.* at p. B22.) According to Respondent, he also contacted the Commission on Teacher Credentialing (CTC) to seek advice on teaching outside of his credentials, but he does not recall the advice from the CTC about whether he would be able to teach at the City of Angels with his music credential.

31. In a letter dated November 2, 2021, the District notified Respondent that a virtual meeting via Zoom was scheduled on November 9, 2021, to discuss Respondent's possible dismissal and immediate suspension by the Board. The letter also informed Respondent that after the meeting, a District administrator will make recommendations to the Board as to whether Respondent's dismissal should move forward. The letter states that if the administrator proceeds with the recommended dismissal and the Board approves the recommendation, Respondent will be suspended without pay pending the outcome of the dismissal action, unless he files a motion for immediate reversal of suspension under Education Code (all further references are to the Education Code unless otherwise designated) section 44939.

32. Present at this November 9, 2021 meeting were Respondent, Stevens, Carlen Powell (Powell), District administrator, and Jill Marucut (Marucut), Respondent's union representative. Respondent wrote an email on the same day after the meeting addressed to Powell, with copies to Stevens and Marucut. In this email, Respondent again asserted that the causes for dismissal against him are "libelous." Respondent wrote, "Given all current available vaccines are s[ti]ll under Emergency Use Authoriza[ti]on, manda[ti]ng them is completely illegal! You are breaking the law. Attempt[ti]ng to place me in disciplinary ac[ti]on based on an illegal mandate is also not lawful." (Ex. 11, A195.) Respondent also expressed his belief that he was the subject of discrimination, writing "LAUSD does not have a right to treat students, faculty and employees differently based on whether or not they are vaccinated, which I am being treated differently. Most importantly, LAUSD does not have a right to discriminate against employees with sincerely held religious beliefs, to be segregated to [*sic*] an online school called City of Angels for the remainder of the school year. This is not a reasonable accommoda[ti]on." (*Ibid.*) Regarding his ability to teach at the City of Angels, Respondent wrote, "While I believe what Jeanette [Stevens] said today: 'If I had accepted the CoA [City of Angels] posi[ti]on, I would be creden[ti]aled to teach it[,] the statement is contradicted by readily available informa[ti]on on CCTC's website." (*Ibid.*)

33. In a letter addressed to Respondent dated November 15, 2021, Powell informed him that she would be recommending Respondent's dismissal from employment with the District to the Board. Powell also described the November 9, 2021 meeting as follows:

During the meeting, on your behalf, Ms. Marucut stated
that you had sought and received a Reasonable

Accommodation as a teacher at City of Angels. You stated that the COA [City of Angels] assignment was drastically different than your current job responsibilities, and therefore not a comparable, nor a reasonable accommodation. You also stated that due to having had COVID, that you possess a natural immunity to the COVID virus. You discussed 15 research studies and shared that you are not required by law to be vaccinated. You also stated that you did not understand the Education Code that was listed in the discipline packet, and you felt that the charges listed in the discipline packet were libelous in nature. In addition, you referenced the documents you had sent on October 21, 2021, in response to the discipline issued on October 20, 2021. These documents are included in the Administrative Hearing Documents.

(Ex. 12, p. A203.)

34. In a letter dated December 7, 2021, Murphy notified Respondent that the Statement of Charges had been filed with the Board, and that, during a closed session of a Board meeting held on December 7, 2021, the Board decided to dismiss Respondent within 30 days, unless he requested a hearing.

Testimony of Gifty Beets

35. Gifty Beets (Beets), District's Assistant Chief Human Resources Officer, testified at the hearing on behalf of the District. Beets explained that the District developed the COVID-19 vaccination policy based on guidance from physicians, the

Centers for Disease Control and Prevention (CDC), California Department of Public Health (CDPH), and the Los Angeles County Department of Health (LACDH). The purpose of the policy is to maintain in-person schooling, ensure the safety of students and teachers, and minimize the circulation of the COVID-19 virus. Beets also explained the dissemination of the COVID-19 vaccination policy through Blackboard Connect to all District employees.

36. Based on her review of Respondent's case, Beets testified that Respondent applied and was ultimately approved for reasonable accommodation based on his sincerely held religious beliefs. While the District did not expect those employees with sincerely held religious beliefs to be vaccinated, the COVID-19 vaccination policy also did not allow any unvaccinated employees to work at any District facility, which included the Peary campus. According to Beets, the "interactive process" described in the COVID-19 vaccination policy is a communication process for employees to ask questions about reasonable accommodation and for the District to answers those questions. The reasonable accommodation provides an opportunity for unvaccinated teachers to work remotely.

37. Beets testified that teachers with valid credentials and approved for reasonable accommodations were accommodated at the City of Angels. The City of Angels is the District's 100 percent online independent studies program. Any teacher with a valid credential is able to teach at the City of Angeles without violating CTC credentialing rules, and the District provides professional development to those teachers assigned to the City of Angels to provide further instruction on how to conduct the independent study program. Beets stated that employees who were not accommodated through the City of Angels were offered utilization of unpaid leave. In Respondent's case, the District did not consider allowing him to teach his music class

at Peary virtually as a reasonable accommodation because the Peary students had returned to campus to receive in-person instruction. Beets testified that the District's offer to work at City of Angels was a voluntary reassignment, not a directive. However, Respondent violated the COVID-19 vaccination policy by refusing the City of Angels assignment as a reasonable accommodation and demanding to work at a District facility unvaccinated.

Respondent's Testimony

38. Respondent obtained his bachelor's degree in music from the University of Southern California. Respondent served as a teacher for the Norwalk-La Mirada Unified School District and Kipp Los Angeles College-Preparatory School before coming to work at Peary as a music teacher in March 2007. Respondent loves his job because he enjoys giving back to his community through teaching.

39. At Peary, Respondent teaches two days of beginning band with tutoring and group private lessons, and two days of advanced band. Respondent also teaches after-school programs. Respondent described his day-to-day duties as "accelerate the kids and prepare them for high school." Respondent recounted that some students start with no experience and interest in music but finish the school year as successful members of the band. The band that Respondent teaches has held joint performances with the local high school band and performed in community events, including Veteran's Day and Martin Luther King Day celebrations. Respondent submitted evaluations from 2008 through 2021 showing that his work as a music teacher at Peary was rated as "Meets Standard Performance" for each school year. (Ex. P.)

40. Respondent acknowledged that he has received and read the COVID-19 vaccination policy through Blackboard Connect. He asserted that COVID-19 vaccines

contain aborted fetal cell lines, and he objects to them based on his religious beliefs. Respondent testified that when he received the September 28, 2021 email from Sotomayor offering him the reassignment to City of Angels, he believed the reassignment was voluntary and he was free to accept or decline it. However, he also conceded that he understood the COVID-19 vaccination policy does not allow unvaccinated employees to work in District facilities. Although Respondent initially wished to use his sick days, he now understands that only employees with medical conditions may use sick days as a reasonable accommodation. Respondent stated that he asked McCarthy about the VAPA Coordinator position at the City of Angels because he thought it was an opportunity for him to use his administrator's certificate. Respondent also would have been amenable to a teaching position at the City of Angels if he could have taught music classes only. Respondent feels that the District did not properly conduct the "interactive process" described in its COVID-19 vaccination policy. Respondent thought that during the "interactive process," the District was going to engage in more discussion rather than using a "my way or the highway" approach.

41. Respondent believes that teaching multiple subjects at the City of Angels would be "unethical" and he would be "cheating [his] students" if he were not teaching music. Respondent conceded that he obtained information about the City of Angels from the "rumor mill," but he also relied on information he obtained from Principal Green. Respondent also relied on Fassett's email in forming his belief that his credential would not allow him to teach multiple subjects at the City of Angels. However, Respondent admitted during cross-examination that Fassett's email made no reference to credentialing problems if he were to teach at the City of Angels. Respondent presented no evidence that he would have been teaching outside of his credentials had he accepted the reassignment to the City of Angels.

Analysis: Violation of the COVID-19 Vaccination Policy

42. The District broadcasted its policy requiring every employee working at a District facility to be vaccinated by October 15, 2021, via Blackboard Connect on September 8, 15, 16, 22, and 19, and October 6, 8, and 13, 2021. The COVID-19 vaccination policy explicitly states that reasonable accommodations based on disability or religious belief do not include working at District facilities unvaccinated. Respondent admitted that he received all these communications regarding the COVID-19 vaccination policy via Blackboard Connect. Due to his sincerely held religious beliefs, Respondent was approved for reassignment to the City of Angels as a reasonable accommodation. In her September 28, 2021 email to Respondent offering the City of Angels reassignment, Sotomayor again emphasized that if Respondent did not take the reassignment and chose to remain at his worksite, he was required to be vaccinated no later than October 15, 2021. Respondent further testified he understood unvaccinated employees were not allowed to work at District facilities, including Peary, after October 15, 2021. Therefore, Respondent either knew, or should have known, that his offer to undergo COVID-19 tests twice a week to teach in person at Peary violated the COVID-19 vaccination policy.

43. Respondent also sought to work as a VAPA Coordinator at the City of Angels, but McCarthy had informed him that no such position was open for hire. Respondent also considered using his sick time as a reasonable accommodation, but he eventually realized that the COVID-19 vaccination policy limited the use of sick time to those employees with a medical condition. Given that these options were foreclosed, Respondent either knew, or should have known, he could either (1) accept the City of Angels reassignment in compliance with the COVID-19 vaccination policy, or (2) refuse the City of Angels reassignment and thereby violate the COVID-19

vaccination policy because he was unvaccinated and could not work at a District facility.

44. Respondent ultimately declined the reassignment to the City of Angels because he feared that his single subject credential would not allow him to teach multiple subjects. This fear was unfounded, in that Respondent's belief he could not teach multiple subjects at the City of Angels was based on pure speculation. Although Respondent sought advice from Fassett at the CDE about his credentials, Fassett did not indicate that Respondent could not teach at the City of Angeles with his credential. She directed Respondent to seek more information from his District. Respondent presented no evidence, either from the CTC website or from his conversation with the CTC, that the CTC prohibited him to teach at the City of Angels with his single subject credential. On the contrary, Respondent was told by Stevens from the District that he would be able to teach at the City of Angels without running afoul of credentialing rules and regulations at the October 20 and November 9, 2021 meetings.

45. Therefore, by refusing the City of Angels reassignment as a reasonable accommodation and insisting on teaching in person at a District facility without being vaccinated, Respondent violated the COVID-19 vaccination policy.

Character Evidence

46. At the hearing, Kevin Walker (Walker), a District teacher since 1991, testified on Respondent's behalf. Walker, who also worked at Peary, has known Respondent since 2007. Walker has observed Respondent as a music teacher and has seen him transform students with no prior musical experience into performers at the level of a high school band. Walker described Respondent as a "firm but fair" teacher who is beloved by his students. Walker also applied and was approved for a

reasonable accommodation from the COVID-19 vaccination policy based on his religious beliefs. Walker confirmed that Principal Green also misinformed him about the use of sick time as a reasonable accommodation, but he later learned from another source that only those with medical issues are allowed to use sick time. Walker is currently working at the City of Angels as a reasonable accommodation. Walker holds a multiple subject credential, and he feels comfortable teaching multiple subjects at the City of Angels. Before starting his work at the City of Angels, the District also provided instruction and support to Walker on using the Ingenuity program to generate curriculum and grading for the independent studies program.

47. At the hearing, Emily Noguchi (Noguchi), the parent of a student at Peary, testified on Respondent's behalf. Respondent has taught music to four of Noguchi's children. Her children loved Respondent's classes, and their musical skills improved greatly under Respondent's instruction. Noguchi described Respondent's classroom as a "very friendly, safe and welcoming environment." She was also impressed by how the middle school students in Respondent's band were able to perform concerts flawlessly after taking his class.

48. Both Walker and Noguchi also submitted character reference letters consistent with their testimony at hearing. Furthermore, Respondent submitted additional character reference letters from his colleagues, parents of students, former students, Peary's Assistant Principal (Ramon Collins), and Peary's former Principal (Marva Woods). (Ex. Q.) These authors uniformly describe Respondent as an excellent music teacher who performed his job with integrity and commitment.

///

///

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving the charges by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038–1039.) Preponderance of the evidence means “the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

First Cause for Termination: Evident Unfitness for Service

2. Certificated employees are subject to dismissal for evident unfitness for service pursuant to section 44932, subdivision (a)(6). “Evident unfitness for service” means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence (Woodland)* (1992) 2 Cal.App.4th 1429, 1444.) “‘Evident unfitness for service’ connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Ibid.*)

3. The District contends that Respondent’s refusal to accept the City of Angels reassignment demonstrates “unreasonableness.” (Ex. 20, p. A293.) The District further contends, “[Respondent’s] unreasonableness and his inability to adhere to the District’s policy is a condition that cannot be remedied, making him unfit to serve the District as a teacher.” (*Ibid.*) These arguments were not convincing.

4. As discussed below, the *Morrison* factors indicate that Respondent is unfit to serve as a teacher. (*Post*, Legal Conclusions 35 & 36.) However, the conclusion

that a teacher is unfit under the *Morrison* criteria is only the threshold issue. The next step is to determine whether the unfitness is "evident"; that is, whether the offensive conduct is caused by a defect in temperament or fixed character trait. (*Woodland, supra*, Cal.App.4th at p. 1445; *Bevli v. Brisco* (1989) 211 Cal.App.3d 986, 991.) Here, Respondent did not comply with the COVID-19 vaccination policy, in that he refused the City of Angels reassignment as a reasonable accommodation and insisted on returning to Peary unvaccinated. Nevertheless, Respondent's failure to comply with the COVID-19 vaccination policy was not the result of a defect in temperament or a fixed character trait. Although Respondent may have been unreasonable in refusing the City of Angels reassignment in this instance, he had no prior, similar problem with failing to follow other District policies. Respondent has the proper temperament to be a teacher, as the record reflects he is a well-loved, effective teacher whose job performance met the District's performance standards throughout his tenure. Respondent's refusal to comply with the COVID-19 vaccination policy does not arise to the level of a defect in temperament or a fixed character trait, and the District did not establish by a preponderance of the evidence that Respondent is evidently unfit for service, pursuant to section 44932, subdivision (a)(6).

Second Cause for Termination: Persistent Violation of School Laws

5. Certificated employees are subject to dismissal for 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, pursuant to section 44932, subdivision (a)(8).

///

REASONABLENESS OF THE COVID-19 VACCINATION POLICY

6. Respondent contends in his closing brief that “[t]he District also bears the burden of proving that any regulations it alleges Respondent violated were, in fact, ‘reasonable,’ since that is one of the elements of the District’s case under § 4932(a)(8). Contrary to the District’s contentions, Respondent does not bear the burden of proving the District’s regulations were unreasonable.” (Ex. V, p. B137.) Respondent’s argument is not compelling.

7. In general, a school district has all authority necessary to fulfill its purposes except as expressly limited or preempted by statute. (§ 35160.) “It follows that courts should give substantial deference to the decisions of local school districts and boards within the scope of their broad discretion, and should intervene only in clear cases of abuse of discretion.” (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017–1018.) As a result of section 35160, Respondent must show that the District’s actions “conflict with or are preempted by any law and conflict with the purposes for which school districts are established.” (*Governing Bd. of Ripon Unified School Dist. v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1379, 1386 [holding that a school district had the authority to require its teachers to obtain a certification to teach English to children who do not speak the language in a dismissal case for persistent violation of reasonable school laws].)

8. In this case, Beets testified that the District developed its COVID-19 vaccination policy in consultation with physicians, the CDC, the CDPH, and LACDH. The goal of the policy is to allow for in-person instruction while protecting the health and safety of students and District employees and minimizing the transmission of the COVID-19 virus. Beets’ testimony established that the COVID-19 vaccination policy requiring all District employees who work in District facilities to be vaccinated is

reasonable. Respondent, on the other hand, presented no evidence that the COVID-19 vaccination policy contravened any law or the District's purposes as a school district.

9. In recognition of his sincerely held religious beliefs, the District did not require or expect Respondent to be vaccinated. However, Respondent claimed that the District did not properly engage in the interactive process as described in the COVID-19 vaccination policy. This is a misunderstanding of the interactive process, which derives from employment discrimination laws. Pursuant to Government Code section 12940, it is an unlawful employment practice to fail to reasonably accommodate a person's religious practices: "It shall be an unlawful employment practice . . . [f]or an employer . . . to discharge a person from employment . . . or to discriminate against a person . . . because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer . . . demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance" (Gov. Code, § 12940, subd. (l)(1).) The interactive process is simply the process by which employees and their employers determine whether an accommodation can be made for the employee. (*Id.* at subd. (n).)

10. Here, the District accommodated Respondent by reassigning him to the City of Angels. Respondent did not believe this reassignment to be reasonable because he would not be teaching music, but multiple subjects. Respondent was also concerned about teaching outside of his credentials, but this concern was speculative, as Respondent did not receive any responses from the CTC or the CDE prohibiting him from teaching at the City of Angels. In fact, based on Stevens' advice at the October 20 and November 9, 2021 meetings and the testimony of Beets and Walker at the hearing, Respondent could have taught at the City of Angels with his single subject credential without any issues. There is also no evidence that teaching at the City of

Angels would have conflicted with Respondent's religious beliefs. On the other hand, Respondent's proposed accommodations—continuing to teach at Peary but testing twice a week, using his sick time, being a VAPA coordinator, teaching at the City of Angels as a music teacher only—either would have violated the COVID-19 vaccination policy or would have required the District to create job positions which do not exist. In light of these considerations, the District did properly engage in the interactive process, and the District offer of reassignment to the City of Angels as an accommodation was also reasonable.

PERSISTENT NATURE OF RESPONDENT'S VIOLATIONS

11. The District contends that Respondent has been in persistent violation of the COVID-19 vaccination policy since October 15, 2021, because he refused reassignment to the City of Angels as a reasonable accommodation and did not submit proof of vaccination to work onsite at a District facility by the stated deadline. (Ex. 20, p. A294.) Respondent, however, contends that his refusal to take the vaccine constitutes a single violation, which is not "persistent" within the meaning of section 44932, subdivision (a)(7). (Ex. V, pp. B135-136.) Respondent's arguments were not persuasive because the facts of this case are distinguishable from the case law Respondent cites in support of his position.

12. For example, Respondent cites to *Bourland v. Comm'n on Prof. Competence (Bourland)* (1985) 174 Cal.App.3d 317, in which the Appellate Court held that a teacher who repeatedly refused a principal's directive to write two additional objectives in her performance review was not subject to dismissal for persistent violation of school rules. The Appellate Court reasoned:

Unlike *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278, 287, 185 Cal.Rptr. 203, cited by the board, this case does not involve persistently repeated acts of conduct affecting the students. [fn. omitted] Absent any conduct in violation of school rules, the dragging on of the private debate between respondent and her principal does not indicate the type of continual insubordination that may seriously affect the discipline in a school. [Citations]

(*Bourland, supra*, 174 Cal.App.3d at 321.)

13. Unlike in *Bourland*, this case does not involve a private dispute between Respondent and his principal. Respondent violated a District-wide COVID-19 vaccination policy whose aim was to maintain in-person instruction during the COVID-19 pandemic. Respondent's violation of that policy rendered him unable to teach and seriously affected the students by depriving them of his presence as a teacher.

14. Respondent also cites to both *Midway Sch. Dist. v. Griffeath* (*Griffeath*) (1946) 29 Cal.2d 13 and *Oakdale Union School Dist. v. Seaman* (*Seaman*) (1972) 28 Cal.App.3d 77. In *Griffeath*, the Supreme Court rejected a school district's characterization of a teacher's unauthorized six-day absence as a "persistent violation" and instead analyzed the teacher's period of absence as a single violation. (*Griffeath, supra*, 29 Cal.2d 13.) Significantly, however, the Supreme Court did note a difference between two leaves of absence as opposed to a period of seven months, as indicators of continual insubordination. (*Id.* at p. 860.) In *Seaman*, the Appellate Court held that a teacher's unapproved leave of absence, lasting for a period of several months, did not amount to "persistent violation of the governing board's rules" merely by its duration.

The court found the teacher, Seaman, was not motivated by an attitude of insubordination because she was unaware the school board had denied her request for leave due to a lack of communication from the school board while Seaman was overseas. The court wrote:

. . . before leaving on her trip [to attend conferences abroad], appellant [Seaman] requested a leave of absence and gave sound academic reasons in support of the request; although the teacher left on her trip with knowledge that the motion to grant her request for a leave of absence had failed to pass for lack of a second, she reasonably could have assumed, as she testified, that the request had not been denied emphatically; appellant made a second request for a leave of absence from Yokohama, Japan, at a time when she could have returned for the commencement of the school year had she received a reply to her letter or a demand that she return.

(*Seaman, supra*, 28 Cal.App.3d 77 at p. 82.)

15. In summary, the principle in *Griffeath* and *Seaman* is that a longer period of school rule violation is indicative of continual insubordination unless the teacher was unaware of the rules, due to lack of contact with the school district or other factors. In this case, Respondent was well aware of the COVID-19 vaccination policy, as he admitted that he had received all of the messages the District disseminated on September 8, 15, 16, 22, and 19, and October 6, 8, and 13, 2021. After his Reasonable Accommodation Application was approved and during the interactive process, Respondent also was in consistent contact with the District through its representatives.

McCarthy informed Respondent that his offer to work as a VAPA coordinator was not feasible because the position was not open for hire. Principal Green eventually corrected her prior mistake and told Respondent that he could not use his sick time as an accommodation, and the COVID-19 vaccination policy also stated that use of sick time was limited to those with medical conditions. Sotomayor's September 28, 2021 email also explicitly warned Respondent that if he declined the City of Angels reassignment, he would have to be vaccinated to continue at his worksite. Given these communications, unlike the defendant in *Seaman*, Respondent could not reasonably assume that any of his proposals for accommodation were acceptable to the District.

16. Therefore, after October 15, 2021, Respondent was in violation of the COVID-19 vaccination policy, and he has been in violation since that time, despite his knowledge of the policy and the District's emphatic refusal of Respondent's proposed alternative accommodations. The duration of Respondent's months-long violation of the COVID-19 vaccination policy is indicative of an attitude of insubordination and constitutes a persistent, continual course of conduct. (See *Board of Education v. Mathews* (1957) 149 Cal.App.2d 265.) It is also noteworthy that while the school rule violations in *Griffeath* and *Seaman* are unapproved leaves of absence, the violation involved in this case, as described above, is a policy which aims to maintain in-person instruction and to protect students and District employees during a global pandemic. Persistent violation of such a policy is the type that "may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn." (*Johnson v. Taft School Dist.* (1937) Cal.App.2d 405, 408.)

17. The District established by a preponderance of the evidence that Respondent persistently violated, or refused to obey, reasonable regulations

prescribed for the government of the public schools by the governing board of the school district employing him, pursuant to section 44932, subdivision (a)(8).

Willful Refusal to Perform Regular Assignment Not a Ground for Dismissal

18. The District alleges in the First Amended Accusation that Respondent, as an additional cause for dismissal, willfully refused to perform regular assignments without reasonable cause, as described by reasonable rules and regulations of the employing district, pursuant to section 44939, subdivision (b). (Ex. 9, p. A147.) Respondent contends section 44932 contains the exclusive list of causes for dismissal. According to Respondent, willful refusal to perform regular assignments described in section 44939 constitutes cause only for immediate suspension, but it is not an independent ground for dismissal. (Ex. V, pp. B138-141.) Respondent's argument is compelling.

PRINCIPLES OF STATUTORY CONSTRUCTION

19. To begin with, sections 44932 and 44939 are to be strictly construed because they "have as their object the termination of a valuable right of a permanent employee, that of continued employment." (*Hankla v. Governing Bd. of Roseland School Dist.* (1975) 46 Cal.App.3d 644, 649; see also *Board of Trustees of Placerville Union School Dist. v. Porini* (1968) Cal.App.2d 784, 789.) The fundamental rule in construing a statute is to determine the Legislature's intent. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) To determine that intent, "[t]he court turns first to the words themselves for the answer." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, quoting *People v. Knowles* (1950) 35 Cal.2d 175, 182.) Additionally, the basic principles of statutory construction require that "[t]he words of the statute must be

construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

PLAIN LANGUAGE

20. Section 44932 enumerates 11 separate causes to dismiss a teacher, including immoral conduct, unprofessional conduct, and alcoholism, among others. However, the statute begins with the phrase, "A permanent employee shall not be dismissed except for one or more of the following causes" Thus, the plain language of section 44932 is that the causes for dismissal listed thereunder are exclusive.

21. Section 44939 authorizes the governing board of a school district to immediately suspend a permanent employee based on five grounds, including immoral conduct, conviction of a felony or of any crime involving moral turpitude, incompetency due to mental disability, willful refusal to perform regular assignments without reasonable cause, and violation of section 51530 (teaching communism). Unlike employees charged only with dismissal under section 44932, employees who are also charged with immediate suspension under section 44939 are suspended without pay pending the outcome of the dismissal action. Section 44939, subdivision (a), begins with, "This section applies only to dismissal or suspension proceedings initiated pursuant to Section 44934." Section 44934, a procedural statute, then references section 44932, stating: "This section shall apply to dismissal or suspension proceedings based on charges as specified in Section 44932 or 44933 [statute relating to dismissal or suspension on grounds of unprofessional conduct]" Hence, the plain language of section 44939, is that only those employees charged with dismissal

under section 44932 may also be subject to immediate suspension without pay under section 44939.

HARMONIZING THE STATUTES WITHIN THE STATUTORY FRAMEWORK

22. Turning then to the statutory framework, it is readily apparent that the grounds for immediate suspension under section 44939 are a smaller subset of the grounds for dismissal under section 44932, but the Education Code does not establish separate, independent grounds for dismissal under section 44939.

23. Substantively, the Education Code sets forth 11 grounds for dismissal under section 44932. However, under section 44939, a teacher may be immediately suspended based only on the five grounds which are described above. That is, many of the causes for dismissal under section 44932, such as dishonesty, unfitness to teach, and unsatisfactory performance, cannot form the grounds for immediate suspension under section 44939. This narrowing of the substantive grounds for immediate suspension under section 44939 within the larger set of grounds for dismissal generally is even more apparent upon examination of the specific causes. For example, the "violation of section 51530" basis for immediate suspension under section 44939, subdivision (b), is a subset of the "[v]iolation of Section 51530 or conduct specified in Section 1028 of the Government Code . . ." cause for dismissal under section 44932, subdivision (a)(10). The "incompetency due to mental disability" basis for immediate suspension under section 44939, subdivision (b), is a subset of the "physical or mental condition unfitting him or her to instruct or associate with children" cause for dismissal under section 44932, subdivision (a)(7). And the "willful refusal to perform regular assignments without reasonable cause" basis for immediate suspension under section 44939, subdivision (b), is a subset of the "persistent violation" cause for dismissal under section 44932, subdivision (a)(8), as well as possibly "unprofessional conduct"

and “evident unfitness for service” causes for dismissal under section 44932, subdivisions (a)(2) and (a)(6), respectively.

24. Procedurally, the Education Code also sets forth different requirements for dismissal and immediate suspension. Under section 44939, the employing district may immediately suspend the employee, but the employee may also file a motion for immediate reversal of suspension (MIRS) within 30 days of service of the initial pleading. (§ 44939, subds. (a), (b), (c).) The MIRS shall include “a memorandum of points and authorities setting forth law and argument supporting the employee’s contention that the statement of charges does not set forth a sufficient basis for immediate suspension.” (§ 44939, subd. (c)(1).) Review of the motion “shall be limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension under this section.” (*Ibid.*) The MIRS process is unique to immediate suspension cases under section 44939 and does not exist for dismissal cases generally under section 44932. These procedural differences further show that the intent of section 44939 is not to create a separate category of causes for dismissal, but to afford additional due process protections for a smaller subset of employees who are not only charged with dismissal but are also suspended without pay.

CASE LAW ON SECTIONS 44932 AND 44939

25. The District contends that section 44939 establishes separate and independent grounds for dismissal, citing to case law: “[A school district] may, if it so chooses and if one of the grounds specified in subdivision (a) of section 44932 exists, seek the dismissal rather than the suspension of an employee. And it may, if it so chooses and if the ground for dismissal is also one of those specified in section 44939, immediately suspend the employee without pay pending the disposition of the

dismissal proceeding." (*Fontana Unified Sch. Dist. v. Burman (Burman)* (1988) 45 Cal. 3d 208, 215-16.) However, this quote does not support the District's position. To the contrary, it tends to support the interpretation that the grounds for immediate suspension under section 44939 are a narrower subset of those for dismissal under section 44932. The quote states that a school district may charge an employee with dismissal under section 44932. However, "if the ground for dismissal is also one of those specified in section 44939," that is, if those grounds for dismissal also fit into the narrower category of grounds for immediate suspension under section 44939, then the school district may choose to charge the employee with immediate suspension without pay, in addition to dismissal. (*Burman, supra*, 45 Cal. 3d 208 at pp. 215-16, emphasis added.)

26. This interpretation is further strengthened by the following passage from *Burman*: "The district may determine when to seek disciplinary action and what discipline to seek. It may, by choosing to pursue only a dismissal sanction [under section 44932, subdivision (a)], preclude the commission from imposing suspension [under section 44932, subdivision (b)]. [fn. omitted] And it may, by invoking the procedures of section 44939, accompany the notice of dismissal with an immediate suspension of the employee without pay." (*Burman, supra*, 45 Cal. 3d 208 at pp. 218.) Thus, while a dismissal action under section 44932 may exist without a suspension, the immediate suspension of the employee without pay under section 44939 must be accompanied by the notice of dismissal under section 44932. A disciplinary action under section 44939 cannot stand alone without a dismissal action under section 44932 because section 44939 does not create any independent causes for dismissal. The causes for immediate suspension under 44939 are a narrower subset of the causes for dismissal under section 44932, and any charge for immediate suspension under

section 44939 must be accompanied by a charge for dismissal under section 44932 that encompasses it.

27. Applying this analysis to the instant case, Respondent cannot be charged, as an independent cause for dismissal, with willful refusal to perform regular assignments without reasonable cause, as described by the reasonable rules and regulations of the employing district, pursuant to section 44939, subdivision (b). However, the District may charge Respondent, as it has done here, with willful refusal to perform regular assignments under section 44939, as a cause for immediate suspension, because the District has accompanied this charge with causes for dismissal under section 44932 (persistent violations and evident unfitness for service) that encompass it.

Willful Refusal to Perform Regular Assignment as a Cause for Immediate Suspension

28. Respondent requests that the Commission render a determination as to whether Respondent willfully refused to perform regular assignments without reasonable cause, as a cause for immediate suspension. The District opposes this request, contending that determination of causes for immediate suspension is outside the scope of the Commission's authority because Respondent's request is essentially a request for backpay under section 44946.

29. Section 44946 states, "If the employee has been suspended pending the hearing, he shall be reinstated within five days after the governing board's decision in his favor, and shall be paid full salary by the governing board for the period of his suspension." That is, the employee who was the subject of immediate suspension without pay is entitled to backpay if the Commission decides in his or her favor. Case

law has confirmed that the predecessor statute to section 44946 entitled a teacher to back pay because the Commission cleared her of the charge forming the basis for her unpaid suspension, even though she was ultimately dismissed for a different reason. (*Von Durjais v. Board of Trustees* (1978) 83 Cal.App.3d 681, pp. 686-687; see also *Board of Education v. Commission on Professional Competence* (1976) 61 Cal.App.3d 664, 669-670.)

30. It should be noted that while section 44939, which authorizes immediate suspension, provides for a teacher to seek relief through the MIRS procedure, such relief is only interlocutory in nature; it is interim relief pending the outcome of the dismissal case. (§ 44939, subd. (c)(6).) Thus, the MIRS is reviewed by an administrative law judge sitting alone rather than the Commission (*Id.* at subd. (c)(2)), and the review of the motion is "limited to a determination as to whether the facts as alleged in the statement of charges, if true, are sufficient to constitute a basis for immediate suspension" (*id.* at subd. (c)(1)). Section 44939, subdivision (c)(4), also states, in relevant part: "The grant or denial of the motion shall be without prejudice to consideration by the Commission on Professional Competence, based upon the full evidentiary record before it, of the validity of the grounds for dismissal." Thus, reading sections 44946 and 44939 together, the Commission has the authority to render a determination on the cause for immediate suspension based on the full evidentiary record before it.

31. The District contends that Respondent's request for backpay is inappropriate because section 44944 limits the disposition that the Commission is authorized to determine. Section 44944, subdivision (d)(1), provides:

The decision of the Commission on Professional
Competence shall be made by a majority vote, and the

commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following:

(A) That the employee should be dismissed.

(B) That the employee should be suspended for a specific period of time without pay. [This disposition is applicable only based on charges for suspension under section 44932, subdivision (b).]

(C) That the employee should not be dismissed or suspended.

32. However, the District's reading of section 44944 ignores the language in the statute requiring the Commission to issue "a written decision containing findings of fact, [and] determinations of issues" Here, whether there was cause to immediately suspend Respondent for willful refusal to perform regular assignment is an issue to be determined, as it is an allegation contained in the First Amended Accusation. (Ex. 9, p. A147.) However, consistent with section 44944, subdivision (d)(1), the ultimate disposition of the case will be whether Respondent is to be dismissed or not dismissed, even though Respondent may be automatically entitled to backpay under section 44946 if the cause for immediate suspension was not established. This interpretation of section 44944 recognizes while the employing school district has the discretion to determine what charges to pursue, the Commission as a professional body is vested with the discretion to determine all issues set forth in the charging pleading. (See *Burman, supra*, 45 Cal. 3d 208, 226.)

33. In this case, Respondent contends the reassignment to the City of Angels was not a directive, but voluntary. (Ex. V, p. B144.) Therefore, Respondent could not have willfully refused his "regular assignment" by declining a voluntary reassignment. (*Ibid.*) The District's offer of reassignment was voluntary because it was a reasonable accommodation for his sincerely held religious beliefs. Respondent did have the right to refuse it, even if it was based on speculative reasons about potential credentialing issues. However, after exerting that right, Respondent placed himself in the position of violating the COVID-19 vaccination policy because Sotomayor's September 29, 2021 email clearly informed him that if he refuses the City of Angels assignment, he must be vaccinated to work onsite at Peary. (Factual Finding 21.) Respondent's "regular assignment" is to teach students, whether the teaching takes place at the City of Angels or on site at Peary. By refusing the City of Angels reassignment and by insisting on working at Peary unvaccinated in violation of the COVID-19 vaccination policy, Respondent refused to perform his regular assignment because he is unable to teach, either at the City of Angels or at Peary. This refusal is also willful, as it exhibited an attitude of insubordination, as set forth above. (*Ante*, Legal Conclusions 15 & 16.) As the California Supreme Court observed in *Board of Educ. of City of Los Angeles v. Swan*, (1953) 41 Cal.2d 546, 552, "[t]he willful refusal of a teacher to obey the reasonable rules and regulations of the employing school district is insubordination."

34. Consequently, the District established by a preponderance of the evidence that Respondent willfully refused to perform regular assignments without reasonable cause, as described by reasonable rules and regulations of the employing district, pursuant to section 44939, subdivision (b).

///

///

***Morrison* Factor Analysis**

35. The California Supreme Court in the case of *Morrison v. State Board of Education (Morrison)* (1969) 1 Cal.3d 214 sets forth certain factors to determine whether an employee's wrongful conduct relates to his fitness to perform duties in an educational setting. These factors are known as the *Morrison* factors. The cause for dismissal of persistent violation of school laws is related directly to Respondent's conduct of District business and thus not subject to such an analysis for the nexus between teacher misconduct and fitness to teach. However, the *Morrison* factors are also used to analyze whether, in light of the misconduct, the teacher is fit to continue to teach. (See *Burman, supra*, 45 Cal. 3d at 220.) The ultimate inquiry is whether the teacher's future classroom performance and overall impact on his or her students are likely to meet the standards of the school employing the teacher. (*Oakland Unified School District v. Olicker* (1972) 25 Cal.App.3d 1098, 1109.)

36. Therefore, an analysis of the *Morrison* factors is warranted. Not all *Morrison* factors must be met for the *Morrison* test to be satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369.) It is sufficient when the most pertinent *Morrison* factors have been considered. (*West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1777.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland, supra*, 2 Cal.App.4th at 1457.) In this case, the *Morrison* factors are analyzed as follows:

- a. The likelihood the conduct may adversely affect students or fellow teachers. Respondent's refusal to teach remotely at the City of Angels as a reasonable accommodation rendered him unable to teach, as he was not allowed to work at a District facility without being vaccinated under the COVID-19 vaccination

policy. Therefore, Respondent's refusal to comply with the COVID-19 vaccination policy adversely affects the students.

b. The degree of such adversity. Respondent's conduct created significant adversity for his students, as they have been deprived of Respondent's presence as a teacher.

c. The proximity or remoteness in time of the conduct. Respondent's conduct occurred less than one year ago, in October 2021, which is recent.

d. The type of teaching certificate held by the party involved. This factor does not have significant application in this case.

e. The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. This factor does not have significant application in this case.

f. The praiseworthiness or blameworthiness of the motives resulting in the conduct. This factor does not have significant application in this case.

g. The likelihood of recurrence of the questioned conduct. Respondent has made no indication that he would be willing to teach at the City of Angels or that he would be vaccinated to teach onsite at Peary. Therefore, the likelihood of recurrence of Respondent's continued refusal to comply with the COVID-19 vaccination policy is high.

h. The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. The imposition of discipline would not chill the constitutional rights of Respondent or other teachers. Respondent has a sincerely held religious belief against vaccination,

and the District recognized that belief by offering him a reasonable accommodation. No evidence was presented that this reasonable accommodation to teach at City of Angels violates Respondent's religious beliefs, but Respondent, nevertheless, refused it. The discipline being imposed on Respondent is not related to his religious beliefs, but to his ability to comply with the COVID-19 vaccination policy. The District, for example, has not imposed discipline against Walker, who, similar to Respondent, has a sincerely held religious belief against vaccination but accepted the reassignment to the City of Angels. Thus, the constitutional rights of Respondent or other teachers are not involved in this case.

i. The publicity or notoriety given to the conduct. This factor does not have significant application in this case

37. The *Morrison* factors demonstrate respondent is unfit to teach. Under the circumstances, terminating his employment with the District is warranted.

///

///

///

///

///

///

///

ORDER

Respondent Jason Knopke is terminated from employment with the Los Angeles Unified School District.

DATE: 09/02/2022




Alan Underwood (Sep 2, 2022 17:53 PDT)
ALAN UNDERWOOD
Commissioner

DATE: 09/07/2022



Kathryn Briedenthal (Sep 7, 2022 09:06 PDT)
KATHRYN BRIEDENTHAL
Commissioner

DATE: 09/07/2022



JI-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings