BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: CARLOS MENENDEZ, a Permanent Certificated Employee, Respondent.	OAH Case No. 2015040894

DECISION

The hearing in the above-captioned matter took place in Los Angeles on June 1 and 2, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Complainant was represented by My T. Huynh, Associate General Counsel, Los Angeles Unified School District (LAUSD or District). Respondent Carlos Menendez appeared and represented himself.

The record was held open for the submission, by the District, of a complete and un-redacted copy of an investigation report generated by the District in 2014, as Respondent had a copy, but not all of the report could be read. The document was timely received as exhibit A, and has been sealed with a protective order.

The matter was submitted for decision on June 5, 2015. The ALJ hereby makes his factual findings, legal conclusions, and order.

INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding the District seeks the termination of one of its tenured teachers, Respondent Carlos Menendez. One statutory ground for termination was alleged: egregious misconduct. (Ed. Code, §§ 44932, subd. (a)(1), 44939.1.)[1]

In the main, it is alleged that Respondent touched three different female fifth grade students in an inappropriate way; that he grabbed a male student by the neck,

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

and berated him for not being able to write; used profanity and demeaned females students; and failed to comply with a directive not to touch students even if he was giving them praise. The directive was allegedly given to Respondent before any of the alleged acts that are summarized above.

Respondent provided evidence regarding the facts and circumstances of the events referenced in the Accusation, and otherwise provided evidence in support of his retention by the District.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Justo H. Avila executed the Accusation in this matter while acting in his official capacity as Chief Human Resources Officer of the District.

2. The District commenced this proceeding on March 27, 2015, when Complainant executed a Statement of Charges against Respondent. Respondent made a timely request for hearing, which led to the issuance of the Accusation. He then filed a Notice of Defense, and this hearing ensued. All jurisdictional requirements have been met.

3. Respondent is a certificated teacher in the District's employ, credentialed to teach elementary school students. During the time relevant to this proceeding—in the main from August 2012 through May 2013—Respondent was assigned to teach fifth grade students at Manchester Elementary School (Manchester) in Los Angeles, California.

Findings on the Factual Allegations Made Against Respondent

4. During the period August 2012 to June 2013, Respondent had physical contact with three different girls who were enrolled in his class, which contact was questionable, at best

5. (A) On one occasion, student L[redacted]C. (L[redacted]) left the classroom at a break, but went back to the room to retrieve something from her backpack. As she was bending over to get into the backpack, Respondent came up behind her, and placed a hand on her buttocks.

(B) On another occasion, while L[redacted] was seated at her desk, Respondent reached around toward some work on the desk. He touched the girl on the breast, for a period of time indicating that the touching was not inadvertent.

(C) On another occasion, Respondent hugged L in an inappropriate way.

6. (A) During October or November 2012, Respondent had physical contact with student R V. She was seated at her desk (around a table with other students) and she asked for help. Respondent placed his arm around her, and then briefly touched her breast while seemingly reaching for the work the student had performed.

7. (A) On one occasion, on a date not clear from the record, but during the 2012-2013 school year, Respondent walked by student Y C. (Y) and hit her on the buttocks with an IPad that he was carrying. It should be noted that at a later date, Y told detectives from the Los Angeles Police Department (LAPD) that she felt that Respondent's act was not deliberate. (Ex. A, p. 5.)

(B) Although not alleged, on another occasion, Respondent hit L on the buttocks with an IPad as he walked past her.

8. In approximately August 2012, Respondent had inappropriate contact with student M V., because he came up behind the boy, who was underperforming, grabbed him by the shoulders, and shook him, telling the student that he—M—could do better than he was doing in school. The boy was traumatized by the event. Months later, when interviewed by investigators working for the District, he began crying when asked about Respondent, and while describing the event.

9. At times during the 2012-2013 school year, Respondent used profanity, or vulgarity, in the classroom in the presence of his fifth grade students. He also spoke to the female students in an inappropriate way. On one occasion, some of the girls came to class and apparently reeked of perfume. Respondent told them they should not "wear that ho juice." This tended to liken them to prostitutes. On other occasions he admonished the girls to behave, lest they end up like the streetwalkers that plied their trade on nearby Figueroa Boulevard.

10. (A) In April 2010 Respondent's supervisor, the principal at Manchester, Mr. Hooker, orally directed Respondent not to touch his students. Thereafter, on May 20, 2010, Mr. Hooker gave Respondent a written directive not to touch a student, even if he was giving them praise. That directive was set out in a memo that summarized the meeting when the directive was first given. In that conference memo, Mr. Hooker stated that he had previously directed Respondent "to no longer touch a student even if you are giving them praise." (Ex. 5.) Mr. Hooker suggested the use of stickers to provide approval of a student's actions.

(B) Respondent's actions described in Factual Findings 5 through 8 were contrary to the prior directive from the principal. The directive from Mr.

Hooker put Respondent on notice that touching the students, even if done with good intent, could be readily misconstrued.

Findings on Other Matters

11. Two of the girls referenced above, L[redacted] and Y[redacted], testified about an event that provides circumstantial evidence relevant to the findings made above. The event was not pleaded, but was described in the course of testimony, without objection.

12. Respondent, in approximately the spring of 2013 told the students that each was to write a letter to the school principal, which was to explain why they did poorly in the-recent standardized testing. This was treated as a class project.

13. L[redacted] and Y[redacted] wrote their letters to Mr. Hooker, as did the other students, and Respondent collected the letters. The students thought that the letters were actually going to be transmitted to the principal. Respondent testified that such was never his intent; he simply wanted the students to use some introspection regarding their recent performance on the test. However, it does not appear he shared his intentions for the letters with the students, who therefore set forth to communicate with the principal of their school.

14. In their letters, both girls made it clear that they did not like the way Respondent ran his classroom. At least one of the students said in her letter that Respondent was a pervert.[2] When Respondent received the letters, he wrote a letter of his own back to the L[redacted] and Y[redacted]. He expressed dismay and hurt in response to both letters, and as noted, responded to Y[redacted]'s act of calling him a pervert. He then met with the two girls about the matter.

15. Both girls credibly testified that after speaking to them about the matter, Respondent had them tear up their letters to the principal, as well as his replies to them. No copies of their letters were preserved or provided in the hearing. Respondent did not provide any of the student letters to the principal. He stated he kept the letters for a time, and eventually disposed of them. At hearing, he did provide copies of his letters to Y[redacted] and L[redacted], found in exhibit E.

16. The student witnesses were credible in their demeanor while testifying. They did not appear to bear a grudge against Respondent, and there was no hint of exaggeration or fabrication of charges. However, as noted in the District's investigation report, exhibit A, Y[redacted] told Los Angeles Police Department

[2] The testimony by the two girls was to the effect that both called him a pervert. In his replies to their letters, Respondent addressed the matter in response to Y[redacted]'s letter, not L[redacted]'s. (Ex. 5, pp. 1-2.)

(LAPD) investigators she did not see Respondent improperly touch anyone, but later told the District's investigators that she saw Respondent touch L[redacted] three or four times. (Ex. A, p. 14.) On the other hand, L[redacted] did tell LAPD investigators Respondent touched her buttocks, as set out in Factual Finding 5(A), and she told them she had been touched other times. (L[redacted] was not interviewed by District investigators because she had moved out of California for a time.)

17. In terms of demeanor, Respondent's testimony appeared credible. It should be noted that his version of events surrounding the letters from the class differed when he spoke to the LAPD, as opposed to when he discussed the matter with the District's investigators. His statements to the LAPD acknowledged that L[redacted] or Y[redacted] had called him a pervert; he did not tell the District's investigators that part of the story.

The Morrison Factors

18 Where there is conduct that might justify termination of a teacher, an examination must be made of whether or not that conduct indicates that the teacher in question is unfit to teach. This requirement was first set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229. There the Supreme Court held that factors that may be examined to determine fitness include the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; and, the proximity or remoteness in time of the conduct. Other factors may include the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood that the conduct in question will recur; and, the extent that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved, or other teachers.

19. (A) *Adverse consequences on students and teachers, and the degree thereof*: There were adverse consequences for students, whose faith and trust in a teacher were shaken by his untoward acts of touching them inappropriately.

(B) *Proximity in time*: This conduct occurred in the period 2012 to 2013, and is fairly recent.

(C) *Type of certificate held by Respondent*: Not fully disclosed by the record, but it must be inferred that he holds a multiple subject credential, allowing him to teach kindergarten through middle school students.

(D) *Likelihood of recurrence*: The chance of recurrence is significant. Respondent was told by his supervisor in 2010 not to touch the students for any reason, but he did so anyway, on more than one occasion.

(E) *Implication of constitutional rights*: No constitutional rights, of either the Respondent or other teachers are implicated if Respondent is terminated.

(F) *Extenuating or aggravating circumstances*: In aggravation, Respondent's actions occurred more than once, despite a direct instruction from his supervisor not to touch the students.

20. Under all the circumstances, Respondent's conduct establishes that he is unfit to teach in the District, within the meaning of the *Morrison* decision, and he should be terminated as a teacher.

LEGAL CONCLUSIONS

1. The Code prescribes the procedures to be followed when a school district wishes to dismiss, suspend or otherwise discipline a tenured teacher. (*Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1132, (*Wilmot*); *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1378 ; see § 44660 et seq.) Among the statutes pertinent to this case are sections 44932, which sets out grounds for termination, and section 44944, which sets out procedures for termination.

2. Even where statutory grounds for termination are established, it must also be established that such conduct renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208; *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445; see *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317, 321.)

3. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative

evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

(C) Discrepancies in a witness's testimony, or between that witness's testimony and that of others, does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.)

(D) "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board*, *supra* at 877-878, quoting *Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

Conclusions Specific to This Case

4. Jurisdiction was established to proceed in this matter, pursuant to section 44944, and Factual Findings 1 and 2.

5. Complainant asserts that Respondent should be terminated for "egregious conduct" pursuant to section 44932, subdivision (a)(1), which states:

> (a) A permanent employee shall not be dismissed except for one or more of the following causes:
>
> (1) Immoral conduct including, but not limited to, egregious misconduct. For the purposes of this chapter, "egregious misconduct" is defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 or 44011 of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code.

6. (A) As shown above, two Education Code sections are used to partially define "egregious conduct." But, they do so by themselves referring to other statutory schemes. Section 44011 refers generally to controlled substance offenses, listing various sections of the Health and Safety Code which proscribe the use of controlled substances. None of the charges in this case refer to use or abuse of controlled substances, so section 44011 is irrelevant.

(B) Section 44010 references numerous sections of the Penal Code that tend to pertain to sex offenses, as follows:

> "Sex offense," as used in Sections 44020, 44237, 44346, 44425, 44436, 44836, and 45123, means any one or more of the offenses listed below:
>
> (a) Any offense defined in Section 220, 261, 261.5, 262, 264.1, 266, 266j, 267, 285, 286, 288, 288a, 288.5, 289, 311.1, 311.2, 311.3, 311.4, 311.10, 311.11, 313.1, 647b, 647.6, or former Section 647a, subdivision (a), (b), (c), or (d) of Section 243.4, or subdivision (a) or (d) of Section 647 of the Penal Code.
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> (b) Any offense defined in former subdivision (5) of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision (2) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961, if the offense defined in those sections was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.
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> (c) Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961.
>
> (d) Any offense defined in former subdivision (1) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961.
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> (e) Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961.
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> (f) Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961, if that offense was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.
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> (g) Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975-76 Regular Session of the

Legislature committed prior to the effective date of the amendment.

(h) Any attempt to commit any of the offenses specified in this section.

(i) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punishable as one or more of the offenses specified in this section.

(j) Any conviction for an offense resulting in the requirement to register as a sex offender pursuant to Section 290 of the Penal Code.

(k) Commitment as a mentally disordered sex offender under former Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of the Welfare and Institutions Code, as repealed by Chapter 928 of the Statutes of 1981.

7. An examination of the referenced statutes constitutes a lengthy excursion. The bulk of the Penal Code statutes cited in subdivision (a) of section 44010 do not come close to being relevant, as they pertain to crimes such as forcible rape, sodomy, or even incest. The referenced Penal Code sections 311.1 through 313.1 pertain to obscene matter. However, as discussed below, Penal Code section 647.6, which pertains to molesting or annoying a child, may apply to this case.

8. Another statute used in section 44932, subdivision (a)(1), to define egregious conduct is Penal Code section 11165.2, which defines child neglect. It does not appear relevant to this case.

9. Penal Code section 11165.3 states:

As used in this article, "the willful harming or injuring of a child or the endangering of the person or health of a child," means a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.

10. Penal Code section 11165.5, also used in section 44932, subdivision (a)(1) to help define egregious conduct, provides, in pertinent part that:

> As used in this article, the term "abuse or neglect in out-of-home care" includes physical injury or death inflicted upon a child by another person by other than accidental means, sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, unlawful corporal punishment or injury as defined in Section 11165.4, or the willful harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, where the person responsible for the child's welfare is a . . . employee of a public or private school.

11. (A) Penal Code section 11165.6 states:

> As used in this article, the term "child abuse or neglect" includes physical injury or death inflicted by other than accidental means upon a child by another person, *sexual abuse as defined in Section 11165.1*, neglect as defined in Section 11165.2, the willful harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4. "Child abuse or neglect" does not include a mutual affray between minors. "Child abuse or neglect" does not include an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer. (Emphasis added.)

(B) Penal Code section 11165.6, by referencing Penal Code section 11165.1, brings that latter statute into consideration in cases of this type, even though it was not directly referenced in section 44932, subdivision (a)(1).

(C) Penal Code section 11165.1, subdivision (b)(4), provides, as follows:

> The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

12. (A) Penal Code section 647.6, subdivision (a)(1), which is cited in section 44010, subdivision (a), states: "Every person who annoys or molests a child under 18 years of age shall be punished by a fine not exceeding five thousand dollars

($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and the punishment."

(B) In the case of *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571, the Court of Appeal stated, regarding the meaning of Penal Code section 647.6, subdivision (a)(1), that:

> The words "annoy" and "molest" are synonymous and "refer to conduct designed 'to disturb or irritate, esp[ecially] by continued or repeated acts' or 'to offend' [citation]; and as used in this statute, they ordinarily relate to 'offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.' [Citation.] Ordinarily, the annoyance or molestation which is forbidden is 'not concerned with the state of mind of the child' but it is 'the objectionable acts of the defendant which constitute the offense,' and if his conduct is 'so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would "annoy or molest" within the purview of' the statute. [Citation.]" (*People v. Carskaddon* (1957) 49 Cal.2d 423, 426, 318 P.2d 4.) The primary purpose of section 647.6 "is the 'protection of children from interference by sexual offenders....' [Citations.]" (*Id.* at p. 425, 318 P.2d 4.) "The deciding factor for purposes of a Penal Code 647.6 charge is that the defendant has engaged in offensive or annoying sexually motivated *conduct* which invades a child's privacy and security, conduct which the government has a substantial interest in preventing...." (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1752, 37 Cal.Rptr.2d 327.) "[T]here can be no normal sexual interest in any child and it is the sexual interest in the child that is the focus of the statute's intent." (*People v. Shaw* (2009) 177 Cal.App.4th 92, 103, 99 Cal.Rptr.3d 112, italics omitted.)

(C) The Court of Appeal went on to state that an actual touching of the child is not necessary to constitute a violation of Penal Code section 647.6, subdivision (a)(1); words alone can suffice. (*In re D.G., supra*, 204 Cal.App.4th at 1572.)

13. Based on Factual Findings 5-7, it must be concluded that Respondent's conduct amounted to the annoyance or molestation of a child under the age of 18 years, and violated Penal Code section 647.6, subdivision (a)(1). Therefore, Respondent has committed egregious (mis)conduct within the meaning of sections 44932, subdivision (a)(1), and 44010, subdivision (a).[3]

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[3] To be sure, this Conclusion, like the underlying findings, is based on a preponderance of the evidence, the standard applying to proceedings of this type. It is

14. Based on Factual Finding 8, it is concluded that Respondent's act of grabbing student M[redacted]V. and shaking him, violated Penal Code section 11165.5, quoted in Legal Conclusion 10, as constituting unlawful corporal injury of a student, by a school employee responsible for the child's well being. Therefore, Respondent has committed egregious conduct within the meaning of section 44932, subdivision (a)(1).

15. Based on Legal Conclusions 13 and 14, and their factual and legal predicates, cause exists to terminate Respondent for egregious conduct pursuant to sections 44932, subdivision (a)(1), and 44939.

16. Applying the *Morrison* factors, it must be concluded that Respondent's conduct renders him unfit to teach in the District, based on Factual Findings 18 through 20.

17. Based on all the foregoing, Respondent should be terminated as a certificated employee of the District.

ORDER

Respondent Carlos Menendez shall be terminated as a certificated employee of the Los Angeles Unified School District.

September 22, 2015

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

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doubtful that the proof would satisfy the standard of proof applicable in a criminal case, where a crime must be proved beyond a reasonable doubt.