

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS FOR THE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

CATERINA LIPERA (EN 705167),
A Permanent Certificated Employee,

Respondent.

OAH No. 2017090853

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on November 13-17, 2017, and January 8, 2018, in Los Angeles. The case was submitted for decision upon conclusion of the hearing.

Michael Voigt and Meredith G. Karasch, Assistants General Counsel, as well as Mampre R. Pomakian and My T. Huynh, Associates General Counsel, represented the Los Angeles Unified School District (District).

Daniel E. Curry, Esq., Schwartz, Steinsapir, Dohrmann & Sommers LLP, represented Caterina Lipera (respondent), who was present each hearing day.

The District seeks to affirm its termination of respondent's employment, based on allegations that in 2009 and 2015 respondent engaged in the egregious misconduct of child abuse against special education students when she forced one to sit in soiled clothes for 20 minutes; physically restrained two others in an adapted chair against District policy; and made several negative remarks about and to her students. Respondent contends she was not in the classroom in 2009 when the student soiled herself but thereafter assisted in changing her clothes; admits that in 2015 she occasionally restrained two students in chairs for their safety and not as punishment; and that some of her comments were taken out of context and not said angrily, while others were not made by her.

It was established by a preponderance of the evidence that respondent committed egregious misconduct in 2009 and 2015 by acts constituting child abuse as defined in the Penal Code. Application of the factors set forth in *Morrison v. State Board of Education* demonstrate respondent is unfit to teach. Respondent presented insufficient evidence of rehabilitation or remediation. Her termination therefore is warranted.

FACTUAL FINDINGS

Parties and Jurisdiction

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 permanent certificated employee of the District.

3. Jose R. Cantu, Ed.D., in his official capacity as the District's Assistant Chief Human Resources Officer, verified on information and belief a Statement of Charges against respondent, alleging factual and legal grounds for respondent's immediate suspension without pay and termination of her employment as a result of various alleged incidents of "egregious misconduct" involving special education students.

4. By a letter dated August 23, 2017, respondent was advised that the Statement of Charges had been filed with the Board, and that during a closed session of a Board meeting held on August 22, 2017, the Board decided to suspend respondent without pay and dismiss her from employment. The dismissal would become effective within 30 days, unless she demanded a hearing. Respondent timely requested a hearing.

5. On September 27, 2017, the District filed an Accusation and Statement of Charges with OAH, as well as respondent's aforementioned request for a hearing.

Respondent's Background Information

6. Credentials. Respondent has a clear multiple subject teaching credential, as well as a level II special education credential allowing her to teach students with moderate to severe disabilities. She obtained her credentials after receiving undergraduate and master's degrees from California State University, Northridge.

7. Employment with the District. During the events alleged in the Accusation, respondent was assigned as a special education teacher at Northridge Middle School (2009) and Stanley Mosk Elementary School (2015). Her overall employment chronology with the District is as follows:

a. Respondent was first employed by the District in 1998 as a paraprofessional, i.e., teacher's aide, in special education classrooms. She continued working in that capacity while she attended college. She began teaching for the District in 1999 under an emergency credential. She completed her probationary service with the District in 2004. (Ex. 119, p. 7.)

b. Respondent taught special education classes from 1999 through 2006 at Joaquin Miller High School. She next taught special education classes at Northridge Middle

School from 2006 through 2011; she thereafter was reassigned and taught general education classes at NMS for the 2011/2012 school year.

c. As a result of displacements and reassignments from 2012 through July 2015, respondent taught mostly special education classes at Hart Street Elementary School and the Lokrantz Special Education Center (or Lokrantz). When Lokrantz was closed, respondent was displaced to Stanley Mosk Elementary School (or Mosk) in July 2015. She taught a special education class at Mosk from August 16, 2015, until she was removed from the classroom on October 6, 2015, as a result of the investigation leading to the filing of the Accusation in this matter. (Ex. 119, p. 7.)

8. Respondent submitted a number of performance evaluations completed by District administrators covering the range of school years from 2005/2006 through 2007/2008, and 2010/2011 through 2011/2012. On balance, the evaluations were generally favorable. However, there are a number of notes buried within many of the evaluations revealing the following patterns during respondent's tenure with the District.

a. Every evaluation presented, but one, contains an overall rating that respondent "meets standard performance." None rates respondent as "exceeding standard performance," but the evaluation for the 2007/2008 school year rates respondent's performance as "below standard."

b. More than a majority of the evaluations contain critical ratings and comments bearing on some of the issues in this case, e.g., respondent's classroom environment, supervision of students, and collegiality with colleagues. Specific examples follow. In 2006, it was noted respondent "[h]as shown a lack of good judgment on several occasions while in the community which has compromised the health, safety, and welfare of her students and staff" and "[n]eeds to devote more time to developing effective working relationships with coworkers, which has resulted in extensive resentment between her and other coworkers." (Ex. 126, p. 2.) In 2008, respondent was advised that her classroom climate "is often not conducive to student learning due to other students screaming or out of control. Avoid making negative comments about students in front of the class to aides in the classroom." (Ex. 128, p. 1.) In 2011, respondent was directed to "follow a schedule that provides supervision of students at all times." (Ex. 129, p. 3.) In 2012, respondent was again advised that she "[d]oes not consistently provide appropriate supervision for students." (Ex. 130, p. 4.)

9. For reasons not established, respondent also received counseling from Cornelia Romey, an assistant principal at Northridge Middle School, on February 16, 2010, concerning her relationships with classroom aides, including that she refrain from making embarrassing comments about aides in the classroom in front of students. (Ex. 24, pp. 2-3.) In addition, as a result of Ms. Romey's perception that respondent misunderstood mandatory child abuse reporting requirements when students were taken to the school nurse's office, respondent was also directed to take additional child abuse training provided by Assistant Principal Claudia M. Lara. (Exs. 24-25.)

*The Events in 2009 Involving Student R [REDACTED]*¹ (*Charges 1-3*)

10. For the 2009/2010 school year, respondent was assigned to teach a special day class (or SDC) for mainly autistic children at Northridge Middle School (or NMS).

11. One of the students in respondent's class that year was R [REDACTED] G., a severely autistic girl in the sixth grade, who had cognitive abilities well below her grade level. R [REDACTED] was described as being non-verbal, stubborn, with no social skills.

12. R [REDACTED] and other special education students in respondent's SDC also attended an elective computer class taught by Laurice Harris during second period at NMS. Although Ms. Harris was a general education teacher, she had worked with special education students since at least 1993. Students from respondent's class were usually brought to Ms. Harris's classroom by one of respondent's aides, but occasionally respondent went to the classroom to observe her students' behavior there.

13. An incident happened on September 30, 2009, during Ms. Harris's second period computer class, in which R [REDACTED] urinated in her clothes and subsequently remained in soiled clothing for at least 10 minutes before she was removed from the classroom to change.

14. Ms. Harris complained to Assistant Principal (or AP) Cornelia Romey about respondent's handling of the situation by or before the lunch period that day. Specifically, Ms. Harris complained to AP Romey that after R [REDACTED] urinated in her clothes, respondent made her sit in soiled clothing for approximately 20 minutes; and that when Ms. Harris offered to assist, respondent told Ms. Harris that R [REDACTED] needed to "learn a lesson" and was "old enough to not soil herself," or words to that effect.

15. After speaking with Ms. Harris and a few of the other aides present in the classroom that day, AP Romey met with respondent to discuss the incident on October 5, 2009. AP Romey told respondent the particulars of Ms. Harris's complaint, including that described immediately above. Respondent provided a verbal response to AP Romey. Ms. Harris's complaint, as well as respondent's response, were memorialized in a conference memorandum dated October 12, 2009. (Ex. 23.)

16. As a result of the office conference, AP Romey provided respondent with guidance and assistance. However, that part of the conference memorandum was not submitted in evidence, so the particular counseling provided was not established. AP Romey took no other disciplinary action against respondent as a result of this incident, nor did she report to any person or authority that she believed the incident constituted child abuse.

17. Ms. Harris retired from the District in 2014 and moved to Indiana. She was deposed for this case and her testimony from the deposition was presented at hearing.

¹ Last names are omitted to protect the privacy of the involved students.

18. Based on the above, the following findings are made concerning what happened on September 30, 2009, during Ms. Harris's second period computer class:

a. R [REDACTED] was present in Ms. Harris's classroom at the beginning of the period, along with an aide from respondent's SDC, Michelle. Ms. Harris also had a few of her aides present in the classroom that morning. There were also a number of Ms. Harris's general education students present.

b. It was not established that respondent took R [REDACTED] to Ms. Harris's class along with her aide. Although AP Romey wrote in her conference memorandum that respondent had done so, respondent testified she had not taken R [REDACTED] to Ms. Harris's class that morning. Ms. Harris was not asked during her deposition who had taken R [REDACTED] to her classroom that morning.

c. However, respondent was present in Ms. Harris's classroom when R [REDACTED] urinated in her clothes. Ms. Harris was clear in her deposition testimony that respondent was there when this incident occurred, and AP Romey's conference memorandum is similarly clear that Ms. Harris told her respondent was there at that time. As discussed above, respondent occasionally went to Ms. Harris's classroom to observe her students in that environment. Respondent's testimony during the hearing was not persuasive that she was in her own classroom at the time and only knew of the incident when called by her classroom aide. Based on AP Romey's conference memorandum, respondent did not tell AP Romey when first confronted about the incident that she was absent when R [REDACTED] urinated. Although respondent testified that she probably submitted a written response to AP Romey after the conference meeting, which would have contained that assertion, respondent failed to submit such a document in evidence or prove one exists. If respondent had not been in the classroom when R [REDACTED] soiled her clothes, one would expect her to have said so to AP Romey when first confronted about the incident; respondent did not. Moreover, respondent's version of events on this point is not internally consistent. As discussed in more detail below, R [REDACTED]'s spare clothes remained in respondent's classroom; they were not taken with R [REDACTED] to Ms. Harris's classroom. If respondent was in her own classroom when notified by her aide that R [REDACTED] soiled her clothes, one would expect respondent to bring the spare clothes with her when she left for Ms. Harris's classroom.

d. Although Ms. Harris testified during her deposition that respondent was not only present at the time, but actually refused to let R [REDACTED] use the restroom before soiling herself, it was not established that occurred. AP Romey's conference memorandum contains nothing indicating respondent was advised R [REDACTED] needed to use the restroom and refused to let her go. One would expect the conference memorandum to include such an assertion if Ms. Harris had said that to AP Romey. Ms. Harris was deposed almost eight years after the fact. She had no motive to purposely exaggerate the events in question. The most reasonable explanation for this inaccuracy is that her memory failed her on this point.

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e. The adults in the classroom noticed R█████ had soiled her clothes when they saw a trickle of fluid running down her chair and onto the floor beneath her. Ms. Harris asked respondent if she needed assistance with the situation. Respondent declined Ms. Harris's offer, telling Ms. Harris that R█████ needed to "learn a lesson" and was "old enough to not soil herself," or words to that effect. AP Romey's conference memorandum is clear that Ms. Harris had made that exact complaint to her later the day of the incident; Ms. Harris was consistent on this point in her deposition testimony.

f. Respondent's testimony was not persuasive that the above comments were made when she was speaking to her aide, overheard by Ms. Harris, and taken out of context. First, Ms. Harris would have known if respondent was talking to her or an aide, especially after offering assistance directly to respondent. Second, respondent admitted in her testimony that she had told her aide, "R█████ is too old to do that, we have to teach her a lesson," indicating that in fact she had made the comments heard by Ms. Harris. Also, respondent's testimony is self-serving and too convenient that her comments pertained to modifying classroom activity from the computer work R█████ did not like. Again, Ms. Harris would have understood what respondent was saying, and she did not believe respondent was referring to modifying R█████'s substantive academic program.

g. R█████ could not be changed immediately because her spare clothes were in respondent's classroom. Respondent decided to send her aide back to her classroom to retrieve R█████'s spare clothes, which would take approximately 10 minutes. For the next 10 minutes or so, R█████ remained seated in her soiled clothes while the spare clothes were being retrieved. Both respondent and Ms. Harris were consistent in their testimony that R█████ remained in the classroom in soiled clothes approximately 10 minutes.

h. Ms. Harris admitted during her deposition that she did not know R█████'s spare clothes were in respondent's classroom. Therefore, when Ms. Harris reported the incident to AP Romey, she did not include that R█████'s spare clothes were elsewhere. AP Romey similarly admitted her ignorance of this fact such during her cross-examination at hearing. As a result, AP Romey had a more negative view of respondent's handling of the situation, i.e., believing R█████ had spare clothes with her in Ms. Harris's classroom but no effort was made to use them during the 10 minutes or so before R█████ was taken out of the classroom.

i. Special education students commonly soil themselves during class; sometimes their spare clothes are not available. It was established by the testimony of AP Romey, Ms. Harris, and the District's expert witness, Laura Zeff, that when such a situation occurs while a student is in a classroom, the student should be moved to a more private location for changing, such as a restroom or the nurse's office. Moving the student will reduce the embarrassment of being with other students while in soiled clothing, and expedite cleaning the student's soiled area and removing the soiled clothes to reduce the chances of a rash developing.

j. Respondent decided to not move R [REDACTED] immediately to a private location. Respondent did not explain during the hearing why she did not do so. The decision was also curious, because in all likelihood, R [REDACTED] would not have been changed in the classroom full of students once the spare clothes arrived; she would have been taken to another location for the change. Respondent only testified that after a period of time, she realized her plan “was not efficient,” and so she decided to move R [REDACTED] and meet her aide Michelle at the nearby restroom to clean up R [REDACTED] and change her into spare clothes. Based on the above-described testimony of respondent and Ms. Harris, R [REDACTED] remained in Ms. Harris’s classroom in soiled clothes approximately 10 minutes before being taken to the restroom.

k. It was established by the testimony of Ms. Harris and AP Romey that respondent’s decision to not move R [REDACTED] immediately to a private location for changing was meant to teach her a lesson about constantly requesting to use the restroom when she did not want to participate in certain classroom activities. During her deposition, Ms. Harris testified respondent had made that complaint to her after R [REDACTED] soiled herself; during the hearing, respondent did not deny making such a complaint. To the contrary, respondent corroborated Ms. Harris’s testimony when she testified that her aide, Michelle, had complained to her at the time of the incident that R [REDACTED] always asked to use the restroom to get out of work and that she thought R [REDACTED] had soiled herself that morning for that reason.² Respondent’s punitive state of mind was corroborated by her other statements to Ms. Harris that she needed to teach R [REDACTED] a lesson and she was too old to soil herself. As a veteran special education teacher at the District, respondent undoubtedly knew it was proper to immediately remove a student who had soiled herself from a classroom to a private location. Respondent provided no satisfactory explanation for not doing so. Her denial that she made the above-described statements to Ms. Harris is not only unpersuasive, but indicates she knows her omission was improper and punitive.

l. It was not established that respondent was required to ensure R [REDACTED] took spare clothes with her to Ms. Harris’s classroom. Because there would have been a delay in changing R [REDACTED]’s clothes due to her not having spares with her, it is not possible to quantify how long R [REDACTED] would have waited to be changed. However, if removed to a private location immediately, the soiled clothes could have been removed faster.

19. According to Ms. Harris, after R [REDACTED] soiled herself, she seemed “a little upset;” she was just sitting and shaking, and perhaps was crying “a little.” AP Romey also convincingly testified that by sitting in her own waste, R [REDACTED] was at risk of developing a rash. In her own testimony, respondent described R [REDACTED] as not crying or doing the things she normally did when she got upset; she was sitting calmly. Respondent’s testimony is not credited because it is self-serving; it is also not likely that R [REDACTED], who had just soiled herself, would have remained seated in her chair as if nothing happened. However, it is undisputed that the other students present in the classroom were busy working with their computers, wearing headphones, and did not seem to notice R [REDACTED] had soiled herself.

² This testimony admitted as administrative hearsay is used to explain or supplement the deposition testimony of Ms. Harris. (Gov. Code, § 11513, subd. (d).)

20. The Accusation alleges respondent's conduct violated a number of District policies, based on AP Romey's more negative view of respondent's actions depicted in her conference memorandum. The District's special education expert witness, Ms. Zeff, offered various opinions on this issue, based on the more extreme, and unproven, view that respondent initially had refused to allow R█████ to use the restroom. However, based on the above findings that respondent punitively delayed the process of changing R█████'s soiled clothing to teach her a lesson about soiling herself to avoid undesirable class work, it was established that respondent violated the following policies in the following regards:

- a. The District's Code of Conduct with Students (ex. 14) was violated because respondent engaged in behavior with a student that was unprofessional (no. 3).
- b. The District's Employee Code of Ethics (ex. 13) was violated because respondent did not set a good example for students (no. 1), create an environment of trust (no. 2), or maintain an appropriate, positive relationship with her student (no. 11).
- c. The District's Respectful Treatment of All Persons (ex. 15) policy was violated because respondent did not treat R█████ respectfully.
- d. California Standards for the Teaching Profession [CSTP] (ex. 16), standard 2, was violated because respondent did not create and maintain an effective learning environment for R█████ in this instance.

21. It was not established that the District's Discipline Foundation Policy: School-Wide Positive Behavior Intervention and Support Bulletin (ex. 18) was violated, in that the version submitted in evidence was enacted well after the events in question and no witness established that a prior version in effect in 2009 was violated by respondent's actions. It was not established that the District's Multi-Tiered System of Behavior Support for Students with Disabilities Bulletin (ex. 17) was violated, for the same reasons. The District's version of its Abolition of Corporal Punishment Bulletin in effect in 2009 was not established.

The Events in 2015 Involving Other Special Education Students

22. For the 2015/2016 school year, respondent was assigned to teach a Multiple Disabilities-Orthopedics (MDO) special education class at Stanley Mosk Elementary School (hereinafter Mosk). She began teaching at Mosk on or about August 16, 2015. Her classroom was initially located on the second story, but it was subsequently moved to the ground floor. Respondent had four students in her class; each was developmentally and orthopedically disabled. Respondent described all four students as "severely" disabled and in need of close supervision.

23. One of respondent's students was N█████, who has seizure disorder and balance/coordination issues. He was a fourth grader. Another student was M█████, who has severe seizure disorder that makes her apt to fall to the ground during a seizure and injure herself. She was a fifth grader. The other two students were A█████ N. and E█████ W.

A [REDACTED] is intellectually disabled and also has a heart condition. She was a fourth grader. E [REDACTED] has a genetic disorder and was a fourth grader. All four students were either at the preschool or kindergarten level academically.

24. At the beginning of the school year, respondent had two paraprofessionals in her classroom, Renee Peeples and Julio Alanya. Mr. Alanya was M [REDACTED]'s one-to-one (1:1) aide, who spent most of his time with M [REDACTED], but was also available to help with other students when present and available. A few weeks into the school year, Mr. Alanya was replaced as M [REDACTED]'s 1:1 aide by Isaias Miza. Aside from occasional times when an aide was on a break or pulled away from the classroom when tending to M [REDACTED], respondent's class usually had two or three adults present at any given time. It was rare for respondent to be the only adult in the classroom when students were present.

25. Ms. Peeples served as respondent's primary aide in the classroom. At the time, Ms. Peeples was enrolled at CSUN in the process of getting her teaching credential. She asked respondent to serve as her mentor. Initially, the two had a good working relationship. Over time, the relationship eroded and became "toxic," as described by Mosk's principal Barbara Friedrich. Ms. Peeples testified the problems began after she made comments respondent perceived as critiques from which respondent became resentful. Ms. Friedrich (or "former principal Friedrich" when her testimony is described), retired in June 2016. She testified respondent once complained to her that Ms. Peeples did not follow her instruction because she was getting her own credential and was "out to get her."

26. A. On October 5, 2015, Ms. Peeples complained about respondent to Principal Friedrich, saying that respondent physically restrained E [REDACTED] and A [REDACTED] in the classroom as a way of punishing them for misbehavior and that she made several improper comments about students to them and/or in their presence.

B. After Ms. Peeples' complaint, Principal Friedrich obtained written statements from Mr. Alanya and Mr. Miza. Upon advice from Northwest Local District Director Margaret Kim, Principal Friedrich removed respondent from the classroom on October 6, 2015. Principal Friedrich also submitted a child abuse complaint to the Los Angeles Police Department (LAPD), which declined to conduct an investigation.

C. On October 12, 2015, the District's Student Safety Investigation Team (SSIT) began investigating the matter. Respondent and the three aides in her classroom were interviewed, as well as Principal Friedrich and school Physical Therapist (PT) Chrissa Patterson, who had done several consultations in respondent's classroom that school year.

D. After the SSIT concluded its investigation, an office conference was held between Director Kim and respondent on October 4, 2016. Director Kim conducted the conference because Principal Friedrich had retired. Director Kim issued a conference memorandum dated October 6, 2016. Respondent submitted a written response dated October 28, 2016.

NEGATIVE COMMENTS MADE TO AND ABOUT STUDENTS (CHARGES 19-28)

27. A. It was established that, on at least a few occasions during the period of August 16, 2015, through October 5, 2015, respondent called A [REDACTED] a "brat" in her presence; told A [REDACTED], "You are a horrible and terrible child," or words to that effect; and called A [REDACTED] and E [REDACTED] "evil" in their presence.

B. Ms. Peeples was convincing in her testimony that respondent had made these comments in a negative way and in the students' presence. It is true that Ms. Peeples had a "toxic relationship" with respondent. But that fact alone does not make her testimony unreliable, in that her testimony was corroborated as described below. Moreover, as discussed above, respondent has been consistently criticized by supervisors for poor relationships with colleagues, including her aides. Based on this record, the fact there was conflict between Ms. Peeples and respondent is more likely attributable to respondent, and not likely evidence that Ms. Peeples was untruthful about respondent. In addition, Ms. Peeples' testimony was consistent with her complaint on this point to Principal Friedrich. Ms. Peeples' testimony was also corroborated by the testimony of Mr. Miza (described below) that he had heard respondent make negative comments about students in their presence, including that the students were "evil." Finally, respondent had been previously counseled in 2008 to avoid making negative comments about students in front of the class.

C. In her hearing testimony, respondent admitted using the words "brat," "evil," and "horrible or terrible" to describe A [REDACTED] and/or E [REDACTED], and that her comments were made in the presence of the students. She maintained, however, that she would have only done so after the students misbehaved in some way; she did not say these things directly to the students but rather to her aides; and that she did not say them in a mean or angry manner. In fact, respondent told the SSIT that she referred to A [REDACTED] as a brat in a "sweet and joking manner." (Ex. 119, p. 5.) Respondent's attempt to downplay the negativity in which her comments were made was not persuasive because it was self-serving and not corroborated by the evidence. In addition, respondent admitted in her testimony that the comments in question were not appropriate, indicating a reluctant concession that they were viewed as negative by others hearing them.

28. A. It was also established that, during the same time period, respondent told the students in her class that other people did not like them because of their disabilities and if they did not act normal other kids would not like them, or words to that effect.

B. This finding is based on the persuasive testimony of Mr. Miza. His testimony is generally consistent with the written statement he provided to Principal Friedrich when first contacted about respondent, as well as in his interview with the SSIT. During the hearing, Mr. Miza was a credible witness, in terms of the content of his testimony and his demeanor while giving it, even under at times hostile cross-examination. Moreover, Mr. Miza did not appear to have any agenda or bias against respondent. While he did not approve of some of respondent's conduct in the classroom, he was slow to make judgments about her and he never initiated a complaint against her.

C. Respondent's denial during the hearing that she said the things attributed to her by Mr. Miza was not persuasive. She flatly denied saying these things when interviewed by the SSIT. However, in her response to Director Kim's conference memorandum, she denied ever calling A [REDACTED] or E [REDACTED] "evil;" yet she admitted during the hearing that she used the word "evil" when referring to them. In her response to Director Kim's conference memorandum, respondent denied making the other comments described by Mr. Miza on the one hand, but wrote "the conversation was taken out of context" on the other hand (ex. 28, p. 4), begging the question what conversation she was referring to if not the one(s) described by Mr. Miza. Like other portions of her conference memorandum response, the just cited excerpt was hazy. During the hearing, respondent clarified she had simply told Ms. Peeples the general education students did not like her students because of their misbehavior. But it was clear from Mr. Miza's testimony that respondent had made far more pointed and critical comments about the students in their presence. In any event, Mr. Miza was a more credible witness than respondent, so any conflict between the two is resolved in favor of Mr. Miza.

29. Because the four students in question had limited communication skills, they were not interviewed by the SSIT or anyone else. Respondent testified that none of the students reacted to her comments and that she believed none of them understood what she was saying. Respondent's testimony was corroborated to an extent by Mr. Miza, who testified that because the students' cognitive abilities were low, they did not respond to the negative comments. However, Ms. Peeples opined in her testimony that the students "could sense" the negativity of respondent's comments, which did not create a proper environment for them. Respondent's above-described concession that her comments were improper because they were not effective in teaching and did not "look good to others" corroborated to an extent Ms. Peeples' testimony. Thus, in terms of any harm done to the students, it was only established that respondent's negative comments were sensed by the students and created a negative learning environment for the students at that time.

30. Respondent's negative comments described above violated the following policies in the following ways:

- a. The District's Code of Conduct with Students (ex. 14) was violated because respondent acted unprofessionally in her students' presence (no. 3).
- b. The District's Employee Code of Ethics (ex. 13) was violated because respondent did not set a good example for students (no. 1), create an environment of trust (no. 2), or maintain an appropriate, positive relationship with her students (no. 11).
- c. The District's Respectful Treatment of All Persons (ex. 15) policy was violated because respondent did not treat the students respectfully.
- d. CSTP, standard 2, was violated because respondent did not create and maintain an effective learning environment for the students.

e. The District's Discipline Foundation Policy: School-Wide Positive Behavior Intervention and Support Bulletin (ex. 18) was violated because respondent was not providing a "safe, respectful, and welcoming environment" to her students by making negative comments about them.

31. It was not established that the following policies were violated by respondent's negative comments about her students described above, either because there was insufficient witness testimony, or respondent's conduct does not fall within the definition of the misconduct described in the policies: the District's Multi-Tiered System of Behavior Support for Students with Disabilities Bulletin (ex. 17); and the District's Abolition of Corporal Punishment Bulletin in effect in December 2013 (ex. 11).

RESTRAINING A [REDACTED] AND E [REDACTED] IN CHAIRS (CHARGES 4-18)

32. Due to the severity of M [REDACTED]'s seizure disorder, her individualized education program (IEP) required her to use an adapted chair which had an attached seat-belt that could be buckled around her waist to keep her from falling to the ground and injuring herself when she had seizure. The adapted chair was added to M [REDACTED]'s IEP in a prior school year after she dropped from a seizure and injured herself by hitting her head. M [REDACTED] was only placed in the adapted chair when she needed to be seated while doing academic work at the class work table. According to school PT Chrissa Patterson, a child properly restrained in an adapted chair pursuant to an IEP still must be removed when she wants to get out of it.

33. As established by the persuasive testimony of PT Patterson, former principal Friedrich, District expert witness Laura Zeff, and some of the policies discussed in further detail below, by the beginning of the 2015/2016 school year the District had an express policy of only using an adapted chair to support the safety of the student in question; only using an adapted chair as intended in a student's IEP; only using an adapted chair after consulting with a school PT or occupational therapist (OT) for proper positioning; never adapting the chair without first consulting a school PT or OT; never using the chair as a way of restraint; and never adding a strap or belt to the adapted chair to restrain the student or restrict his or her movement. Staff were also advised to tell an administrator if a student was seen improperly restrained in a chair. (See also ex. 19.)

34. PT Patterson provided informal training on the above-described uses and prohibitions of adapted chairs to respondent and her aides at the beginning of the school year and a few times thereafter. She also provided them a form with the above-described instructions. (Ex. 19.)

35. Nonetheless, within the first few weeks of the school year, before Mr. Alanya was replaced by Mr. Miza, respondent placed A [REDACTED] and E [REDACTED] in the adapted chair and buckled them in with the attached seat-belt. Ms. Peebles witnessed respondent do this. Although Mr. Alanya never saw respondent place a student in a chair and restrain her in this manner, he did come into the classroom and see A [REDACTED] so restrained; he immediately removed her. After Mr. Miza replaced Mr. Alanya, he too observed respondent place

A [REDACTED] and E [REDACTED] in an adapted chair and restrain them by using the seat-belt. On a few other occasions, respondent placed A [REDACTED] and E [REDACTED] in a regular chair and restrained them by wrapping Velcro straps around them and the chair. Respondent's classroom aides estimated respondent so restrained A [REDACTED] and E [REDACTED] at least three to five times between the beginning of the school year through when respondent was removed from the classroom. The two students remained restrained for 10-60 minutes.

36. Respondent restrained A [REDACTED] and E [REDACTED] in this manner to physically restrict their movement. This was not proper, because no chair was to be used to physically restrain a student absent a safety concern. There was nothing in either student's IEP allowing the use of an adapted chair or other means of physical restraint. After seeing the girls restrained, the aides reminded respondent of PT Patterson's directions described above, but respondent either ignored them or explained that the students needed to be placed in the chair because they were misbehaving. All three of respondent's aides thought restraining the two students was a bad idea. In fact, before he was replaced by Mr. Miza, Mr. Alanya told PT Patterson about the situation. PT Patterson visited the classroom and told respondent that she could not restrain A [REDACTED] or E [REDACTED] because such a restraint was not included in their IEPs and was not required for safety reasons. Respondent continued to restrain the students after PT Patterson's visit. PT Patterson ultimately removed the seat-belt strap from the adapted chair and later, after being advised respondent was still using the chair as restraint, took the adapted chair out of the classroom.

37. Respondent restrained A [REDACTED] and E [REDACTED] in the chairs because of their behavior, including climbing on furniture, trying to elope from the classroom, or bothering other students. However, it was not established that the two students' behaviors rose to the level of a safety concern. In any event, no evidence was presented indicating any concern about the two students' behavior was placed in their IEPs or that respondent contacted Principal Friedrich for help with this situation. To the contrary, the aides had ways of deescalating the two students' problem behaviors. Respondent became increasingly frustrated with the students and did not use those tactics; it was easier for her to restrain them in the chairs. Moreover, Ms. Peeples and Mr. Miza persuasively testified much of the students' problem behaviors arose because respondent's classroom was chaotic, lacked structure, and the assignments were "random." Respondent previously was critiqued for shortcomings in supervising her students and creating an environment conducive to learning.

38. Respondent's motivation in restraining A [REDACTED] and E [REDACTED] in the chairs was punitive. This was amply established by the actions and testimony of the three classroom aides, who were troubled by seeing the two students so restrained. The aides' conclusions that respondent acted punitively was corroborated by the negative comments respondent made about the students discussed above; the fact the aides either told respondent the restraint was a bad idea, advised PT Patterson about the situation, or ultimately complained to Principal Friedrich; as well as the incident described in more detail below when A [REDACTED] knocked something over in the classroom and respondent stated, "Okay you're going in that chair now."

39. Based on the above and the evidence presented, it was established, as alleged, that during the period of August 16, 2015, to October 5, 2015, on several occasions, respondent strapped E [REDACTED] in an adapted chair to restrain her, for up to one hour at a time.

40. Based on the above and the evidence presented, it was established, as alleged, that during the period of August 16, 2015, to October 5, 2015, on several occasions, respondent strapped A [REDACTED] in an adapted chair to restrain her, for up to one hour at a time.

41. Based on the above and the evidence presented, it was established, as alleged, that during the period of August 16, 2015, to October 5, 2015, A [REDACTED] knocked something over, to which respondent stated, "Okay you're going in that chair now." Despite A [REDACTED]'s attempts to resist the restraint by dropping to the floor, squirming and yelling, respondent still restrained her in the adapted chair. A [REDACTED] wiggled in an attempt to free herself from the restraint and slid down the chair until the strap was below her neck, before she was removed from the chair.

42. A. It was not established that, on at least one occasion during the period between August 16, 2015, through October 5, 2015, respondent made A [REDACTED] and/or E [REDACTED] sit in a chair with their legs pinned against a cupboard as a means of punishment.

B. The allegations related to this finding arose as a result of Ms. Peeples' statement to the SSIT that respondent had done so. However, Director Kim's conference memorandum did not include this complaint, suggesting Ms. Peeples had not made this complaint to Principal Friedrich when she first approached her about respondent. Neither of the other two aides in respondent's classroom, Mr. Alanya or Mr. Miza, mentioned this to either Principal Friedrich or the SSIT. While respondent told the SSIT that the girls sometimes voluntarily sat in chairs near a wall or cupboard, she ultimately denied ever "pinning" them in a chair against a cupboard in order to punish them. Under these circumstances, there was insufficient corroboration of Ms. Peeples' complaint to establish this allegation.

43. Respondent testified during the hearing that restraining A [REDACTED] and E [REDACTED] as described above was "wrong to do," a "very bad choice," she "would not do it again," and that doing so violated various District policies. Respondent nonetheless tried to minimize or mitigate her misconduct for various reasons, none of which were persuasive, as follows:

a. When respondent was questioned about the incidents by the SSIT, she essentially denied ever restraining the two students; her response to Director Kim's conference memorandum on this point was evasive, but she did not admit ever restraining the students. The fact she initially denied restraining the students, only to later admit she had, calls into question respondent's veracity on this point.

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b. Respondent testified she was not acting punitively but rather trying to protect the safety of all the students in her classroom by keeping A [REDACTED] and E [REDACTED] from hurting themselves or others. She described a number of problem behaviors engaged in by the two students. However, respondent never advised the SSIT or Director Kim that she had restrained the students for their own safety, a discrepancy that calls into question this explanation. As a veteran special education teacher, respondent knew there were many ways of dealing with problem behaviors before resorting to something as drastic as physical restraint. As discussed above, the classroom aides did not depict the two students' behavior as severe enough to warrant restraint, and they had effective ways of dealing with the students' behaviors in the past. Finally, former principal Friedrich persuasively testified the students did not pose major behavior problems; teachers who taught them prior to respondent did not experience severe behavior problems from them; and respondent should have been able to control them with so many adults present in her classroom.

c. Respondent testified she had little to no training on how to use adapted chairs prior to coming to Mosk, including nobody advising her that a student could not be restrained in a chair if that was not part of her IEP. She also testified PT Patterson visited her classroom four to five times, but intimated all PT Patterson told her was that the "District was moving away from using adapted chairs." Respondent testified PT Patterson did not give her a copy of the instructional form on adapted chair use and did not provide her with much training. Respondent also testified that on her last classroom visit, PT Patterson actually saw A [REDACTED] restrained in a chair and told her "whatever you need to do to keep your classroom secure is ok with me." Respondent's testimony in this regard is given no credit. Based on the persuasive testimony of PT Patterson, and corroborated by all three of respondent's classroom aides, there is no way PT Patterson would have made the comment attributed to her, or not immediately objected if she saw A [REDACTED] restrained in a chair. The combined testimony of all four of those witnesses also established that respondent was present when PT Patterson explained how to use the adapted chair as well as its prohibited uses. As a veteran special education teacher for the District, respondent knew or should have known that using restraints as she did was improper, especially when all of her aides immediately recognized the problem and repeatedly questioned her about using restraints.

44. A [REDACTED] and E [REDACTED] did not like being restrained in the chairs. A [REDACTED] sometimes expressed her displeasure by yelling and screaming. E [REDACTED] was more communicative and would say things like, "get me out." E [REDACTED] sometimes would cry when restrained. Both students sometimes also wiggled to get free of the restraints. The restraints were loose, allowing the students to wiggle and slide down the chair under the restraints. Sometimes the strap would get close to their neck, as discussed above regarding the incident involving A [REDACTED]. Mr. Alanya also described a time when A [REDACTED] had wiggled so much he saw her virtually hanging over the side of the chair. But the students were not removed from the restraints after expressing they wanted out, contrary to the policy outlined by PT Patterson. While the students clearly did not like being restrained in the chairs, it was not established that either A [REDACTED] or E [REDACTED] were in pain when so restrained or exhibited symptoms of pain. The screaming and crying was related to being restrained in place, not feeling pain.

45. On the other hand, M█ did not express the same types of complaints when put in the adapted chair. As discussed above, she was only placed in it for a limited time and mostly did not object to being in it. She was usually let out of the chair when she complained about being in it, unless she had not yet completed the assignment at the work table that prompted her placement in the chair. As discussed above, M█'s placement in the chair was required by her IEP due to legitimate concern for her safety. During the hearing, respondent seemed to analogize placement of restraints on A█████ and E█████ to using the adapted chair for M█. For the reasons explained herein, this was a faulty analogy.

46. Respondent's use of restraints with A█████ and E█████ described above violated the following policies in the following ways:

- a. The District's Code of Conduct with Students (ex. 14) was violated because respondent acted unprofessionally (no. 3).
- b. The District's Employee Code of Ethics (ex. 13) was violated because respondent did not set a good example for students (no. 1), create an environment of trust (no. 2), or maintain an appropriate, positive relationship with her students (no. 11).
- c. The District's Respectful Treatment of All Persons (ex. 15) policy was violated because respondent did not treat the two students respectfully.
- d. CSTP, standard 2, was violated because respondent did not create and maintain an effective learning environment for the students; and standard 4 was violated because respondent did not provide the students with appropriate learning experiences when restrained.
- e. The District's Discipline Foundation Policy: School-Wide Positive Behavior Intervention and Support Bulletin (ex. 18) was violated because respondent was not providing a safe, respectful, and welcoming environment to her students by restraining them as punishment; and she did not respond to student misconduct by consequences paired with meaningful instruction and guidance.
- f. The District's Multi-Tiered System of Behavior Support for Students with Disabilities Bulletin (ex. 17) was violated because respondent did not appropriately respond to the two students' behaviors with multi-tier levels of behavioral support before resorting to the drastic intervention of physical restraint.

47. It was not established that the District's Abolition of Corporal Punishment Bulletin in effect in December 2013 (ex. 11) was violated by respondent restraining the two students in chairs. This policy specifically defines "corporal punishment" as the "willful infliction of, or willfully causing the infliction of, physical pain on a pupil." (Ex. 11, p. 1.) The policy clarifies that corporal punishment "refers to the intentional application of physical pain as a method of changing behavior." Although A█████ and E█████ were not

comfortable while being restrained in the chairs, and clearly wanted out of them, it was not established that either was feeling or exhibited symptoms of physical pain while restrained.

Other Relevant Facts

48. Respondent submitted letters of recommendation from the principals of Hart Street Elementary School (ex. 116) and Lokrantz (ex. 117), written in 2014 and 2015 respectively. Respondent testified she requested the letters after learning she was being reassigned. The letters are generally favorable to respondent; they essentially recommend her for employment when respondent looked for her next school site.

49. Character reference letters and witnesses were presented in favor of respondent's general character and ability to teach special education students. That evidence indicates, in a general way, that respondent has some support from colleagues and parents of former students. Some other observations are worth noting about this evidence:

a. The only classroom aide who testified during the hearing in favor of respondent was Mariela Christian, who worked with respondent at Hart Street Elementary School during the 2012/2013 and 2013/2014 school years. Ms. Christian opined respondent is a good teacher who did not engage in any of the actions involved in this case.

b. Respondent's other character witnesses were a friend, two parents of former students, and a fellow teacher at the District who was recently dismissed by the Board. Those witnesses also have a favorable view of respondent's teaching ability. Nonetheless, the probative value of those witnesses' testimony was undercut because they either did not observe respondent teach in the classroom, did so in years that substantially pre-dated the events in question at Mosk (and less so at NMS), and/or admitted in testimony that their opinions of respondent would change if the charges against her were proven.

c. The many character reference letters were admitted only as administrative hearsay. The letters can only be used to explain or supplement the above-described character witness testimony. (Gov. Code, § 11513, subd. (d).)

50. Respondent was not disciplined as a result of the incident with R█████ G. AP Romey did not explain in her testimony why respondent was not disciplined, which is perplexing given that AP Romey had a more extreme understanding of the incident than was proven and she testified that respondent essentially did not deny Ms. Harris's complaint during the office conference.

51. The only child abuse report against respondent was by Principal Friedrich after she received Ms. Peeples' complaint. Given the findings above, the lack of reporting is surprising, especially considering the District provides annual child abuse report training to all District staff. This lack of reporting is partially explained by the following facts: there were no visible signs of injury to any of the involved students; the personnel in question were not familiar with respondent and were giving her the benefit of the doubt; some of the

involved staff made complaints to superiors (e.g., AP Romey, PT Patterson or Principal Friedrich) and believed appropriate action would be taken; or respondent's classroom aides were reluctant to submit a report about a superior with whom they still worked.

52. The fact that the one child abuse report was not investigated by the LAPD does not exonerate respondent. The LAPD's reasoning in declining to investigate the report was not provided. There are a myriad of possible reasons for the LAPD's declination, including Director Kim's uncontested testimony that the LAPD generally does not investigate such complaints in the absence of visible signs of physical injury.

53. No evidence suggests the parent of any student involved in this matter complained to any person or entity about respondent or the events in question. But this fact is substantially tempered by the lack of sufficient evidence establishing any of those parents were advised of the particular events in question.

54. Respondent attempted to demonstrate remorse for her conduct by testifying, as described above, that her restraint of A [REDACTED] and E [REDACTED] was wrong and the negative comments made about her students were inappropriate. However, respondent was quick to point out that she only restrained the students for their protection, and that she did not act punitively against R [REDACTED] or in making the negative comments. Those denials were not persuasive, as explained above. Under these circumstances, respondent did not demonstrate much remorse, if any.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving cause for discipline in this matter 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 that "the evidence on [the District's] 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.)

Egregious Misconduct Generally

2. Complainant alleges respondent should be terminated for "egregious misconduct" pursuant to Education Code section 44932, subdivision (a)(1),³ which states in pertinent part:

- (a) A permanent employee shall not be dismissed except for one or more of the following causes:

³ Further unspecified statutory references are to the Education Code.

(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.

3. As shown above, two Education Code sections are used to partially define “egregious misconduct.” But, they do so by themselves referring to other statutory schemes. Section 44010 refers to many sections of the Penal Code that pertain to sex offenses. Section 44011 refers generally to controlled substance offenses, listing various sections of the Health and Safety Code which proscribe the possession, use, or sale of controlled substances. None of the charges in this case refer to sex offenses or controlled substances.

4. The remaining statutes used to define egregious misconduct are Penal Code sections 11165.2 through 11165.6, which define various forms of child abuse. These are the provisions relied upon by the District in this case.

Egregious Misconduct as Defined by Penal Code sections 11165.2 through 11165.6

5. Sections 11165.2 through 11165.6 are part of the Child Abuse and Neglect Reporting Act (CANRA) contained in part 4 of the Penal Code. The stated purpose of the CANRA is “to protect children from abuse and neglect. . . .” (Pen. Code, § 11164, subd. (b).) Pursuant to Penal Code section 11165.9, those persons deemed to be “mandatory reporters” are required to report “suspected child abuse or neglect,” including that conduct defined in sections 11165.2 through 11165.6. Such reports are required “whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.” (Pen. Code, § 11166.)

6. The only provision of the CANRA cited in the Accusation is Penal Code section 11165.6, which in turn defines “child abuse or neglect” by referencing other provisions of the CANRA pertinent to this case as follows:

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, . . . 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. . . .

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7. Penal Code section 11165.2 provides a definition for child “neglect” as follows:

As used in this article, “neglect” means the negligent treatment or the maltreatment of a child by a person responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s health or welfare. The term includes both acts and omissions on the part of the responsible person.

8. Penal Code section 11165.3 provides a definition for “the willful harming or endangering of a child” as follows:

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.⁴

9. A. Penal Code section 11165.4 defines the term “unlawful corporal punishment or injury” as follows:

As used in this article, “unlawful corporal punishment or injury” means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition. It does not include an amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to person or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, as authorized by Section 49001 of the Education Code. It also does not include the exercise of the degree of physical control authorized by Section 44807 of the Education Code. . . .

⁴ In closing argument, the District cited the federal case of *Garcia ex rel. Marin v. Clovis Unified School Dist.* (E.D. Cal. 2009) 627 F.Supp.2d 1187, 1192, for the proposition that “even leering or staring” constitutes child abuse under Penal Code section 11165.3. However, aside from the fact that this federal district court case is not binding precedent, the underlying facts alleged in that matter were more extreme than simply “leering and staring” and involved much more overt sexual acts against a female middle school student by the school personnel in question. The case therefore is not analogous or persuasive.

B. Corporal punishment is not specifically defined in this statute or elsewhere in the CANRA. However, the term is defined in Education Code section 49001, subdivision (a), to mean “the willful infliction of, or willfully causing the infliction of, physical pain on a pupil.” Education Code section 49001 was enacted in 1986. Penal Code section 11165.4, was enacted one year later in 1987 and, as seen above, refers to section 49001. It is assumed the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rule. (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 21.) Based on this general principle of statutory construction, it is assumed that the definition of corporal punishment contained in Education Code section 49001 is similarly used in Penal Code section 11165.4, including “the infliction of . . . physical pain.” Interestingly, the same definition is used in the District’s corporal punishment bulletin in effect in 2013.

C. The parties have different interpretations of Penal Code section 11165.4. The District argues one meets the definition of the statute if she either willfully inflicts cruel or inhuman corporal punishment or willfully inflicts injury resulting in a traumatic condition. Respondent argues all of those conditions must be present, meaning one must willfully engage in cruel or inhuman corporal punishment or injury that also leads to a traumatic condition. While Penal Code section 11165.4 is far from clear, cases interpreting the exact same language contained in Penal Code section 273d have consistently held that liability for cruel or inhuman corporal punishment or injury on a child also requires the infliction of a traumatic condition. (*People v. Burns* (1948) 88 Cal.App.2d 867, 873.) Stated another way, “[n]o conviction under section 273d may be had without evidence that the child has suffered a traumatic condition.” (*People v. Stewart* (1961) 188 Cal.App.2d 88, 91.) More recently, it has been held that liability under Penal Code section 273d “requires the defendant to inflict a cruel or inhuman corporal punishment or injury upon a child and the actual result is an injury resulting in a traumatic condition.” (*People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1160.) For purposes of Penal Code section 273d, “traumatic condition has been defined as a wound or other abnormal bodily condition resulting from the application of some external force.” (*People v. Stewart, supra*, 188 Cal.App.2d at p. 91.)

D. The Legislature is presumed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light of those decisions. (*People v. Giordano* (2007) 42 Cal. 4th 644.) Thus, when legislation has been judicially construed and a subsequent statute, on the same or an analogous subject, is framed in identical or substantially similar language, courts ordinarily presume that the Legislature intended the language used in the later statute receive a like interpretation. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal. 4th 780.) Since Penal Code section 11165.4 was enacted many years after the first two appellate cases cited above, which premise liability for corporal punishment or injury on the infliction of a traumatic condition, it is presumed the Legislature intended the same requirement when placing in section 11165.4 the same wording contained in Penal Code section 273d.

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E. The definitions of “willful harming or injuring of a child” and “unlawful corporal punishment or injury” incorporate the parental privilege to impose reasonable physical discipline. (*Gonzalez v. Santa Clara County Department of Social Services* (2014) 223 Cal.App.4th 72, review denied, on subsequent appeal.) Successful assertion of the privilege requires both a reasonable occasion for discipline and a punitive measure that is reasonable in kind and degree. (*People v. Clark* (2011) 201 Cal.App.4th 235, 250.) Courts recognize that the parental privilege also extends to teachers, who are viewed as standing “*in loco parentis*” for purposes of disciplining pupils. (*Gonzalez v. Santa Clara County Department of Social Services, supra*, 223 Cal.App.4th at p. 88.)

10. A. In this case, three distinct sets of misconduct by respondent were proven: (a) she punitively decided to delay the process of changing R [REDACTED]’s soiled clothing to teach her a lesson about soiling herself to avoid undesirable class work; (b) she made several negative comments about and to her students; and (c) she physically restrained A [REDACTED] and E [REDACTED] in chairs as punishment. To determine whether respondent’s misconduct was egregious, Penal Code sections 11165.2 through 11165.4 are analyzed separately, as follows:

B. Respondent committed child neglect as defined by Penal Code section 11165.2. By forcing R [REDACTED] to remain in soiled clothing for a substantial period of time, respondent subjected R [REDACTED] to the threat of getting a rash. By using straps to physically restrain A [REDACTED] and E [REDACTED] in chairs, respondent subjected those students to physical harm by either falling over the side of the chair and onto the floor or by choking when they attempted to slide under the straps. It was not established, however, that respondent’s negative comments constituted child neglect, in that it was not proven the comments harmed or threatened to harm the students. (Factual Findings 10-47.)

C. Respondent also willfully harmed and/or endangered children as defined by Penal Code section 11165.3. By forcing R [REDACTED] to remain in soiled clothing for a substantial period of time, respondent caused or permitted R [REDACTED] to suffer the indignity of sitting in her own waste in a classroom full of other adults and fellow students; R [REDACTED]’s mental suffering was demonstrated by Ms. Harris’s observation that R [REDACTED] seemed “a little upset,” was “shaking,” and perhaps crying “a little.” As explained above, R [REDACTED]’s health was also endangered by the threat of rash caused by sitting in her own waste for several minutes. By using straps to physically restrain A [REDACTED] and E [REDACTED] in chairs, respondent subjected those students to mental suffering, in that the girls did not like being restrained and demonstrably objected to it. As explained above, A [REDACTED] and E [REDACTED]’s health was also endangered by being so restrained, either from falling over the side of the chair and onto the floor or by choking when they attempted to slide under the straps. It was not established, however, that respondent’s negative comments constituted willful harm or endangerment, in that it was not proven the comments harmed or threatened to harm the students. (Factual Findings 10-47.)

D. It was not established that respondent committed unlawful corporal punishment or injury of a child as defined by Penal Code section 11165.4. As discussed in detail above, corporal punishment for purposes of this statute requires the infliction of

physical pain on a child. Although R [REDACTED], A [REDACTED], and E [REDACTED] were uncomfortable and suffered mentally, it was not established that any of them encountered physical pain by respondent's acts or omissions. The same is true concerning the negative comments respondent made. The fact that respondent's acts did not violate the District's corporal punishment bulletin is consistent with this conclusion. In addition, it was not established that respondent's conduct caused an injury resulting in a traumatic condition, i.e., a wound or other abnormal bodily condition resulting from the application of some external force. It is therefore unnecessary to consider whether the parental reasonable discipline privilege (extended to teachers by the loco parentis doctrine) is applicable here, though it is worth noting that respondent has at all times denied using discipline against any of the students. (Factual Findings 10-47.)

11. Respondent engaged in conduct in 2009 and 2015 that constituted child neglect pursuant to Penal Code section 11165.2 and willful harming or endangering of a child pursuant to Penal Code section 11165.3. It therefore was established that she committed egregious misconduct pursuant to Education Code section 44932, subdivision (a)(1). (Factual Findings 1-47.)

Analysis of the Morrison Factors

12. Curiously, both parties argue an analysis of the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 is unnecessary in this egregious misconduct case. However, the definition of egregious misconduct includes acts that are deemed to be immoral; the *Morrison* case expressly requires analysis of the various factors specified in all teacher discipline cases involving alleged immoral conduct. (*Id.* at pp. 227-230.) Therefore, the factors suggested by *Morrison* are compared to the facts established in this case. Not all *Morrison* factors need be present for the *Morrison* test to be satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369.) 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 Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.) In this case, the *Morrison* factors demonstrate respondent is unfit to teach as follows (Factual Findings 1-54):

a. The likelihood the conduct may adversely affect students or fellow teachers. It is likely respondent's misconduct adversely affected [REDACTED] in 2009 and two special education students in 2015. The individual acts of misconduct caused the students to feel discomfort; respondent's collective acts in 2015, including her negative comments about the students, created a negative classroom environment not conducive to student learning.

b. The degree of such adversity. There was a minimal level of adversity created in 2009 by respondent's single act of misconduct, but more moderate adversity created by her more pervasive, collective acts in 2015.

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c. The proximity or remoteness in time of the conduct. The events in 2009 are remote, but the events in 2015 are proximate. However, combining the misconduct with the patterns of related poor performance noted in respondent's various evaluations shows a more pervasive pattern of problematic behavior spanning from 2009 through 2015.

d. The type of teaching certificate held by the party involved. This factor has significant application. Respondent's special education certificate allows her to teach the District's most vulnerable students, many of whom were not able to articulate their discomfort or objection to respondent's treatment of them. There is a sense from this case that respondent's patience with these at times trying students gradually eroded to the point where she became frustrated and acted punitively in response.

e. The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Respondent presented a number of mitigating facts, including that none of the students suffered from physical pain or sustained a traumatic injury; none of the involved parents made a complaint about respondent; she was not disciplined for her misconduct in 2009; only one child abuse report was made among the many mandatory reporters who observed respondent's actions; and no criminal investigation or prosecution was undertaken. However, there are a number of aggravating factors that essentially off-set the mitigation. For example, respondent committed multiple acts and varieties of misconduct over a span of years demonstrated a concerning pattern. It is not clear that any of the involved parents knew of the events in question. Respondent was not completely candid when interviewed by the District during its investigation or when testifying in this matter. Ultimately, respondent did not demonstrate much remorse or contrition, if any.

f. The praiseworthiness or blameworthiness of the motives resulting in the conduct. There is only blame for the way respondent acted.

g. The likelihood of recurrence of the questioned conduct. Respondent has failed to accept meaningful responsibility for her misconduct and demonstrated very little remorse, if any. She has not presented any evidence indicating regenerative steps or measures to change her behavior, such as anger management or continuing education on topics such as classroom teaching, supervision, or student behavior management. The totality of the evidence indicates that if respondent is returned to the classroom, she is likely to engage in the same or similar behavior.

h. The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. This is not foreseen.

Disposition

13. A. “[An ALJ] has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction.” (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343-344.) Even where cause for dismissal has been established, an ALJ still has broad discretion to determine whether such

discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

B. The District argues, without any supporting legal authority, that once egregious misconduct is established, there is no discretion to do anything other than affirm termination of the involved teacher. The District's argument is not persuasive. First, there is nothing in the Education Code supporting such an argument. Second, when pushed to the extreme, this argument crumbles, especially considering that no limitations period applies to egregious misconduct allegations. Consider a hypothetical scenario in which a teacher, with no other record of discipline, commits one substance abuse violation described in Education Code section 44011 (e.g., possession of a controlled substance), off-campus and unrelated to school activity, more than ten years ago, and has been sober ever since. Under the District's argument, that teacher is subject to termination without any discretion, even though the above-described *Morrison* factors may warrant a different disposition.

C. In this case, respondent engaged in egregious misconduct with three students. Her misconduct is especially concerning because it involved special education students who were, and are, significantly disabled. Respondent's egregious misconduct was punitive and cruel. While respondent's negative comments about the students were not established to be egregious misconduct, they were also cruel and contributed to a negative learning environment for her students. Those comments also provide a glimpse into respondent's negative mind-set about the special students she was entrusted to instruct. While the acts of misconduct were separated by the span of eight years, that gap was bridged by a consistent pattern of critiques from respondent's supervisors showing her deficiencies in getting along with her aides, properly supervising her students, and providing an environment conducive to learning. Those are exactly the shortcomings that created the circumstances during which respondent engaged in her misconduct. It is apparent that over time, respondent has lost her patience working with special education students and lost focus of her special mission in that regard. This is perplexing given that, in 2015, respondent only had four students in her classroom, but one or two other adults to assist her. Respondent's unconvincing denials and half-hearted apologies demonstrate she has not learned much of a lesson. The *Morrison* factors indicate respondent is unfit to teach in her current condition. Under the circumstances, terminating her employment with the District is warranted. (Factual Findings 1-54; Legal Conclusions 1-12.)

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ORDER

Respondent Caterina Lipera is terminated from employment with the Los Angeles Unified School District.

DATED: February 6, 2018

DocuSigned by:

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings