

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

In the Matter of the Dismissal of:

MATTHEW SANCHEZ (EN 699255),
A Permanent Certificated Employee,

Respondent.

OAH No. 2015030317

DECISION

On August 24, 2016, March 14-17, 2016, March 29-30, 2016, and May 3-4, 2016, Michael A. Scarlett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, and Isela Macias and Anthony Botts, Commission Members, heard this matter in Los Angeles, California on behalf of the Commission on Professional Competence (Commission).¹

Ellen C. Wu, Attorney at Law, Dannis Woliver Kelly, and Susan Hyman, Assistant General Counsel, Los Angeles Unified School District (LAUSD or District) represented Justo H. Avila, Chief Human Resources Officer (complainant), LAUSD.

Richard J. Schwab, Attorney at Law, Trygstad, Schwab & Trygstad, represented Matthew Sanchez (respondent), a permanent certificated employee of the District, who was present throughout the hearing.

¹ On August 24, 2015, the hearing convened before ALJ Scarlett, Karen Schuett, and Gregory Lane (the previous Commission Members) and testimony and evidence was taken. However, an ex parte communication between respondent's attorney Richard Schwab and Commissioner Gregory Lane resulted in the disqualification for cause of Commissioner Lane. Consequently, the Commission panel was dismissed and the hearing continued pending designation of new panel members. On October 22, 2015, the parties stipulated that ALJ Scarlett would remain as the assigned ALJ on the new Commission panel. The parties also stipulated that the testimony and evidence taken on August 24, 2015, could be considered by the new Commission panel including Commissioners Macias and Botts. The parties further agreed that all prior motion rulings by ALJ Scarlett would remain binding and in effect.

Oral and documentary evidence was received and the record was closed and submitted for decision on May 4, 2016. The Commission finds as follows:

FACTUAL FINDINGS

Jurisdiction and Allegations

1. On January 23, 2015, complainant issued a Statement of Charges against respondent. On February 26, 2015, respondent filed his Request for Hearing and Notice of Defense. On March 13, 2015, complainant made and filed an Accusation against respondent in his official capacity. On May, 2, 2016, complainant filed an Amended Accusation intended to conform the charges in the Accusation to the evidence admitted at hearing.² Complainant's motion to amend the Accusation was granted, without objection by respondent. All jurisdictional requirements were met to proceed to hearing.

2. On September 26, 2014, the District issued to respondent a Notice of Unsatisfactory Service or Acts of Certificated Employee specifying allegations and charges that ultimately constituted the January 23, 2015, Statement of Charges. On September 26, 2014, the District also issued respondent a Notice of Suspension for a period of 15 days without pay. The Notice of Suspension indicated that the District was providing notice pursuant to Education Code section 44938.³

3. The District alleges that respondent is subject to dismissal from his employment as a permanent certificated employee of the District for immoral conduct, in violation of sections 44932, subdivision (a)(1) and 44939; unprofessional conduct, in violation of section 44932, subdivision (a)(2); unsatisfactory performance, in violation of section 44932, subdivision (a)(5); evident unfitness for service, in violation of section 44932, subdivision (a)(6); persistent violation or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the Governing Board of the school district, in violation of section 44932, subdivision (a)(8); and willful refusal to perform regular assignments without reasonable cause, in violation of section 44939.

4. The District's Statement of Charges and Amended Accusation allege that during the 2012-2013 school year respondent engaged in inappropriate conduct with several of his second grade female students. The misconduct allegedly included allowing students to sit on respondent's lap, hugging students, rubbing and touching students' backs, shoulders,

² Complainant filed a "Corrected Amended Accusation" on May 5, 2016, to specifically delineate the deletions and amendments in the Amended Accusation.

³ All further statutory references shall be to the Education Code unless otherwise specified.

waists, sides, stomachs, thighs and legs, and commenting inappropriately about students' appearances and bodies.

Background

5. Respondent is a second grade teacher at West Vernon Elementary School (Vernon). He has worked with LAUSD since approximately October 1997, all 19 years at Vernon. Respondent received his Bachelor of Science degree in Behavioral Science in 1997 and has a Clear Clad Multi-Subject teaching credential. Respondent is married, 18 years, and has an eight-year old son who was in second grade as of the date of this hearing.

6. In late April or early May 2013, Maria Alvarez, the mother of G [REDACTED] H., one of respondent's second grade students, noticed a change in her daughter's behavior and became concerned. G [REDACTED] H., who was then seven years old, told Ms. Alvarez that respondent rubbed her back and hugged her in class which made G [REDACTED] H. feel very uncomfortable. On May 6, 2013, Ms. Alvarez went to Principal Lupe Buenrostro's office at Vernon and told Ms. Buenrostro that her daughter was afraid to come to school because of respondent's conduct. G [REDACTED] H. told Ms. Buenrostro that respondent rubbed her back and asked her for hugs. Ms. Buenrostro initiated an investigation into the student's complaint which led to the District's Accusation/Amended Accusation against respondent.

7. On May 7, 2013, respondent was removed from his second grade classroom and temporarily reassigned to the LAUSD Education Service Center – East, pending an investigation into the allegations by G [REDACTED] H. and Ms. Alvarez. On May 7, 2013, Ms. Buenrostro interviewed several students from respondent's second grade class. On May 8, 2013, Ms. Buenrostro interviewed W [REDACTED] N., one of respondent's second grade students, and her mother. W [REDACTED] N.'s mother stated that the student was afraid to return to respondent's classroom because G [REDACTED] H. had told W [REDACTED] N. that respondent rubbed her back. Wendy N. also told her mother that respondent rubbed her and in Spanish told W [REDACTED] N. that she was very slender and respondent liked her slender. On May 14, 2013, a conference meeting was convened with respondent to discuss allegations made by G [REDACTED] H. and W [REDACTED] N., both students in his second grade class. Respondent denied the allegations, and after approximately one week, the District returned him to his second grade classroom to complete the 2012-2013 school year. G [REDACTED] H. was removed from respondent's second grade class and placed in another class to finish the school year. W [REDACTED] N. was not removed from respondent's because Ms. Buenrostro informed the mother that W [REDACTED] N. could not be reassigned to the same classroom as G [REDACTED] H., and the mother decided to leave W [REDACTED] N. in respondent's class. Ms. Buenrostro informed respondent that the District would leave his case open and continue the investigation by interviewing respondent's present and former second grade students.

8. Respondent began the 2013-2014 school year in his classroom. However, based on information obtained from subsequent interviews of respondent's students during the 2013-2014 school year, respondent was again removed from the classroom on October 10, 2013. Respondent was again reassigned at the LAUSD Education Service Center until

September 26, 2014, at which time he was provided a Notice of Unsatisfactory Service or Act, and Notice of Suspension. On February 11, 2015, after the District had issued its Statement of Charges against respondent, the LAUSD School Board notified respondent of its intent to dismiss and to place respondent on immediate unpaid suspension.

9. At all times relevant to the Amended Accusation and Statement of Charges the following District policies or guidelines were in effect: the LAUSD Code of Conduct with Students (CCS); the LAUSD Child Abuse and Neglect Reporting Requirements Policy; the LAUSD Employee Code of Ethics (ECE); the LAUSD Sexual Harassment Policy; and the Board Resolution reaffirming the District's policy requiring the "Respectful Treatment of All Persons." (Exhs. 21-25.) Respondent is familiar with and received annual training on these policies and guidelines, some years receiving bi-annual training on some of the policies.

Charges No. 1-7 (G [REDACTED] H. Allegations)

10. Charges No. 1, 3, 4, 5, and 7 allege that respondent called G [REDACTED] H. up to his desk, allowed her to sit on his lap, and rubbed her back in a circular motion, while his desk was surrounded by easels and/or charts to obstruct other students' view of his desk. The District also alleges that respondent asked G [REDACTED] H. for hugs. The evidence established that respondent committed these acts.

11. G [REDACTED] H., K [REDACTED] P., K [REDACTED] E., and K [REDACTED] M., all credibly testified that respondent set up two charts or easels around his desk, one in front and one on the side of his desk, in a manner that effectively blocked respondent's desk from the view of the students for extended periods of time during classroom instruction. In January 2014, Tamica Cruze, the LAUSD Student Safety Investigation Team (SSIT) investigator, interviewed several students in connection with the District's investigation into respondent's conduct. G [REDACTED] H., K [REDACTED] M., K [REDACTED] P. and H [REDACTED] G. all told Ms. Cruze that respondent positioned charts and/or easels around his desks in a manner that blocked the students' view of respondent's desk when he was seated at his desk. Maria Alvarez, G [REDACTED] H.'s mother, stated that she observed two charts or easels position in this manner around respondent's desk on one occasion during parent/teacher night.

12. Respondent testified that he never placed the charts or easels around his desk in a manner intended to block the students' view of his desk. He stated that charts or easels were never placed in front of his desk like many of the students described. But he admitted that he positioned a chart or easel on the side of his desk facing the kidney table when he was instructing students seated at that table. However, respondent told Ms. Cruze that he did not recall positioning the charts in front of and on the side of his desk as described by the students, but he admitted it was possible the charts were position that way.

13. The evidence established that two charts and/or easels were placed in a manner around respondent's desk that effectively blocked the students' view of respondent while he was seated at his desk for extended periods of time during classroom instruction.

14. On May 6, 2013, G [REDACTED] H. told Ms. Buenrostro that respondent rubbed her back and asked for hugs. G [REDACTED] H. consistently asserted these allegations throughout the District's investigation and at hearing. At hearing, G [REDACTED] H. could not recall when respondent rubbed her back during the school year, the evidence established that these incidents occurred during the second semester of the 2012-2013 school year. G [REDACTED] H. testified that respondent called her up to his desk and patted his leg to indicate that respondent wanted G [REDACTED] H. to sit on his lap. She sat on respondent's lap on the corner of his knee. The charts and/or easels were around respondent's desk when G [REDACTED] H. sat on his lap. Respondent rubbed G [REDACTED] H.'s back in a circular motion while she sat on his lap. G [REDACTED] H. testified that this occurred on more than one occasion, but less than five times. She stated that respondent rubbed her back most of the time on top of her uniform, but that sometimes he rubbed her back under her clothes, but not making skin-to-skin contact. In a statement to Ms. Buenrostro on May 20, 2013, W [REDACTED] N. corroborated G [REDACTED] H.'s allegation that respondent rubbed G [REDACTED] H.'s back on multiple occasions. K [REDACTED] M. also told Ms. Cruze during the SSIT interview that she observed respondent rubbing G [REDACTED] H.'s back in circular motion over the student's clothes at least two times per day.

15. G [REDACTED] H. stated that she sat on respondent's lap because she did not know it was wrong. She stated that respondent's rubbing her back made her feel very uncomfortable. When she realized it was wrong for respondent to ask her to sit his lap and rub her back, she became mad. G [REDACTED] H. did not want to go to school because of respondent's conduct. She told her mother she was not feeling well to avoid going to school. G [REDACTED] H. became scared to go to respondent's class because of respondent's conduct. On at least one occasion, respondent asked G [REDACTED] H. to sit on his lap, she told him to scoot over so she could sit on the chair next to him, and did not sit on his lap.

16. In January 2014, G [REDACTED] H. initially told Ms. Cruze that she did not sit on respondent's lap when he requested her to do so, instead stating that she sat next to him on the edge of the chair. She also told Ms. Cruze that respondent touched her skin when he rubbed her back under her clothes, but she denied skin-to-skin contact to her mother and in her testimony hearing. G [REDACTED] H. was clearly uncomfortable testifying about respondent's conduct. Although her prior statements regarding sitting on respondent's lap and him rubbing her back, were not exactly consistent, this is not unusual given the student's age. G [REDACTED] H. credibly testified that she sat on respondent's lap on multiple occasions at his request, that respondent's desk was blocked from the view of other students by two easels and/or charts, and that respondent inappropriately rubbed her back which made her uncomfortable.

17. Multiple students corroborated G [REDACTED] H.'s allegation that she sat on respondent's lap. K [REDACTED] P. and S [REDACTED] C. testified that they saw G [REDACTED] H. sitting on respondent's lap in class, either at respondent's desk or at the computer table. Both of these witnesses' testimony was consistent with statements they made to SSIT investigator Ms. Cruze. M [REDACTED] M. and M [REDACTED] O. testified that they observed G [REDACTED] H. sitting on respondent's lap in the classroom. K [REDACTED] E. testified that she and another student, A [REDACTED]

G., sat on respondent's lap on at least occasion. Several other students, H [REDACTED] G., J [REDACTED] J., W [REDACTED] N., and T [REDACTED] G., who did not testify at hearing, gave statements to Ms. Cruze that they witnessed students, including G [REDACTED] H., sitting in respondent's lap in the classroom.

18. Respondent also hugged G [REDACTED] H. on multiple occasions. Although G [REDACTED] H. did not testify that respondent hugged her, G [REDACTED] H. told Ms. Cruze that respondent hugged her in the classroom on at least one occasion. G [REDACTED] H. also told Ms. Cruze that she observe respondent hugging several students in the classroom, including T [REDACTED] G. Y [REDACTED] R., A [REDACTED] G., M [REDACTED] M., and K [REDACTED] M. Multiple students observed respondent hugging G [REDACTED] H. on more than one occasion. K [REDACTED] P. testified that respondent hugged G [REDACTED] H. at the computer table and pick her up sit her down on respondent's leg on multiple occasions. K [REDACTED] M. testified that respondent hugged female students in the classroom, including G [REDACTED] H., on multiple occasions, although she denied respondent ever hugged her. T [REDACTED] G. told Ms. Cruze that she, G [REDACTED] H., W [REDACTED] N., and K [REDACTED] M. gave respondent group hugs in the classroom. T [REDACTED] G. stated that respondent told students that he was feeling sad and would call students to his desk to give him a "group" hug. She estimated that this occurred about two times per week.

19. Respondent denied that he ever requested G [REDACTED] H. or any other student to sit on his lap during the 2012-2013 school year. He stated that he never allowed G [REDACTED] H., or any other student, to sit on his lap at his desk with charts or easels around his desk, or to sit on his lap at the computer table. Respondent categorically denied this allegation, although multiple students credibly testified that respondent allowed G [REDACTED] H. to sit on his lap. He also denied that he rubbed G [REDACTED] H.'s back or that he requested or received hugs from G [REDACTED] H. or any other student. Respondent admitted that G [REDACTED] H. tried to hug him on numerous occasions in class but that he would always attempt to deflect the hug by giving the student a "high five" or "fist pump." He admitted that sometimes a group of students would run towards him and attempt to hug him, and if he could not overt the contact he would pat the students on the head and gently direct them away. Respondent stated that he was a jovial and joking teacher and that he liked to have fun with his students, but he denied that he had any inappropriate contact with G [REDACTED] H.

20. It was established that respondent rubbed G [REDACTED] H.'s back, hugged her and sat the student on his lap at his desk when his desk was blocked from the view of other students by easels and charts during the 2012-2013 school year, as alleged in Charges No. 1, 3 through 5, and 7.

21. Charge No. 2 alleges that respondent inappropriately spoke to G [REDACTED] H. stating words to the effect of "Did I tell you how beautiful you are?," that he called her "baby girl," and told her "I miss you" in the classroom. Although G [REDACTED] H. told Ms. Cruze that respondent made these statements, and also told Ms. Buenrostro that respondent called her "baby girl," G [REDACTED] H. did not testify at hearing that respondent made these comments to her. She recalled that once respondent told her that she should not put her hair up in a "scrunchie" because she looked nice with her hair down, but the comments alleged in

Charge No. 2 were not corroborated by G [REDACTED] H.'s testimony. No other students, either during the investigation or at hearing, corroborated G [REDACTED] H.'s allegation that respondent made these comments to her. Finally, although Ms. Cruze indicated in her report (Exh. 26) that G [REDACTED] H. stated that respondent made these comments, Ms. Cruze did not corroborate these statements in her testimony at hearing. Consequently, there is insufficient evidence to support Charge No. 2.

22. Finally, Charge No. 6 alleges that respondent purchased a mermaid doll and gave it to G [REDACTED] H. for no educational reason. G [REDACTED] H. testified that respondent gave her more attention than he gave other students. She stated that on one occasion respondent gave her a "Little Mermaid" doll and told her not to tell other students about the doll and to place the doll in her backpack. G [REDACTED] H. stated that respondent told her not to tell T [REDACTED] G. because respondent was supposed to give the doll to T [REDACTED] G. She threw the doll away when she realized that it was wrong for respondent to give her a gift.

23. Respondent denied that he gave G [REDACTED] H. the doll as a gift or that he told her not to tell anyone about the doll. Respondent testified that he had a "reward system" for the students in his class. When students performed well he gave them stars or points and at the end of the week, the highest performing three students were allowed to pick a prize from a group of inexpensive toys, school supplies, etc. that had been donated or that he purchased. The top three students each week were allowed to pick a prize. Respondent testified that he never gave students the prizes, instead they would select their own prizes from the items. Multiple students corroborated respondent's testimony that he had a rewards systems and that the top performing students could choose their prizes.

24. The evidence established that G [REDACTED] H. was frequently a top performer in respondent's class, and that if she obtained the doll in respondent's class, it was as a result of respondent's "reward system" in which he allowed students to choose their prizes. G [REDACTED] H.'s testimony regarding the doll gift was not corroborated by any other evidence, other than mother's testimony. Consequently, there was insufficient evidence to establish Charge No. 6.

Charges No. 8-12 (W [REDACTED] N.'s Allegations)

25. Charges No. 8-12 allege that respondent spoke to and touched W [REDACTED] N. inappropriately during the 2012-2013 school year. Charge No. 8 alleges that respondent stated to W [REDACTED] N. words to the effect of "Estas bien delgada, W [REDACTED]. Me gustas que estas delgada" (Exh. 3), translated in English to mean "You are very slender, W [REDACTED]. I like that you are slender." Respondent denied making this statement and W [REDACTED] N. did not testify at hearing. No other witness testified that they actually heard respondent make these comments to W [REDACTED] N. Charge No. 9 alleges that respondent patted W [REDACTED] N.'s shoulder on one occasion and stated words to the effect of "wow, you're very flaca (thin)." (Exh. 8.) Respondent admitted that he patted W [REDACTED] N. on the shoulder and made this statement. Consequently, there is insufficient evidence to sustain Charge No. 8, but respondent admitted Charge No. 9, an allegation which is sustained.

26. Charge No. 10 alleges that respondent hugged W■■■■ N. on multiple occasions during the 2012-2013 school year. Multiple students observed respondent frequently hugging students in his classroom. T■■■■ N. told Ms. Cruze that respondent requested hugs from students, including W■■■■ N., and that students gave him “group hugs.” K■■■■ P. testified that he observed respondent hugging W■■■■ N. in the classroom. Although W■■■■ N. told Ms. Cruze that respondent never hugged her, the evidence established that respondent frequently hugged students, and respondent was observed hugging W■■■■ N. by at least two other students, one of which was K■■■■ P., who testified at hearing. Consequently, there is sufficient evidence to establish Charge No. 10.

27. Charges No. 11 and 12 alleged that respondent rubbed W■■■■ N.’s lower back during recess, and allowed W■■■■ N. to sit on his lap at his desk while he touched her inappropriately. W■■■■ N. told Ms. Buenrostro in her initial interview in May 8, 2013, that respondent had rubbed her back on one occasion. However, in January 2014, W■■■■ N. told Ms. Cruze that respondent had never touched her in any way. On December 13, 2013, W■■■■ N. also told Ms. Buenrostro that respondent asked her to sit on his lap, and she told Ms. Cruze in January 2014, that she sat on respondent’s lap. However, W■■■■ N. did not testify at hearing to corroborate statements to investigators, and no other student testified that they witnessed respondent rubbing W■■■■ N.’s back or W■■■■ N. sitting on respondent’s lap. Given the inconsistencies in W■■■■ N.’s statements on these allegations, there is insufficient evidence to sustain these two allegations. Consequently, Charges No. 11 and 12 were not established.

Charges No. 13, 14, and 16 (T■■■■ G.’s Allegations)

28. Charges No. 13 and 16 allege that respondent participated in group hugs with T■■■■ G. and other students. The evidence supported these allegations. T■■■■ G. provided a written statement to Ms. Buenrostro that respondent hugged her in the classroom. She also told Ms. Cruze that students, including T■■■■ G., gave respondent group hugs when he was feeling sad. K■■■■ P.’s and K■■■■ M.’s testimony corroborated T■■■■ G.’s statement that respondent hugged T■■■■ G. and participated in group hugs with female students. Consequently, Charge Nos. 13 and 16 were established by the evidence.

29. It was not established that respondent allowed T■■■■ G. to sit on his lap at his desk or computer table and touch T■■■■ G. inappropriately as alleged in Charge No. 14. Although T■■■■ G. told Ms. Cruze that respondent allowed her (T■■■■ G.) to sit on his lap, T■■■■ G. did not tell Ms. Buenrostro that she sat on respondent’s lap. No other student testified that they observed T■■■■ G. sitting on respondent’s lap. K■■■■ P. testified that he observed respondent hugging T■■■■ G. at the computer table. However, this testimony is inconsistent with T■■■■ G.’s statement to Ms. Cruze. Because T■■■■ G. did not testify at hearing, there was insufficient evidence to corroborate her statement to Ms. Cruze that respondent allowed T■■■■ G. to sit on his lap. Consequently, Charge No. 14 was not established by the evidence.

Charge No. 15 (A [REDACTED] F.'s Allegation)

30. The District alleged that respondent touched A [REDACTED] F.'s shoulder in a way that made her feel uncomfortable on multiple occasions during the 2012-2013 school year. When interviewed by Ms. Buenrostro, A [REDACTED] F. did not state that respondent had touched her in any manner. She stated that she observed respondent touching female students' shoulders or stomachs when he walked by their desks to let the students know that they could stop working and leave for free time. At hearing, A [REDACTED] F. testified that respondent never touched her in any manner. Consequently, Charge No. 15 was not established by the evidence.

Charge Nos. 17- 21 (A [REDACTED] G., K [REDACTED] E., M [REDACTED] M. Allegations)

31. The District alleged that respondent allowed K [REDACTED] E., A [REDACTED] G. and M [REDACTED] M. to sit on respondent's lap. The evidence established that Kattelyn E. Ashley G., and M [REDACTED] M. all sat on respondent's lap in the classroom during the 2012-2013 school year. K [REDACTED] E. told Ms. Cruze that she sat on respondent's lap once because she got hurt during recess, and that she observed A [REDACTED] G. sitting on respondent's on at least one occasion during the 2012-2013 school year. K [REDACTED] E.'s testimony corroborated her statement to Ms. Cruze. She observed A [REDACTED] G. sitting on respondent's lap at least two times, once because A [REDACTED] G. was crying. K [REDACTED] E. also sat on respondent's lap one at least one occasions when she was crying after being teased by one of the boys in the class. K [REDACTED] E. credibly testified that respondent allowed both she and A [REDACTED] G. to sit on his lap in the classroom. M [REDACTED] M. testified that respondent requested her to sit on his lap on at least one occasion and she did sit on his lap. She stated that sitting on respondent's lap made her feel uncomfortable. K [REDACTED] P. observed A [REDACTED] G. and M [REDACTED] M. sitting on respondent's lap, thereby corroborating Kattelyn E.'s and M [REDACTED] M.'s statements and testimony. He stated that female students sat on respondent's lap all the time in the classroom. Consequently, Charges No. 17, 20, and 21 were established by the evidence.

Charges No. 18 and 19 (H [REDACTED] G. and R [REDACTED] P.'s Allegations)

32. The District alleged that respondent allowed R [REDACTED] P. and H [REDACTED] G. to sit on his lap in the classroom during the 2012-2013 school year. H [REDACTED] G. told Ms. Cruze that he once sat on respondent's lap when he was crying in the classroom. However, H [REDACTED] G. did not testify at hearing and no other student testified that they observed this incident. R [REDACTED] P. testified that that she did not sit on respondent's lap and that respondent never touched her inappropriately in any manner. Consequently, Charge Nos. 18 and 19 were not established by the evidence.

Charge Nos. 24 and 25 (K [REDACTED] E. and R [REDACTED] P. Allegations)

33. The District alleged that on one occasion respondent hugged K [REDACTED] E. and that he hugged R [REDACTED] P. on multiple occasions during the 2012-2013 school year. K [REDACTED] E. told Ms. Buenrostro that respondent hugged her on one occasion, but she did not tell Ms.

Cruze or testify at hearing that that respondent hugged her in the classroom. She only stated that respondent allowed her to sit on his lap. R [REDACTED] P. told Ms. Buenrostro that she never saw respondent hug any student and testified that respondent never touched her in any manner. Consequently, Charge Nos. 24 and 25 were not established by the evidence.

Charge Nos. 22, 23, 26 and 27 (Respondent Inappropriately Touched Students' Backs, Shoulders, Waists, Hips, Sides, Stomachs, Torsos, Thighs, and Legs)

34. The District alleged that respondent inappropriately touched female students on their backs, shoulders, waists, hips, thighs, stomachs, thighs and legs while the students were seated at their desks. These allegations were primarily supported by M [REDACTED] M. and S [REDACTED] C.'s statements during the investigation and their testimony at hearing. M [REDACTED] M. testified that respondent would go around to female students' desks checking their work and tell them they were doing a great job. While commenting on the students' work, respondent would rub the students' thighs and/or legs telling them they did a great job. M [REDACTED] M. stated that respondent did this to her on multiple occasions and that she observed respondent doing the same thing to G [REDACTED] H., A [REDACTED] F., and Y [REDACTED] R. M [REDACTED] M. stated that respondent only rubbed female students' thighs and legs when complimenting them on their school work and patted the boys on their backs to compliment them for doing good school work.

35. S [REDACTED] C. testified that when students were good in class, respondent would squat down next to their desks and rub their sides and/or torso and whisper in their ears. She testified that respondent did this to her at least three times, and that she observed him doing the same thing to A [REDACTED] G., T [REDACTED] G., M [REDACTED] M., and W [REDACTED] N. S [REDACTED] C. also observed respondent tickling G [REDACTED] H., A [REDACTED] G. and T [REDACTED] G. on their stomachs and/or sides or waists on multiple occasions.

36. K [REDACTED] M. testified that respondent would walk up to female students' desks, come up from behind them and grab or hug them by their waist while they were seated at their desk. She testified that she observed respondent do this to M [REDACTED] M., T [REDACTED] G., A [REDACTED] G., A [REDACTED] F., Y [REDACTED] R., and G [REDACTED] H. K [REDACTED] M. stated that respondent touched female students in this manner at least two times per week. K [REDACTED] M. also observed respondent reach over female students while they were seated at their desks and rub the students' thighs and/or legs. She observed respondent touching M [REDACTED] M., G [REDACTED] H., A [REDACTED] F., S [REDACTED] C., T [REDACTED] G., Y [REDACTED] R., and M [REDACTED] O. in this manner. K [REDACTED] M. also recalled that respondent would squat down next to the students' desk and whisper in their ears when he was checking their work so that he would not disturb other students.

37. A [REDACTED] F. told Ms. Cruze that she observed respondent tapping the shoulders or stomachs of female students when he walked by their desk to let them know that they could stop working and go play for free time. At hearing, A [REDACTED] F. corroborated her statement to Ms. Cruze when she testified that she observed respondent squat down next to G [REDACTED] H. and touched her waist and abdomen area and whisper something in the

student's ear while G [REDACTED] H. was seated at her desk. A [REDACTED] F. thought that respondent's behavior and conduct was "weird."

38. S [REDACTED] C., M [REDACTED] M., K [REDACTED] M. and A [REDACTED] F. made statements to Ms. Cruze that respondent squatted down next to students while they were seated at their desks and rubbed the students' waist, stomach, sides, torso, hips, thighs, legs, or shoulders. These students' SSIT statements were consistent with their testimony at hearing.

District's Investigation Witnesses

39. On May 6, 2013, Ms. Buenrostro initiated the District's investigation after receiving the complaint from G [REDACTED] H.'s mother. Ms. Buenrostro interviewed 19 or 20 students from respondent's second grade class, including G [REDACTED] H. and W [REDACTED] N. During the course of the investigation, she interviewed some of the students a second time and interviewed several of respondent's former students. Ms. Buenrostro did not learn that respondent allowed students to sit on his lap until she interviewed G [REDACTED] H. and W [REDACTED] N. a second time in December 2013. During, her initial interviews in May 2013, she only asked students whether they hugged by respondent and whether they observed respondent touching G [REDACTED] H.

40. Ms. Buenrostro testified that respondent was returned to the classroom in May 2013, after the initial student interviews because the Los Angeles Police Department declined to pursue a case against respondent, and respondent denied the allegations by G [REDACTED] H. and W [REDACTED] N. Based on the information she then had, she did not believe returning respondent to the classroom posed a safety risk to the students, and G [REDACTED] H. had been removed from respondent's classroom. Thus, she believed returning respondent to the classroom at that time was a proper decision. Ms. Buenrostro, however, would not have returned respondent to the classroom if she had been aware of G [REDACTED] H.'s December 2013 allegation that respondent requested her to sit on his lap, and that he allowed multiple female students to sit on his lap. She stated that it is never appropriate for a student to sit on a teacher's lap and that such conduct violated the District's Code of Conduct with Students.

41. Ms. Buenrostro visited respondent's classroom unannounced during the 2012-2013 school year and had never observed inappropriate conduct by respondent with his students. She testified that the doors to respondent's classroom were closed and locked when she conducted the classroom visits. Ms. Buenrostro never received any reports of inappropriate conduct by respondent with students from administrative staff or any teachers. There were no parent or student complaints against respondent until the May 6, 2013 complaint.

42. Eugene Hernandez, LAUSD Administrator of Operations, made the decision to return respondent to the classroom in May 2013 because the allegations were vague and respondent categorically denied that he had rubbed G [REDACTED] H.'s back or hugged the student. However, Mr. Hernandez also stated that had he known about the allegations that surfaced later in the investigation, such as students sitting on respondent's lap and

respondent hugging and touching students inappropriately, he would not have returned respondent to the classroom. Mr. Hernandez confirmed that respondent's conduct with his students, specifically allowing students to sit on his lap, violated the District's Code of Conduct with Students policy.

43. Kristen Murphy, the District's Field Director in the Office of Staff Relations, is charged with determining whether a teacher should be disciplined based on the results of an investigation for misconduct. Ms. Murphy believed that respondent's conduct with G [REDACTED] H., as alleged in the May 6, 2013 complaint, was serious and inappropriate conduct by respondent. The other interviews conducted by Ms. Buenrostro on May 7, 2013, also revealed that respondent inappropriately hugged students on multiple occasions. Ms. Murphy believed that there was enough evidence to recommend respondent's dismissal in May 2013, but because respondent categorically denied the allegations, the Office of Staff Relations decided to return respondent to the classroom, and to continue the investigation. The subsequent student interviews in September and December 2013 raised a concern for Ms. Murphy that respondent was "grooming" the female students in his class with inappropriate physical contact. She recommended that respondent be removed from the classroom again in October 2013, and requested a formal SSIT investigation into respondent's conduct.

44. Tamica Cruze was the lead investigator for SSIT. Ms. Cruze testified at hearing and presented as an experienced investigator who is competent in interviewing young children. The SSIT investigation included 31 student interviews, 20 of which were students from respondent's 2012-2013 second grade class, with some interviews conducted by Ms. Buenrostro. Ms. Cruze personally interviewed 16 students, 15 from respondent's 2012-2013 second grade class, and one of his students from a prior school year. Ms. Cruze's SSIT report found that G [REDACTED] H. and W [REDACTED] N. had made consistent statements during their interviews; that G [REDACTED] H. continued to voluntarily visit respondent's class after she was transferred out of his second grade class and into the next school year, 2013-2014; and that respondent had made inconsistent statements regarding the student allegations. Respondent first stated that he never had physical contact with students, but later admitted that he patted W [REDACTED] N. on the shoulder and told her she was "flaca." He also admitted that he patted students on the head or shoulder, while stating "atta boy" or "good job." Finally, respondent suggested that students in his 2012-2013 second grade class may have made the allegations against him because he had given them a lot of school work in May 2013, but the report noted that student interviews with respondent's former students revealed that respondent hugged students in those classes as well, thus confirming some of his then current students' allegations.

45. The SSIT reported found that 20 students alleged that they observed respondent hugging and/or touching/rubbing students; seven students observed students sitting on respondent's lap; four students alleged respondent placed charts or easels around his desk which blocked the students' view of him at his desk; six students alleged that they observed respondent seated at his desk as he hugged, touched, or allowed a student to sit on

his lap; and three students stated that they never witnessed respondent hug or touch any students.

46. After reviewing Ms. Cruze's SSIT report, Ms. Murphy believed there was a serious problem. Based on Ms. Buenrostro's student interviews and the SSIT report by Ms. Cruze, Ms. Murphy recommended that the District proceed with dismissal proceedings against respondent. Ms. Murphy believed that respondent's conduct, as found in the SSIT report (Exh. 26), violated the District's Code of Conduct with Students policy. Specifically, she believed respondent's conduct violated the provisions of the policy that prohibits teachers from: (1) engaging in behaviors with students that are unprofessional, unethical, illegal, immoral or exploitative; (2) giving gifts, rewards, or incentives to students that are not school related, in exchange for a student to say or do something; (3) making statements or comments to students that are not age-appropriate, professional, or which may be considered sexual in nature, harassing, or demeaning; and (4) touching or having physical contact with a student that is not age-appropriate or within the scope of a teacher's responsibilities or duties. (Exh. 23.) Ms. Murphy also believed that respondent's conduct violated the District's Sexual Harassment Policy and the Employee Code of Ethics. Ms. Murphy was particularly concerned that respondent continued to categorically deny all of the allegations in the face of multiple student statements to the contrary.

Respondent's Defense to the Allegations

47. Respondent has categorically denied all of the students' allegations. On August 29, 2014, respondent stated that all of the students' allegations were "absolutely and unequivocally false." (Exh. 16.) Respondent denied that his desk was ever surrounded by easels and charts or that he had any contact with any physical contact with any student, including G [REDACTED] H., at his desk that was obstructed from the view of other students. Respondent admitted that students frequently came up to his desk for help with school work, but he insisted that he never assisted any student at his desk when the view of his desk was obstructed by charts or easels.

48. Respondent denied that he requested or allowed G [REDACTED] H. or any other student to sit on his lap. He stated that if a student tried to sit on his lap he would simply stand up to prevent the student sitting. Respondent also denied initiating hugs G [REDACTED] H. or any other student in his students. Respondent admitted that students would come up and hug him, but he did not hug the students back. Respondent stated he would simply pat the students on their head and/or back and send them away, unless he was surprised by the student and could not avoid the hug. Respondent also denied that he touched W [REDACTED] N. in an inappropriate manner. He admitted that he patted W [REDACTED] N. on her upper back and felt her shoulder blade and said "wow, your very flaca." (Exh. 8.) However, he maintained that if he patted or touched a student on their back or shoulder, it was normally intended as praise like an "atta boy" or "good job."

49. Respondent testified that he never allowed any student to sit on his lap, that he never requested hugs from students because he was sad, that he never participated in group

hugs students, and that he never had any physical contact with any student, including rubbing a students' back, side, stomach, waist, thigh or leg. Respondent stated that the only physical contact he had with his students was when he patted or tapped them on their upper back, shoulders, or heads or gave them high fives or fist pumps to show praise or encouragement for school work well done.

50. Respondent stated that he only whispered in students' ears to provide corrective feedback regarding classwork or their behavior so as not to embarrass the student in from of their peers. Respondent also stated that he had a reward system for students in his class in which students were designated as superstars, blue stars, and yellow stars. He would give students free time or prizes as rewards. Respondent testified that if G [REDACTED] H. got a "Little Mermaid" in his class, it was because she had earned a prize for doing school work and she picked the doll out of the group of prizes he had in the classroom for his reward system.

51. Respondent asserted that it would be impossible for him to commit the misconduct alleged by the District in its Amended Accusation because his classroom was always open and frequently visited by administrative staff, the teacher next door, parents, and volunteers. Respondent admitted that female students frequently remained in his classroom during recess but explained that the female students typically did not want to play outside in the yard during recess whereas the male students preferred being outdoors. He allowed his female students to stay in the classroom and draw on the board or help him with other tasks in the classroom. However, respondent emphasized that the classroom door was never closed when the female students were present during recess.

52. Respondent did not have a teacher assistant assigned to his second grade class for the 2012-2013 school year. However, Andrea Alcorn, who taught in the classroom next door, frequently walked into respondent's classroom unannounced through an open unlocked adjoining door between the two classrooms. Ms. Alcorn testified that she collaborated a lot with respondent and his students during the 2012-2013 school year, changing students daily for instructional purposes. Ms. Alcorn testified that she entered respondent's class daily unannounced and never observed respondent engaging in inappropriate conduct with his students.

53. Ms. Alcorn observed students walking up to respondent and hugging him but she did not feel this was uncommon or inappropriate for second grade students. She never observed students sitting on respondent's lap or respondent rubbing or touching a student's back. Ms. Alcorn only spent a few minutes per day actually in respondent's classroom because she had to teach her own class, but it was not uncommon for her to stand in the doorway between the two classrooms. Ms. Alcorn testified that respondent was well liked by his students and respected by parents. She considered respondent a very good teacher. Ms. Alcorn enrolled her grandchild into respondent's class although she was aware of his students' allegations.

54. Stacie Webster has taught at Vernon for almost 18 years, including teaching second graders, and has known respondent this entire time. She stated that respondent had a great reputation for honesty and professionalism as a teacher. In Ms. Webster's opinion, both teachers and students respected respondent as a teacher. Ms. Webster was aware of the allegations against respondent. She admitted that she has personally rubbed students' backs to calm them down and make them feel comfortable and secure. However, Ms. Webster would not just rub the backs of male students, and not female students, but would treat the students the same. She described teachers as social workers and nurses and stated that having physical contact with students, particularly young students, is almost unavoidable. She expressed that young students like second graders are very emotional and sometimes need support. She admitted, however, that the District's policy is that it is never appropriate for a teacher to touch or rub students' backs because such touching can be misinterpreted. She also admitted that it is never appropriate to rub a student's thigh, waist, side or torso. Ms. Webster stated that a teacher should never initiate hugs with students, but she admitted that she hugged students on occasion if they became emotional. Again she reiterated that it would be wrong for her to just give hugs to male students and not female students, or to students of one particular sex. Finally, Ms. Webster admitted that it would never be appropriate for teacher to allow a student to sit on the teacher's lap.

55. Respondent testified that during the 2013-2014, G [REDACTED] H. and a circle of her friends or classmates would frequently come by his classroom and giggle, peek inside of his class and asked if respondent needed any help. Respondent informed Ms. Buenrostro of G [REDACTED] H.'s behavior and Ms. Buenrostro, after observing the students approaching respondent's class, advised G [REDACTED] H. to no longer come to respondent's class. Respondent stated that on at least one occasion, in September 2014, G [REDACTED] H. came up behind him and hugged him. He was extremely shocked and disturbed by G [REDACTED] H.'s conduct. Respondent stated that G [REDACTED] H.'s behavior showed that the student was not afraid of him, and suggested that her conduct proved that he had not committed the inappropriate conduct alleged by the student.

Credibility Findings

56. The students' statements throughout the District's investigation have been overall consistent. G [REDACTED] H.'s statements to Ms. Buenrostro and Ms. Cruze were generally consistent and her testimony at hearing was consistent and credible regarding her allegations against respondent. The other students credibly and consistently described incidents in which respondent inappropriately touched students in his 2012-2013 second grade class. There is overwhelming credible evidence and testimony that respondent allowed students to sit on his lap, hugged students, and inappropriately touched, rubbed, and patted, students' backs, shoulders, waists, stomachs, torsos, thighs or legs during instruction in his classroom.

57. It is important to emphasize that the students generally did not harbor any ill will against respondent which could be perceived to bias or taint their statements or testimony. To the contrary, most of the students spoke favorably of respondent when asked

whether they liked him as a teacher. The students' testimony generally was candid, frank, and honest, and their demeanors evidenced sincerity and truthfulness. Of course some of the students' testimony was slightly inconsistent with prior statements, and some students appeared to be reluctant to fully disclose all of the incidents they may have observed in the classroom. However, this is not unexpected of fifth grade students who are eleven and twelve years old. In totality, the students' testimony was credible and consistent with the facts that were discovered during the District's investigation.

58. Respondent consistently denied the allegations in the District's Amended Accusation at hearing and during the District's investigation. He categorically denies that he ever allowed a student to sit on lap, that he ever initiated or requested hugs from students, or that he inappropriately touched a student in any manner. Respondent's categorical denial of all charges, in light of the credible testimony and statements of multiple students from his second grade class, is simply not believable. The evidence clearly established that respondent allowed students to sit on his lap, that he hugged students, and that he frequently had physical contact with his students, including rubbing, patting, and touching their backs, shoulders, waists, sides, stomachs, torsos, hips, thighs and legs. Respondent initially denied that he had any physical contact with students, but later admitted that he patted their upper backs or shoulders to praise the students for a job well done with their school work. Respondent admitted that students initiated hugs with him, but denied he hugged them back. However, the evidence established that respondent actually requested hugs from his students and participated in group hugs with his students.

59. Although physical contact with students is prohibited by District's policies, age-appropriate contact with students is sometimes expected, particularly with second grade students. Ms. Webster testified that she would hug students that were emotionally distraught or needed comforting. Although she understood the risk of the physical contact being misinterpreted, she truthfully admitted that unfortunately some physical contact with students this young is unavoidable. Respondent, who admitted that he had a jovial and joking personality, steadfastly denied any mutual physical contact with his students. His statements and testimony are simply not credible given the substantial evidence to the contrary. Consequently, respondent's testimony is not credible.

Performance Evaluations

60. Prior to the allegations in the Statement of charges and Amended Accusation, respondent received satisfactory performance evaluations annually from the District indicating an overall evaluation that he "Meets Standard Performance," or that he "Exceeds Standard Performance."

61. Respondent has no prior history of disciplinary action taken by the District. By all accounts, prior to the Statement of Charges and Amended Accusation in this case, respondent had met all of the performance standards required by the District.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proof in this matter and the standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.) Proof by a preponderance of the evidence requires a showing that it is more likely than not to be true. In other words, the evidence is more convincing than that which is offered in opposition. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).)⁴ The Commission's decision is deemed to be the final decision of the District's governing board. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 331.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*Id.* at pp. 343-344.) Thus, even where cause for dismissal has been established, a Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

Determination of Charges

I. UNPROFESSIONAL CONDUCT & UNSATISFACTORY PERFORMANCE

3. Cause does not exist to dismiss respondent for unprofessional conduct pursuant to section 44932, subdivision (a)(1), or unsatisfactory performance pursuant to section 44932, subdivision (a)(4).

4. Unprofessional conduct as used in section 44932, subdivision (a)(1), may be defined as conduct that violates the rules or ethical code of a profession or is unbecoming a member of a profession in good standing. (*Board of Ed. v. Swan* (1953) 41 Cal.2d 546, 553, overruled in part, on another ground, in *Bekiaris v. Board of Ed.* (1972) 6 Cal.3d 575, 588, fn. 7.)

5. The term "unsatisfactory performance" is not specifically defined in the Education Code or case law. Inasmuch as there is separate cause for dismissal for unprofessional conduct in subdivision (a) of section 44932, and we are not to presume the

⁴ Effective January 1, 2015, section 44944, subdivision (c)(1-3), was changed to section 44944, subdivision (d).

Legislature intended to enact completely duplicative statutes (*In re Maes* (2010) 185 Cal.App.4th 1094, 1110), unsatisfactory performance must mean something different from unprofessional conduct. In fact, section 44938, subdivision (c), specifies that “unsatisfactory performance” does not include any other cause for dismissal specified in section 44932.

6. While unprofessional conduct can be determined by analyzing a teacher’s conduct relative to the broader educational community, unsatisfactory performance must be analyzed with an eye toward the teacher’s performance as evaluated by his or her employing school district. Section 44938 supports this proposition. Section 44938 requires a charge of unsatisfactory performance to be preceded by a written notice of unsatisfactory performance, and refers to section 44660 et seq., which in turn establish guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for discipline may be established if a certificated employee performs unsatisfactorily to his employing school district.

7. However, the purpose of the statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well. (*Bakersfield Elementary Teachers Ass’n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757.) Therefore, a reasonable limitation is that an employing school district cannot be arbitrary or capricious in making decisions regarding whether a certificated employee has performed unsatisfactorily.

8. Section 44938, subdivision (a), provides that “[t]he governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

9. Section 44938, subdivision (b), provides that the governing board shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

(2) The governing board may act during the time period composed of the last one-fourth of the schooldays it has scheduled for purposes of computing

apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

10. Here, although respondent’s conduct as alleged in Charge Nos. 1, 3-5, 7, 9-10, 13, 16-17, 20-23, and 26-27 may have constituted unprofessional conduct or unsatisfactory performance, the District failed to provide respondent the required notice under section 44938, subdivisions (a) and (b), and an opportunity to correct or cure his unprofessional conduct or unsatisfactory performance after he received notice of such conduct. The evidence established that the District provided respondent a Notice of Unsatisfactory Acts or Services on September 26, 2014, and issued the Statement of Charges in this case on January 23, 2015. However, respondent was removed from his classroom and placed at one of the District’s administrative offices on October 10, 2013, where he remained until he received the Notice of Unsatisfactory Acts or Services and his Notice of Suspension on September 26, 2014. Consequently, respondent was not provided an opportunity to correct his faults and overcome the grounds for the charges giving rise to the causes for dismissal based on unprofessional conduct or unsatisfactory performance after receiving the September 26, 2014 notice. (See *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.) This jurisdictional defect is fatal to the District’s causes for dismissal on the grounds of unprofessional conduct and unsatisfactory performance.

II. IMMORAL CONDUCT

11. Cause exists to dismiss respondent for immoral conduct pursuant to section 44932, subdivision (a)(1), by reason of Factual Findings 5 through 20, 25-26, 28, 31, 34-38, and 39-58.

12. “Immoral conduct,” pursuant to sections 44932, subdivision (a)(1), and 44939, has been defined to mean conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. It is sometimes used as synonymous with “dishonesty” or a high degree of unfairness. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Immoral conduct can be construed according to common usage. “The term ‘immoral’ has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.” (*Palo Verde Unified School District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

13. The Commission 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, here the Commission, 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.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance*, 189 Cal.App.3d 1040, 1052.)

14. A preponderance of the evidence established that respondent’s conduct as alleged in Charge Nos. Charge Nos. 1, 3-5, 7, 9-10, 13, 16-17, 20-23, and 26-27 of the Amended Accusation constituted immoral conduct. Respondent allowed students to sit on his lap on multiple occasions, engaged in hugging students and participated in group hugs with his students. Statements and testimony by G■■■■ H., K■■■■ E., and K■■■■ P. were particularly persuasive regarding these allegations. Respondent’s categorical denial of these incidents was not supported by the evidence. Had respondent admitted this conduct and offered justification for his actions, i.e., that the physical contact with the students was age-appropriate and required because of the emotional needs of his second grade students, respondent actions, although violative of District’s policies, may have been explainable or understood. However, his steadfast denial of the incidents, couple with evidence that respondent set up easels and charts around his desk to obstruct the students’ view of his desk when students were observed sitting on his lap at his desk, suggest a nefarious intent by respondent.

15. Additionally, a preponderance of the evidence established that respondent inappropriately rubbed and touched students’ waists, sides, torsos, backs, shoulders, thighs, and legs while students were seated at their desks. The students stated that respondent would come around to their desks and while checking their school work, squat down or lean over them, and rub or touch their waist, stomachs, sides, torsos, backs, shoulders, thighs, or legs while praising them for doing good school. Respondent defended that he would simply pat the student on the upper back or shoulder or give students a high five or fist pump to praise the student. Respondent’s testimony was contradicted by multiple students, including M■■■■ M., S■■■■ C., K■■■■ M., A■■■■ F., G■■■■ H., and W■■■■ N. All of these students gave statements or testified that respondent touched or rubbed them in an inappropriate manner. These allegations of respondent touching and rubbing students’ waists, stomachs, torsos, thighs and legs are particularly egregious because there is no reasonable justification for a teacher touching a student below the waist in this manner.

16. Of significance and particularly disturbing is that evidence establishing that respondent committed his misconduct with only the female students in his class. There were no allegations that male students were allowed to sit on respondent’s lap or engaged in hugging activity with respondent. Respondent’s conduct was specifically targeted towards the female students in his second grade class. On these facts, the preponderance of the

evidence established that respondent engaged in immoral conduct with students in his second grade class during the 2012-2013 school year.

III. EVIDENT UNFITNESS FOR SERVICE

17. Cause exists to dismiss respondent for evident unfitness for service pursuant to section 44932, subdivision (a)(5), by reason of Factual Findings 5 through 20, 25-26, 28, 31, 34-38, and 39-58.

18. Section 44932, subdivision (a)(5), provides that the District may suspend or dismiss a permanent employee for “evident unfitness for service.” “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445 (*Woodland*).) Evident unfitness for services requires that unfitness be attributable to a defect in temperament which “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.*)

19. Here, respondent engaged in multiple acts of misconduct, as alleged in Charge Nos. 1, 3-5, 7, 9-10, 13, 16-17, 20-23, and 26-27, and established by the evidence at hearing, established that respondent is evidently unfit for service. Respondent allowed multiple students to sit on his lap at his desk, while his desk was blocked from the view of other students by easels and charts, inappropriately rubbed G [REDACTED] H.’s back while she sat on his lap, engaged in solicited hugs with students, individually and in groups, and inappropriately rubbed students on their waists, stomachs, sides, torsos, backs, shoulders, thighs, and legs.

20. Based on these multiple incidents of misconduct, the District has established that respondent suffers from a temperamental defect and inadequacy that connotes a fixed character trait that is presumed not remedial. Accordingly, the District established by a preponderance of the evidence that respondent is evident unfit for service.

IV. APPLICATION OF THE MORRISON FACTORS

21. To terminate the teacher on grounds of immoral conduct, dishonesty, or evident unfitness for service, it must also be established that the conduct renders the teacher unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230.) The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance or persistent violation of school rules, laws or policies because such causes of action, by definition, have a direct nexus to teaching. (*Id.*, at pp. 227-230.) “[A]n individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” (*Id.*, at p. 235.) Thus, a determination of unfitness requires an analysis based on criteria set forth in *Morrison*.

22. In *Morrison*, the Supreme Court of California held that the determination of whether a person is fit to teach must be based on an objective and analytical approach, consisting of a review of the teacher's conduct and an assessment of a variety of specific factors. "In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers." (*Morrison v. State Board of Education*, *supra*, 1 Cal.3d at pp. 227-230.) In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all *Morrison* factors need be examined, only the pertinent ones. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369, 384.) 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*, *supra*, 2 Cal.App.4th at p. 1457.)

23. In this case, application of the *Morrison* factors demonstrate that respondent engaged in conduct that is related to teaching and render him unfit to teach as follows:

(1) The likelihood that the conduct adversely affected students or fellow teachers: Respondent's conduct adversely affected G [REDACTED] H. who was reassigned from his classroom. G [REDACTED] H. was scared to go to school because of respondent's conduct and expressed that she did not want to remain in respondent's class. Although respondent stated that G [REDACTED] H. continued to visit his classroom after being taken out of his class, the evidence showed that the student was accompanied with friends or classmates whenever she returned to respondent's classroom. That was no longer assigned to or attending respondent's class, may have also explained her lack of fear in visiting his classroom with friends. Several students expressed that they were made uncomfortable by respondent's conduct and described his conduct as weird. K [REDACTED] M., G [REDACTED] H., M [REDACTED] O., and M [REDACTED] M. particularly expressed their discomfort with respondent's conduct.

(2) The degree of such adversity anticipated: G [REDACTED] H. was required to be removed from respondent's classroom because of his inappropriate conduct.

(3) The proximity or remoteness in time of the conduct: Respondent's conduct occurred between August 2012 and May 2013. Thus, it is not remote in time within the meaning of *Morrison*.

(4) The type of teaching credential held by the party involved: Respondent has a Clear CLAD Multi-Subject teaching credential which places him in elementary or middle

school classrooms with young students that would be at risk for the inappropriate behaviors that have been established in this case.

(5) The extenuating or aggravating circumstances, if any, surrounding the conduct: Respondent's categorical denial of all allegations is of particular concern. Additionally, respondent placed or set up charts and easels at his desk to obstruct the view of students when he allowed female students to sit on his lap at his desk. Respondent also engaged in conduct in which he rubbed or touched the waists, stomachs, thighs, and legs of female students.

(6) The praiseworthiness or blameworthiness of the motives resulting in the conduct: Respondent attempted to establish a motive for the students' allegations by stating that the students were upset with the amount of work he gave them in May 2013. However, this motive was not substantiated. In fact, most students spoke favorably about respondent as a teacher. Respondent also attempted to justify touching his students by stating he patted the students on the upper back or shoulder in offering praise for their school work. Respondent conduct is blameworthy and his attempt to establish legitimate motives for his actions was not credible. There simply was not legitimate motive for touching or rubbing a student's body below the student's waist or on their thighs or legs.

(7) The likelihood of the recurrence of the questioned conduct: It is highly likely that respondent would again engage in inappropriate activity in the future. Respondent accepted very little responsibility for his conduct, categorically denying all of the charges and providing incredible explanations for his conduct.

(8) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers: This factor is not at issue. There is no constitutional right that would be adversely affected by the District imposing discipline for respondent's misconduct and appropriately touching his students.

V. PERSISTENT VIOLATION OR REFUSAL TO OBEY SCHOOL LAWS OR REGULATIONS

24. Cause exists to dismiss respondent for persistent violation of or refusal to obey school laws or regulations pursuant to section 44932, subdivision (a)(8), by reason of Factual Findings 5 through 20, 25-26, 28, 31, 34-38, and 39-58.

25. Persistent violation of or a refusal to obey school laws or regulations under section 44932, subdivision (a)(8), requires that the violation be either "persistent" or "motivated by an attitude of continuous insubordination." (*Governing Bd. of Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.) Cases interpreting section 44932, subdivision (a)(8), require a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on*

Professional Competence (1985) 174 Cal.App.3d 1176, 1196.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

26. Here, respondent was aware of the school policies prohibiting engaging in inappropriate conduct with students. Respondent was trained on the District's policies annually, including the LAUSD Code of Conduct with Students, the LAUSD Sexual Harassment Policy, and the LAUSD Employee Code of Ethics. There is no dispute that respondent's conduct, as established by the preponderance of evidence in this case, violated these District policies. Respondent allowed students to sit on his lap, engaged in both individual and group hugs with students, and inappropriately touched female students on multiple occasions during the 2012-2013 school year, in violation of the LAUSD Code of Conduct with Students, the LAUSD Employee Code of Ethics, and the LAUSD Sexual Harassment Policy. Respondent's misconduct constituted a persistent violation of or refusal to obey the District's policies and regulations.⁵

Disposition

27. Respondent's misconduct with his second grade female students in this case is a serious concern for the District. Although respondent's conduct was not overtly sexual in nature, the District is justifiably and reasonably concerned that his conduct can and will lead to more direct sexual misconduct with female students. Respondent's students were adversely impacted by his conduct, ultimately requiring one student to be removed from his classroom. Although respondent had no prior history of disciplinary action prior to the charges alleged in this proceeding, respondent's conduct clearly shows that he is unfit to continue teaching with the District. Under these circumstances respondent's dismissal from the District is the appropriate disposition in this case.

28. The Commission on Professional Competence concludes that cause exists to dismiss respondent based on immoral conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws or regulations. The Commission reached this decision on a vote of two to one, with Commission Member Isela Macias in dissent.

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⁵ The District also alleged that respondent's misconduct constituted a willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district, pursuant to section 44939. However, there is insufficient evidence to sustain this cause for discipline.

ORDER

The determination of the Governing Board of the Los Angeles Unified School District in the Amended Accusation to dismiss respondent Matthew Sanchez (EN 699255) pursuant to Education Code sections 44932 and 44939 is upheld. Accordingly, respondent shall be dismissed as a certificated employee of the District.

DATED: **August 26, 2016** _____

DocuSigned by:
Michael A. Scarlett
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MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

DATED: **August 26, 2016** _____

DocuSigned by:
Anthony Botts
FDD2A696BDF40B...

Anthony Botts
Commission Member

DATED: **August 26, 2016** _____

DocuSigned by:
Isela Macias
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Isela Macias
Commission Member