

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SANTA ANA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation and
Statement of Charges Against:

ANTONIO ESPINOSA,
A Certificated Employee,

Respondent.

OAH Case No. 2010040290

DECISION

This matter was heard by the Commission on Professional Competence on October 11 – 14, 2010, in Santa Ana under the authority of Education Code sections 44932 and 44939. The Commission was comprised of the following members: Michael Poizner, a retired Counselor from the Whittier Union School High School District; Jack Foreman, Counselor with the Centinela Valley Union High School District; and Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings.

Complainant Superintendent of Schools for the Santa Ana Unified School District was represented by Eric Bathen, Attorney at Law, and Jordan Meyer, Attorney at Law. Arturo Jimenez, Director of Human Relations, was present throughout the hearing. Respondent Antonio Espinosa was present throughout the hearing and represented by Carlos R. Perez, Attorney at Law, and Kent Morizawa, Attorney at Law.

Oral, documentary, and stipulated evidence having been received and argument heard, the Commission on Professional Competence submitted this matter for decision on October 14, 2010, and finds as follows:¹

FACTUAL FINDINGS

1. The Santa Ana Unified School District (school district) is a large, comprehensive school district located in Orange County that is comprised of 36 elementary schools, nine intermediate schools, three alternative high schools, and seven high schools,

¹ The Administrative Law Judge on his own motion admits complainant's Exhibit 2 (Request for Hearing) and Exhibit 3 (Notice of Board Action) into evidence and marks complainant's Prehearing Brief as Exhibit 23.

including Santa Ana High School, Valley High School, and Segerstrom High School. The school district serves and educates approximately 54,000 students. The administrative offices of the school district are located at 1601 East Chestnut Avenue in Santa Ana.

2. On February 1, 2010, Jane A. Russo, Superintendent of Schools, for the school district made the Statement of Charges and recommended that cause existed for the immediate suspension and dismissal of respondent Antonio Espinosa as a permanent certificated employee of the school district. On February 1, 2010, the Superintendent also made, and served respondent with, the Notice of Intention to Suspend and Notice of Intention to Dismiss, notifying respondent that the Governing Board was scheduled to act upon her recommendation in a closed session at an upcoming meeting. On February 2, 2010, respondent requested a hearing to determine if there was cause to terminate his employment with the school district.

3. On February 9, 2010, the Governing Board of the school district approved the Statement of Charges and adopted the recommendation of the Superintendent to suspend respondent without pay and benefits and to dismiss him from employment with the school district. On February 10, 2010, the school district notified respondent of the decision of the Governing Board and, because he had requested an evidentiary hearing to challenge any decision to terminate his employment, continued him as an employee in unpaid suspended status.

4. On March 29, 2010, the Accusation, Case No. 2010040290, was made and filed by the Superintendent in her official capacity for the school district. The Statement of Charges was attached to and made part of the Accusation. The Notice of Accusation and Accusation, Statement of Charges, and pertinent sections of the Education and Government Codes were served upon respondent by first class mail. On April 1, 2010, respondent filed a timely Notice of Defense, objecting to the Accusation and requesting a hearing.

5. On March 29, 2010, the parties entered into a Stipulation Regarding Commencement of Hearing, waiving the requirement under Education Code section 44944 to commence a hearing within 60 days, agreeing to participate in a trial setting conference, and agreeing to complete discovery in this matter seven days prior to the hearing. On May 3, 2010, pursuant to a Request to Set filed by the school district, the Office of Administrative Hearings conducted a telephonic conference during which the hearing on the Accusation and Statement of Charges was ordered to begin on October 11, 2010. On May 7, 2010, the school district properly served respondent with a Notice of Hearing. On September 20, 2010, a prehearing conference was held with the parties and a prehearing conference order issued. The hearing ensued as ordered and noticed on October 11, 2010. Jurisdiction exists in this matter.

6. (A) Pursuant to school district policy no. BP-4117, certificated employees of the school district, including classroom teachers and counselors, have the general responsibilities to plan, organize, present, and evaluate a program of meaningful instruction to pupils in areas assigned and to carry out other assigned related duties necessary to the

successful operation of the school, while under the direction of the school principal. Specific responsibilities include assisting pupils to set and maintain standards and to follow acceptable normative rules of behaviors; applying a wide variety of instructional techniques and media applicable to individual pupils or groups of pupils of varying capabilities identified by valid analysis; implementing by instruction and “action efforts” the school district’s philosophy of education and the school district’s and school’s identified goals and objectives; taking necessary precautions to protect pupils; providing for a system of continuous evaluation of pupil progress consistent with established instructional objectives and district policy; and upholding and enforcing school rules and governing board policy.

(B) Pursuant to state and federal law and school district policy no. 4119.11, the Governing Board prohibits sexual harassment by or against an employee, job applicant, or student and requires that the superintendent take all actions necessary to ensure the prevention, investigation, and correction of sexual harassment. Prohibited sexual harassment includes unwelcome sexual advances or unwanted verbal, visual, or physical conduct of a sexual nature made against another person in the work or educational setting when such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work or educational environment.

Respondent Antonio Espinosa

7. (A) At all times relevant herein, Antonio Espinosa (hereinafter respondent) has been employed as a permanent certificated employee of the school district. Beginning in July 2007 and continuing through December 2009, respondent was assigned and worked as a counselor at Segerstrom High School.

(B) Respondent grew up and attended schools in Santa Ana after immigrating to this country from Mexico. He graduated from Santa Ana High School in 1972 and then attended Santa Ana College and California State University Long Beach (CSULB) where he attained a bachelor of arts degree in Spanish with a minor in Biology. In 1975, he became a student teacher at Santa Ana High School for one semester and was then hired to be a football and soccer coach. In the fall of 1976, respondent became an English Language Development instructor at Santa Ana High School. In 1980, he attained a master of arts degree from CSULB and obtained credentials to work as a counselor and school psychologist. He completed the requirements for his advanced degree and credentials while continuing to work for the school district.

(C) In 1980, respondent was hired by the school district as a school psychologist and worked at two elementary schools for the next five years. In 1985, he became a secondary school psychologist for the school district. For the next four years, he was assigned as a school psychologist at an intermediate school and three high schools, including Valley High School. In the spring of 1989, respondent completed the requirements for and obtained an administrative credential. He was then hired to be an assistant principal

at Valley High School where he remained for five years. In June 1994, he was promoted to principal at one of the school district's new alternative high schools. In August 1996, he became the principal at an intermediate school where he remained for five years.

(D) In June 2001, respondent was promoted by the school district to be principal of Valley High School, the second largest of the school district's seven comprehensive high schools with approximately 3,300 students. As principal, he was expected to be the educational leader of the high school campus and to supervise the different personnel, functions, and offices of the high school, including, but not limited to, curriculum, certificated staff, and student activities.

8. (A) In December 2006, after five years in his administrative position, respondent was removed by the school district as the principal of Valley High School. The school district found that there were issues with respondent's leadership at the high school in the prior school year. Under his stewardship, Valley High School had failed to meet student participation rates for state-wide testing. He had allowed students to take a field trip during tests. Associate Superintendent of Human Relations Juan Lopez met with respondent, advised him that the school district had lost faith in his abilities to be principal at the high school, and reassigned him to a new position within the school district.

(B) Beginning in January 2007, respondent was reassigned to be the principal of the Graduate Success Program which was a position that the school district had created for him. Headquartered at Santa Ana College and an alternative high school, the Graduate Success Program was a high school graduation program for adults who had previously achieved credits towards graduation but had not completed all of the high school requirements. In or about March 2007, the school district served respondent with a layoff notice but he was retained. Later that year, in or about July 2007, the school district reassigned respondent to a counselor position at its newest secondary school, Segerstrom High School.

9. Segerstrom High School is a fundamental high school which stresses academics while enforcing a strict code or rules for dress, homework, attendance, and discipline for its 2,450 pupils. The high school is open to pupils who live within the school district and agree to abide by its fundamental rules. In order to implement its fundamental philosophy and codes, the high school utilizes a card system. Pupils receive cards for each incidence of tardiness, missed assignment or homework task, violation of the dress code, and misconduct. As they accumulate cards, pupils are first given a warning. Subsequently, the pupils may be given detention, their parents may be contacted, and they may be referred to the counseling office. Staff members at Segerstrom High School abide by the card system and use the card system to instill discipline among the pupils, change their behaviors, and facilitate their academic achievement. Pupils may be "non-invited" from the high school for receiving too many cards.

10. (A) Segerstrom High School has five counselors for its pupils. Counselors are required to advise and assist pupils with their academic achievement and progress. Their

duties change as the pupils progress in high school. Counselors help freshmen with their organizational and study skills, check their class placements and grades, and plan their schedules for graduation. Counselors monitor seniors more closely. They try to ensure that the seniors will graduate and possibly gain admission to college or other post-secondary programs. Counselors will verify the seniors' course credits for meeting requirements for graduation and college admission and may suggest additional coursework, such as night school classes, in order to fulfill those requirements. Counselors may also assist pupils with behavioral and emotional problems in the classroom or with non-academic issues at home or in their personal lives that impede their ability to learn.

(B) At Segerstrom High School, counselors play an important role in enforcing the card system and are authorized to implement interventions to change pupils' behaviors and enhance their opportunities to achieve. Pupils are required to see a counselor upon receiving their fourth or fifth card or violation of the school's codes. For example, if a pupil has missed homework assignments and received "homework cards," the pupil will be referred to a counselor. The counselor will inquire of the pupil what assignments were missed and why before determining what interventions are appropriate to change the pupil's behavior or study habits. Counselors may suggest extra tutoring, call the pupil to the counseling office, contact the parent, conduct follow-up with the teacher, track the pupil's progress, and order detention for the pupil. Counselors are to be available for and may advise pupils regardless whether or not they are assigned to their individual counseling caseload.

11. Respondent became a counselor at Segerstrom High School in the summer before the 2007-2008 school year and was assigned a counseling caseload of approximately 450 pupils. Over the next two or three school years, respondent developed a reputation among his colleagues in the high school guidance center as a counselor who called more pupils from their classes to his counseling office than any of them. Among students, he also became known as a counselor who was more lenient in approving tardy slips to go to class late, schedule changes, and detention completion slips. Students were often waiting in the counseling area to see respondent during the school day. At no time relevant herein, however, did his colleagues in the guidance office ever observe respondent engage in any inappropriate conduct with the students in or out of his office. The allegations in the Accusation and Statement of Charges arise from complaints filed by two female students at the high school.

Student VM

12. (A) In the fall semester of the 2008-2009 school year, VM, a female student, entered Segerstrom High School as a freshman. In her first semester of high school, VM began having academic struggles in her Algebra I class. Her teacher found that VM was behind in her math skills and needed extra help. She allowed VM to retake a few tests. She offered VM tutoring after school on Fridays but VM's class schedule allowed little time for tutoring after school. By the time of the first grading period in or about October 2008, VM

was failing Algebra. Her math teacher called VM's mother and recommended to the parent that she speak with her daughter's counselor to get help in math.

(B) In or about October 2008, VM's mother called respondent at the high school. She advised respondent that she was worried about her daughter because she was failing Algebra. She asked respondent to help her daughter as much as he could. Respondent told the mother that he would assess VM after talking to her math teacher. He indicated he could try to help her pass math by offering her tutoring before and after school. Subsequently, respondent spoke with VM's math teacher Pena-Munoz who informed him that she had already recommended tutoring for VM but that the student did not attend tutoring and that VM needed to study and do her homework. Respondent called VM's mother who stated that her daughter told her that she did do her homework. Respondent asked the mother to have VM stop by his office and he would check to see if she actually did her math homework.

13. (A) On or about October 21, 2008, after speaking with her mother and math teacher, respondent summoned VM to his counseling office and discussed her progress in Algebra with her. Respondent determined that the counseling intervention he would follow for VM was to have the student come by his office before her math class and he would check to see that she had completed her homework assignments and attended tutoring. Respondent asked VM to come by his office on a daily basis.

(B) Continuing for the next three to four weeks until late November or early December 2008, VM came by respondent's office during the passing period before her seventh period Algebra class on almost a daily basis. As a matter of routine, VM went to the guidance center without being called or summoned by respondent. She announced her arrival or knocked on his door and entered his office if he was free or she waited outside his office with other students if he was busy or already meeting with another student. On occasion, while waiting in the guidance center to see respondent, VM asked other students for help on her math assignments.

(C) Upon meeting with VM in his office, respondent asked VM how school was going and about her Algebra homework. He would check to see that she had completed her Algebra homework. He also asked about and made sure that she was attending her tutoring. Respondent sat at his desk and VM either stood or sat in a chair in his office. These daily meetings with VM lasted a few minutes after which respondent gave VM a pass so that she would have an excuse if she was late to her Algebra class and said that he would see her the next day. During this three or four week period, respondent regularly called VM's mother two to three times per week to tell her how her daughter was doing with his intervention and in math.

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Conference Summary

14. (A) In late November or early December 2008, VM's mother attended a presentation at the school district offices on the topic of predatory behaviors endangering children, which was given by Juan Lopez, Associate Superintendent of Human Resources. After the presentation, VM's mother approached Lopez and told him that she was concerned that her daughter was not comfortable being around respondent. Subsequently, the associate superintendent advised Segerstrom High School Principal Amy Avina of the mother's concerns of the interaction between her daughter and respondent and asked the principal to speak with VM and obtain her statement. The principal then met with VM. After the meeting, because VM was embarrassed, the principal referred her to counselor and changed her counselor assignment.

(B) It was not established that, in December 2008, VM made a written statement about her interactions with and complaints about respondent during or after the meeting with Principal Avina. VM testified that she was not asked to make a written statement of her complaints. The school district did not produce a statement written by VM in the course of the hearing. The associate superintendent did not refer to any written statement by VM. The principal testified that she asked VM to write a statement but her testimony was brief and lacking in detail. Based on all of the evidence, the principal's testimony that she had VM write a statement but that she and the school district had lost the statement was not persuasive.

15. (A) On December 17, 2008, after she interviewed the student, Principal Avina and Associate Superintendent Lopez met with respondent and a teachers' association representative. The two administrators discussed VM's complaints about respondent, including her complaints that she felt uncomfortable around respondent because he called her into his office daily and caused her to be late to math class, visited her health class more than twice, made inappropriate comments to her about the physical development of her breasts, offered to drive her home and to the grocery store in his car, and closed the door and blinds to his office when he met with female students. In response, respondent denied making or intending to make inappropriate advances to VM, denied commenting on VM's breasts, and denied offering to give her a ride. He told the administrators that he never closed his door and blinds when meeting with VM.

(B) The principal reviewed respondent's conduct and the conduct expected of counselors in the high school guidance department. The principal informed respondent, in part, that counselors were not to encourage or request students to visit their offices on daily basis, should schedule periodic academic counseling sessions outside of the school day or during the lunch period, and maintain a professional relationship with students.

(C) The associate superintendent informed respondent that his conduct "negatively impacted" VM inasmuch as he was making her uncomfortable each day when she came to his office. The associate superintendent then issued directives to respondent, telling him to keep his office door open at all times when alone with a student and, if he had

a need for privacy, he was to have another staff member present in the office in any closed door meeting; to cease visiting students in classrooms except for planned presentations or unless directed to do so by the assistant principal for guidance; and to discourage students from visiting him on a regular basis during class time. Respondent was further advised that VM was removed from his caseload and he was to avoid all contact with her and her family.

(D) The day after the conference, on December 18, 2008, Principal Avina prepared a Conference Summary Performance Report which summarized the discussion and directives of the associate superintendent. This Conference Summary was issued pursuant to the progressive disciplinary guidelines of the collective bargaining agreement between the school district and teacher's association. The associate superintendent approved the conference summary which was then delivered to respondent. Respondent did not submit a written response to the Conference Summary.

Charges or Allegations regarding Student VM

16. (A) It was not established that, in the fall semester of the 2008-2009 school year, respondent called VM into his office on a daily basis between her sixth period English class and her seventh period Algebra class. Respondent did call VM out of her English class to come to his office before her Algebra class on two occasions so that he could discuss her math homework and tutoring with her. On all other occasions, however, VM went to respondent's office without being called or summoned by him. While he did not call for VM or send out call slips for her, respondent did instruct or make sure that VM understood that she was to come by his office before her math class to discuss her homework assignments and tutoring.

(B) After respondent began having VM come to his office to discuss her homework and tutoring for Algebra, VM was late in arriving at her Algebra class and missed instruction for an undetermined amount of time during the initial part of this three or four week intervention. Her math teacher complained to respondent about VM's tardiness and respondent replied that the student would be late for only a few minutes. After her math teacher raised her concerns with respondent, VM was not as late in arriving to class and the math teacher's concerns were mollified. VM was late to her math class because respondent had instituted an intervention and was trying to help her in the class.

17. It was not established that, when he met with VM or any other female student, respondent closed the door and blinds to his office. During his meetings with VM, the door to respondent's office was sometimes closed but the blinds on the windows around his office were always open. No evidence was presented of any meetings that respondent held with any other female student. In the 2008-2009 spring semester, the principal received a complaint from another counselor that respondent had his door and/or blinds closed while meeting with students, but no evidence was presented of the names of any students and dates of any such meetings.

18. (A) It was not established that, in or about October or November 2008, respondent offered to take or drive VM to her home in his vehicle. On one occasion in the morning, VM had to leave school and go home for a personal reason. She walked home and returned to the attendance office to check back into school. In the attendance office, VM saw respondent and explained to him that she had left school and walked home and back. Respondent replied that she should have asked for a ride. Respondent did not offer to drive and did not actually take VM home in his car that morning.

(B) It was not established that, in or about October or November 2008, respondent offered to take or drive VM to the grocery or shoe store in his vehicle. On one occasion, respondent told VM that he was trying to call or contact her mother. VM replied that her mother was shopping at a shoe store. Respondent asked if he went to the shoe store whether he would really find her mother there. Respondent made this statement in a joking manner and VM took the statement as a joke. He never offered to take or took VM to the grocery or shoe store.

19. On no more than two occasions in or about October and November 2008, respondent visited or saw VM in her Regional Occupational Program health careers class that was held in the afternoons, but it was not established that respondent was doing anything inappropriate by visiting or seeing VM in that class. On one occasion, respondent spoke to VM and her friends for a few minutes on the stairs outside or near her health careers class. On the other occasion, respondent went to the class to check up on VM and a few other students to make sure that they were attending the class so that they could receive credit for it. In addition, on another occasion, respondent went to VM's dance class. It was not established that, on these two or three occasions, respondent was following or stalking VM to her classes or that he stared at her in either the health careers or dance class.

20. (A) It was not established that, in or about October or November 2008, respondent made inappropriate comments to VM about her physical appearance. Nor was it established that respondent made comments to VM about her physical development or the development of her breasts. The evidence proffered on these allegations was not credible.

(B) VM testified that, on one occasion while meeting with respondent in his office, respondent enlarged her school picture from her student file on his computer monitor and, while looking at the school picture, stated that it looked like "her little kitty was full of milk." VM testified that she believed respondent was referring to her breasts and felt embarrassed and uncomfortable. The evidence was not persuasive that respondent made such an inappropriate statement to VM for several reasons. First, the purported statement itself did not sound like a statement a grown man would say. With its characterization of breasts as a "kitty" and the connection between breast development and milk, the statement was more akin to a comment that a child or teenager would make to another child or teenager. Second, Principal Avina testified that VM told her about this statement when interviewed in December 2008, but neither VM's statement nor this particular comment was memorialized in any writing by VM or the principal. VM actually testified that she did not make a written statement. Moreover, the statement was not referenced in the December 17,

2008, conference summary prepared by the principal and approved by the associate superintendent. As attested to by respondent, he was not accused of or asked at the conference whether he made the so-called “kitty” statement to the student. Third, VM testified that she told her mother about the comment, but VM’s mother did not report to the associate superintendent that respondent had made such a statement to her daughter and did not testify about being told of the comment. If respondent had made this comment and VM reported it to her mother, then the mother would surely have been upset and very likely told the district administrator about it. Fourth, Associate Superintendent Lopez, who participated in the conference and approved the conference summary, did not recall ever having heard or been told before the hearing that respondent made the “kitty” statement to VM.² When asked during the hearing what he thought of it, Lopez called the comment disgusting, sexual, and immoral. Lopez’s strong reaction to the purported comment had a tendency in reason to demonstrate that, if respondent had, in fact, made such an inappropriate comment to VM, then the principal would have or should have told the Associate Superintendent about it and Lopez would have sought more serious disciplinary action against respondent than a conference summary for having made such an inappropriate comment. That respondent was given only a conference summary supported the conclusion that the associate superintendent was not told of the comment and further suggested that the administrator was not told about such comment because respondent did not make such an inappropriate comment to the female student and the student did not report such comment to the principal.

21. It was not established that, in or about October and November 2008, respondent frequently looked at VM in a very inappropriate manner and thereby made her feel uncomfortable around him. VM testified that respondent looked at her in a “weird” way. However, VM was not sure how many times that occurred and her testimony on this allegation lacked specificity or detail, which detracted from its persuasiveness. Principal Avina also testified that VM told her that respondent looked at her “like a man looks at a woman at a party.” That VM made such a statement to the principal was not credible, for it did not sound like a statement attributable to a high school freshman. As a whole, the weight of the evidence suggested that VM was not comfortable with respondent because she was meeting with him on almost a daily basis and he asked her every time whether she had done her Algebra homework and attended her tutoring for a math class that she was failing.

22. Based on Findings 9 – 21 above, the evidence did not establish that respondent engaged in inappropriate conduct with VM or tried to have or to start an inappropriate relationship with the student for his own prurient interest.

² One year later, in December 2009, at the request of the associate superintendent, Director of Human Resources Arturo Jimenez conducted an investigation of other allegations against respondent. During his investigation, Director Jimenez was not aware of any written statement purportedly made by VM. Two months before the hearing in this matter, Director Jimenez looked for a written statement by the student in the offices of the school district but could not find any such written statement.

23. When he stopped meeting with VM in his office, respondent found that his counseling intervention was not working well, for VM was not consistently doing her math homework. That fall semester, VM did not improve her performance in Algebra and failed the class. In the ensuing spring semester, she was reassigned to a basic math skills class.

Student CP

24. (A) In the fall semester of the next school year, 2009-2010, CP, a female student, was a senior at Segerstrom High School. Respondent was not CP's assigned counselor but he had counseled her on several occasions in the two prior school years as was permitted by the rules or practices at the high school. For example, in December 2007, when CP was a tenth-grader, respondent had a "tenth grade counseling" session with CP and her parents to review her academic goals and the graduation requirements. Respondent counseled CP on three other occasions during the fall 2008 semester, which he documented in Counselors Log Reports.

(B) On June 5, 2009, CP went to the high school guidance center and asked for respondent's assistance to enroll in or take classes in summer school, which was to be held on the campus of the alternative high school. She needed the summer school credits to maintain her academic progress towards graduation. Respondent looked at CP's transcript and counseled her to take three summer school classes. Because he taught Spanish during the summer session, respondent saw and greeted CP when he saw her at summer school. CP said hello to respondent and also asked him to help her friend enroll at Segerstrom High School. Her friend was not invited or allowed to transfer to the fundamental high school.

25. (A) In the following fall 2009 semester, CP was an office aide during fourth period. She worked in the attendance office, which was near the guidance center, and respondent saw CP there while she worked as an office aide. That semester, CP began going to respondent's office and asked him to sign or approve her tardy cards because she had heard that he was more lenient than other administrators or counselors.

(B) Later that semester, on November 10, 2009, CP came to see respondent with a homework card. She had failed to complete a homework assignment for her Economics class. CP asked for a grade check for Economics and respondent gave her a grade check form to take to her teacher. Respondent also looked up CP's grades in her classes and found that she was failing three classes, Economics, English and Art, and earning a "D" in Psychology. CP asked for respondent's help. Respondent called CP's teachers and asked about her academic standing in their classes.

(C) One week later, on or about November 17, 2009, respondent met with CP and her Economics teacher. CP needed to complete assignments and take make-up tests. The Economics teacher was willing to meet with CP after school. For his part, respondent determined that his counseling intervention for CP would be to review her grades and meet with her periodically to discuss her grades and academic progress.

26. (A) Over the next two or three weeks, from on or about November 17, 2009, until December 3, 2009, respondent met with CP in his office on occasion to discuss her grades after he conducted weekly grade checks. As reflected in the Counselors Log Report, respondent met with CP twice during the first week of December 2009. On one of those two dates, December 3, 2009, he spoke to CP about her grade in English and discussed a teacher's log for her assignments. The dates of the other meetings before that week in December 2009 were not established by the evidence.

27. (A) On Friday, December 4, 2009, respondent wanted to contact CP's mother to confirm a parent-teacher conference that he scheduled for the next Tuesday to discuss the progress of CP and her brother. Her brother had missed a fourth homework assignment. Respondent called the mother four or five times on her home and work telephone numbers but could not reach her. That same day, while respondent was speaking with two students, CP came into his office and her cellular telephone rang. Respondent asked CP for her cellular telephone number so that he could reach her mother. CP gave him her number and respondent wrote down the number. Respondent asked CP to remind her mother about the parent-teacher conference.

(B) After the weekend, on Monday, December 7, 2009, respondent had not heard from CP's mother and both CP and her brother were absent from school. He was busy the next day with college applications and admissions and wanted to confirm that CP's mother was coming to the parent-teacher conference that he had scheduled. Using the high school telephone, respondent called CP on her cellular telephone twice. On the second call, CP's sister answered. Respondent identified himself as a counselor at the high school and asked for CP. Her sister replied that CP was sleeping. Respondent found that the telephone connection was bad and asked the sister to have CP call him back. Neither CP nor her mother called respondent back that day and he cancelled the next day's parent-teacher conference. CP received three other calls on her cellular telephone from the high school that day when she was absent but CP did not answer those calls and the evidence did not demonstrate that respondent made those three calls.

28. (A) The next day, Tuesday, December 8, 2009, CP returned to school. She attended her seminar class, which lasted 20 minutes, during which time the teacher assigned the class to silent reading. The teacher was required to model the students and was reading as well. During the silent reading assignment, respondent entered the seminar classroom. Earlier in the school day, respondent and the seminar class teacher had participated in a student study team meeting for another student. The seminar class teacher left the meeting. Respondent went to her classroom to talk about the meeting. Respondent spoke briefly with the teacher. He was in the class for a total of five minutes and then left. This was the only time that respondent visited CP's seminar class.

(B) On December 8, 2009, while he was in the seminar class, respondent saw CP and noticed that she was putting on make-up and talking with a friend, JQ, who had turned sideways to face and to talk to CP. Respondent looked at CP for two seconds. CP

was supposed to be engaged in silent reading. Both CP and her friend noticed respondent looking at CP for two seconds. Respondent left the seminar class without talking to CP.

(C) Later that same day, near the end of seventh period, respondent called CP's English teacher and asked that CP come to his office. After receiving the message, CP did not go to respondent's office. It was the end of the school day for CP.

Administrative Leave

29. (A) The next day, December 9, 2009, during CP's seminar class while the students were writing essays, respondent called the seminar teacher and asked that CP come and see him in his office. The seminar teacher gave the message to CP who said all right but did not leave the classroom. The seminar teacher stated again to CP that respondent wanted to see her right away. CP asked if she could speak with her teacher. The two of them went outside the classroom and CP explained that she did not feel comfortable with respondent because he called her out of class often and had called her on her cellular telephone. The seminar teacher then called respondent back and told him that CP was still writing her essay. A few minutes later, respondent called for a second time and said CP could come to his office after the class. The seminar teacher gave this second message to CP and advised the student that she did not have to go to respondent's office if she did not want to and recommended to CP that she talk with the principal.

(B) Shortly thereafter, on December 9, 2009, the seminar teacher told Principal Avina that CP was upset when respondent called for her in class that day. The principal asked the seminar teacher to send her an email message. That same day, the principal interviewed CP and obtained her written statement. The principal also obtained statements from CP's friend JQ and the office assistant who CP worked with as an office aide. The principal called Associate Superintendent Lopez.

30. On December 10, 2009, Associate Superintendent Lopez and Director of Human Resources Arturo Jimenez interviewed respondent with a union representative present. Lopez reminded respondent that one year earlier they had met because a student stated respondent made her uncomfortable in a sexual way and that respondent was given a conference summary with clear directions for his interactions with students. Lopez told respondent that the school district had received "very serious information" that he was "on the prowl again" and wanted to ask him questions about student CP. Respondent answered Lopez's questions, stating, in part, that he had been calling CP to his office and working with her for three weeks to check on her grades and how she was doing in class. He admitted calling CP twice on her cellular telephone to try to contact her mother. Respondent denied visiting CP while she worked as an office aide in the attendance office and denied visiting her in her seminar class for 15 minutes. At the conclusion of the interview, Superintendent Lopez informed respondent that he was being placed on paid administrative leave while the school district conducted an investigation of the allegations lodged against him by CP. Respondent was given a letter memorializing the disciplinary action. On December 10,

2009, or shortly thereafter, Lopez assigned the investigation to Director Jimenez who then interviewed students CP and JQ along with the principal. Jimenez also interviewed two counselors, the office assistant, and the seminar teacher. Subsequently, the school district filed the Accusation and Statement of Charges against respondent.

Charges or Allegations Regarding Student CP

31. (A) It was not established that respondent met with CP for the duration of the fall semester or called her out of class frequently or three to five times per week. Respondent met with the student for two or three weeks from late November to early December 2009 and called her out of class every now and then. Moreover, when he met with CP, respondent always kept the door to his office open. CP came to his office after respondent called her teacher or sent a call slip to her class. He tried to meet with her during lunch or passing periods. His meetings with CP were brief. It was not established that respondent caused CP to be tardy to any class or to miss any instruction due to the intervention meetings he had with her. Nor was it established that respondent did or said anything inappropriate to CP during his office meetings with her.

(B) It was not established that respondent was required by any policy or rule of the high school or school district to inform CP's counselor of record that he was meeting with his assigned student CP or to obtain that counselor's consent to meet with the student. Counselors are available to meet with and advise all students regardless whether or not the students are assigned to their counseling caseload. Students are allowed to meet with any counselor to have their cards signed under the high school's card disciplinary system.

(C) It was not established that respondent did anything improper by calling CP out of class more than once in a week or by performing frequent grade checks of her academic progress. Three other counselors testified in this matter. While they all preferred not to disrupt the students' instruction and called them out of class on an as needed basis, respondent followed a different practice than his colleagues by calling more students, including CP, out of class. The school district proffered evidence that it was not possible to do weekly grade checks because students' grades do not change that often. However, one of the counselors admitted that grade checks could be made weekly and the students' patterns of completing assignments would then be reviewable. Said counselor preferred that the parents ask for weekly grade checks because she herself did not have time to ask teachers for them.

32. (A) It was not established that respondent asked an office assistant for CP every day during the fall semester when CP worked as an office aide in the high school attendance office. Respondent inquired of CP's whereabouts once or twice per week and said hello to CP when he saw her in the offices. The office assistant did not ever see respondent speaking with CP and did not see respondent do anything that was inappropriate in the attendance office.

(B) It was not established that respondent ever asked CP about her boyfriend or told CP to make sure that her boyfriend treated her right. On one occasion, respondent came into the office when CP was talking with a female friend and he overheard the friend state that CP wanted to marry her boyfriend. Respondent denied having ever asked about CP's boyfriend and CP's testimony on this allegation was not consistent with the statement that she gave to the school district.

33. (A) It was not established that, on December 7, 2009, respondent did anything inappropriate or unprofessional by obtaining CP's cellular telephone number and then calling CP twice on a school day during school hours. He was trying to contact her mother to confirm a parent-teacher conference. From the school records, respondent had the mother's home and work numbers but could not reach her. He obtained CP's number and called her in an attempt to contact her mother and not for any inappropriate or insidious reason. It is not uncommon for high school teachers and administrators to call students on their cellular telephones on school-related projects and activities as a matter of convenience and efficiency.

(B) It was not established that, on December 8, 2009, respondent stayed in the seminar class and then looked or stared at CP for five minutes. The seminar teacher did not notice respondent looking at CP. As CP's friend testified, respondent walked to the door of the classroom and looked at CP for two seconds and not five minutes. It would not have been unexpected for respondent to look at CP when he saw that she was not doing her reading assignment since he had been trying to help her to improve her grades. Nor was it established that respondent went to the seminar class to follow or stalk CP.

34. Based on Findings 9 – 11, 14 – 15, and 24 – 33 above, the evidence did not establish that respondent acted inappropriately towards or engaged in inappropriate conduct with student CP. Nor was it established that respondent tried to have or to start an inappropriate relationship with student CP for his own personal or prurient reasons.

Violation of School Rules or Policy

35. (A) Based on Findings 9 – 34 above, it was not established that respondent failed to carry out his assigned and related duties as a counselor and certificated employee necessary for the successful operation of the high school or failed to uphold and enforce school rules and governing board policy as required by school district policy. Nor was it established that respondent failed to take necessary precautions to protect pupils or engaged in conduct or courses of conduct to endanger pupils.

(B) Based on Findings 9 – 34 above, it was not established that respondent engaged in sexual harassment of students VM and CP, or any other student, within the meaning of Education Code section 212.5 or in violation of the policy, rules, and regulations of the school district. Respondent did not make any unwelcome sexual advances, requests for sexual favors, or create an offensive or hostile environment at the high school.

36. Based on Findings 9 – 34 above, it was not established that respondent violated or failed to abide by the directives of the Associate Superintendent which were enunciated at the December 17, 2008, conference and memorialized in the Conference Summary when he met with CP to discuss her grades and academic progress. Respondent kept his office door open at all times while meeting with CP. It was not established that his office blinds were ever closed. He visited CP's classrooms for valid school and job related reasons. Respondent did not encourage CP or any other student from visiting him on a regular basis during class time. Instead, he called CP's teachers or sent call slips to CP's classroom and tried to meet with the student during lunch and passing periods. It was not established that respondent caused CP to miss any significant class or instructional time.

Other Evidence

37. Respondent has been married for 25 years. His wife is also employed by the school district as a high school counselor. He and his wife have two children; one of whom is in college and the other is a high school senior in another school district. Respondent also has two brothers and a niece who are employees in the school district. His niece teaches science at Segerstrom High School. Respondent is active with his church for which he has taught a Bible class for high school students and hosted Bible classes for adults in his home.

38. (A) Respondent was a credible and persuasive witness. His testimony was consistent with the interview and the statements that he gave to the school district. He had valid reasons for meeting with the two female students, which were confirmed by the statements and testimony of VP and CP. Both the mother of VM and the student CP sought out respondent's assistance in the academic area. For both students, respondent determined that his intervention would be to meet with them to review either homework assignments or academic progress in classes. He performed his intervention consistent with his counseling duties and school district policy.

(B) From the outset, respondent has denied having committed any inappropriate conduct with the two female students and no testimony was elicited or evidence produced that demonstrated he was lying or covering up any improper motives or illicit plans. Respondent's conduct was consistent not only with school district policy but also with his reputation and practices as a counselor. He did not say or do anything that was inappropriate, suggestive, or sexual in nature. He did not follow or stalk the two students.

39. Allegations contained in the Accusation and Statement of Charges for which there are no specific findings in this Decision were deemed unproven or considered immaterial or irrelevant upon consideration of all of the evidence.

* * * * *

Pursuant to the foregoing findings of fact, the Commission on Professional Competence makes the following determination of issues:

LEGAL CONCLUSIONS

1. Complainant has the burden of proof in this matter because it is seeking to dismiss respondent from employment as a certificated employee of the school district. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035.)

It is well-settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Nevarov v. Caldwell* (1958) 161 Cal. App.2d 762, 777.)

2. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(1), for immoral conduct in that it was not established that respondent engaged in any immoral conduct, based on Findings 1 – 39 above.

In general, immoral conduct has been defined as that which is hostile to the welfare of the general public and contrary to good morals. Immorality is not confined to sexual matters but includes conduct inconsistent with rectitude; conduct indicative of corruption, indecency, depravity, and dissoluteness; or conduct that is willful, flagrant, or shameless showing moral indifference to the opinions of respectable members of the community and an inconsiderate attitude toward good order and the public welfare. (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

In the present matter, the evidence did not demonstrate that respondent engaged in immoral conduct with two female students, VM and CP. Respondent did not engage in a pattern of singling out female students and calling them or having them come to his office for the purpose of trying to form improper relationships with them. He did not stalk or follow the students by visiting them in their classes and did not stare at them. Respondent had valid school and job related reasons for meeting with the two students. Both students were having academic difficulties. VM’s mother and CP asked for respondent’s assistance so that the two students could pass their classes. For brief periods of time, which lasted no more than two to four weeks over two different fall semesters, respondent instituted an academic and counseling intervention for the students by meeting with them frequently to discuss their assignments and grades. While meeting with them, he did not say or do anything that was sexual, illicit, or immoral in nature. He did not touch them or stare at them.

In December 2008, when he approved the Conference Summary issued to respondent, Associate Superintendent Lopez found respondent had engaged in serious behavior that crossed professional boundaries and made the student VM uncomfortable. One year later, when he learned about the allegations posed by CP, Lopez leaped to the conclusion that respondent was “testing the waters” with CP and looking to form an improper and unprofessional relationship with her. Lopez determined that respondent had once again engaged in inappropriate, sexual, and immoral conduct with a student. Lopez concluded that respondent was a sexual predator and a danger to children and had to be terminated from his job before he succeeded in forming an illicit relationship with a female student.

The evidence, however, did not support the conclusion that respondent was a sexual predator or had immoral, sexual, or prurient motives when he met with the two students. In this regard, because there was no evidence that respondent engaged in any improper physical contact, the allegation that respondent purportedly made the “kitty” statement to student VM was critical for showing whether or not he had sexual or prurient motives for meeting with not only the first student VM but also the second student CP. Inasmuch as the evidence failed to demonstrate that respondent made this statement or any other statement suggestive of an improper motive, the Commission concluded that respondent was trying to help the students, had benign and proper motives for meeting with them, and did not engage in immoral conduct.

3. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(7), for persistent violation of or refusal to obey school laws and regulations in that it was not established that respondent violated any school law or any reasonable regulation prescribed for the governance of public schools by the State Board of Education or by the governing board of the school district, based on Findings 1 – 39 above.

Under Education Code section 44932, subdivision (a)(7), the violation must be persistent or “motivated by an attitude of continuous insubordination.” (*Governing Board of the 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.) 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.)

In the present matter, the evidence did not show that respondent violated or refused to obey any rule, regulation, or order prescribed by the State Board of Education or the Governing Board of the school district. He did not violate the school district’s policies prohibiting sexual harassment and outlining responsibilities of certificated teachers. Respondent did not violate or refuse to obey the directive of the Associate Superintendent set forth in the December 2008 Conference Summary. He met with the student CP with his

office door open, did not go to her classroom for the purpose of visiting or stalking her, and did not encourage CP or any other student to visit him on a regular basis during class time.

4. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(5), for evident unfitness for service in that it was not established that respondent engaged in conduct which demonstrated that he is not fit to be a counselor or certificated teacher due to a defect in temperament that cannot be remedied or otherwise, based on Findings 1 – 39 above.

Evident unfitness for service 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.) Evident unfitness for service requires that unfitness be attributable to a defect or inadequacy in temperament which “connotes a fixed character trait, not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.* at 1444.)

Evident unfitness for the service of teaching requires an analysis based on the criteria set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, to determine whether, as a threshold matter, certain questioned conduct indicates unfitness for service. In the *Morrison* case, the Supreme Court of California held that the determination 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 criteria which include: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the respondent; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

The Commission on Professional Competence has broad discretion in applying the *Morrison* standard in disciplinary matters. The role of the commission is not merely to determine whether the charged conduct in fact occurred, but to decide whether the conduct, as measured against the *Morrison* criteria, demonstrates unfitness to teach. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220.)

In the present matter, the Commission has determined that the preponderance of the evidence did not show that respondent used his job as a certificated teacher and counselor to engage in immoral conduct with two female students. The preponderance of evidence did not show that respondent took advantage of his position of authority and trust in the high school to call, pursue, or stalk two female students in order to have inappropriate relationships with them. Respondent did not persistently violate or refuse to obey school laws or regulations or to perform his regular assignments as prescribed by the rules and regulations of the school district, and did not violate any state or school policy, rule, or

directive. Because respondent did not commit any conduct charged in the Accusation and Statement of Charges, it is not necessary evaluate any charged conduct against the *Morrison* criteria for determining whether respondent is unfit to be a teacher or counselor for the school district.

On the contrary, the Commission must conclude that respondent is a fit teacher and dedicated counselor who tried to help two students and make a difference in their academic and school lives. Acting within the structure and the policies of the fundamental high school and its academic and disciplinary card system, respondent met with and called the two students to his office and reviewed their assignments and grades so that they could pass their classes. Respondent did not act in a surreptitious manner with any student; he met with the students openly in his office and only after being asked to help them, sent out call slips to their classrooms and called their teachers, and contacted or tried to contact the students' parents about their progress. Respondent called and met with students in the guidance center more often than other counselors but he did not spend an inordinate amount time with any one student and did not engage in any improper conduct with any student. His conduct and activities were at all times consistent with his duties as a high school counselor and demonstrated that he has a caring and giving temperament and is willing to go the extra mile to help a student when asked.

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WHEREFORE, the Commission on Professional Competence makes the following Order:

ORDER

The Accusation and the Statement of Charges, OAH Case No. 2010040290, filed and issued by complainant Superintendent of Schools of the Santa Ana Unified School District against respondent Antonio Espinosa is dismissed, based on Conclusions of Law 1 – 4 above, jointly and for all. Respondent Antonio Espinosa shall be retained as a permanent certificated employee of the Santa Ana Unified School District.

Dated: _____

Michael Poizner, Commission Member
Retired Counselor
Whittier Union High School District

Dated: _____

Jack Foreman, Commission Member
Counselor
Centinela Valley Union High School District

Dated: _____

Vincent Nafarrete, Commission Member
Administrative Law Judge
Office of Administrative Hearings