

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

In the Matter of the Accusation Against,

JACINTA PLAZA,

Respondent.

OAH No. 2013050170

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on August 26, 27, 28, and 29, 2013. The Commission consisted of Nancee Fine, Hilda Rodriguez, and Administrative Law Judge Carla L. Garrett, Office of Administrative Hearings, State of California, who presided.

Ernest Bell, Bryan Park, and Woody Kochwain, Attorneys at Law, represented the Los Angeles Unified School District (District).

Lawrence Trystad, Attorney at Law, represented Respondent Jacinta Plaza (Respondent).

The parties submitted the matter for decision on August 29, 2013.

Respondent is a permanent certificated employee of the District assigned to teach fifth grade at Sheridan Street Elementary School (Sheridan). District alleged that Respondent demonstrated immoral conduct (sections 44932, subdivision (a)(1) and 44939)¹, dishonesty (sections 44932, subdivision (a)(3)), evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a) (7)), and willful refusal to perform regular assignments without reasonable cause (section 44939), all arising out of Respondent's students taking the California State Test (CST) in May 2011. The essence of the charging allegations is that Respondent violated State and District testing policies during the administration of the 2010-2011 CST by (1) inappropriately providing hints to some of her students during testing of the CST; (2) reviewing for accuracy the answers provided by some of her students on their examinations during testing of the CST; (3) instructing and/or indicating to some of her students to recheck and/or reexamine specific questions and/or answers during testing of the CST; (4) permitting some students to use their science textbooks during testing of the CST; and (5) withholding some of her students in her classroom during

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All statutory references are to the Education Code unless otherwise noted.

recess and/or lunch to allow them to continue working on the CST examinations. District seeks Respondent's dismissal.

As more fully set forth below, District failed to sustain its burden of demonstrating Respondent committed the acts described in the Accusation. Accordingly, District's Accusation is dismissed.

FACTUAL FINDINGS

1. On May 24, 2013, District served Respondent with an Accusation and Statement of Charges executed by Vivian K. Ekchian, Chief Human Resources Officer, acting in her official capacity. On April 23, 2013, Respondent executed a request for hearing, and on June 6, 2013, served her Notice of Defense.

2. Respondent is a certificated permanent employee of the District, who began teaching for District at Sheridan in 1998. The student body at Sheridan is mainly Latino, and many students come from families of lower-economic status. Respondent, who immigrated to the United States as a child from Ecuador with her single mother and younger siblings, identified with the students at Sheridan, and, like she had done in the past as a volunteer teacher in Columbia and in Mexico, made it her mission to help the underprivileged students at Sheridan. With the exception of sixth grade, Respondent has taught every grade at Sheridan, and has taught fifth grade for the last three years. She has and continues to operate under the premise that, with hard work, her students can succeed.

3. Over the years as a teacher at Sheridan, Respondent has received approximately nine or ten trainings from District on how to administer the CST. The trainings generally consisted of watching training videos and reviewing instructions on how to administer the test.

4. In 2009, and again in 2010, when Respondent taught fourth grade and fifth grade, respectively, the Los Angeles Times, based on her students' progress on the CST in math and English, compared Respondent's "value-added" rating of test score improvement to other District teachers, and ranked Respondent in the most effective overall category, the most effective in math category, and the most effective in English category.

5. On May 20, 2010, Respondent received her 2010 District evaluation, executed by Sheridan's principal Genaro Carapia, according to which, Respondent met standard performance. Mr. Carapia noted that Respondent devoted "countless, extra unselfish hours to address student learning." Mr. Carapia indicated that Respondent did not need to be evaluated the following year.

6. On April 26, 2011, Respondent signed a 2010-2011 STAR Test Security Affidavit, which stated that Respondent (1) would not divulge the content of the tests to any other person; (2) would not copy any part of the tests or test materials; (3) would keep the tests secure; (4) would limit access to the tests and test materials to the actual testing periods;

(5) would collect and account for all materials following each period of testing; (6) would not review any test questions, passages, or other test items independently or with pupils or with any other person before, during, or following testing; (7) would not develop scoring keys, review any pupil responses, or prepare answer documents except as required by the test administration manuals; (8) would return all test materials to the designated STAR test site coordinator; (9) would keep all test materials locked in secure storage except when administering the tests; (10) would administer the tests in accordance with the directions for test administration and test administration manuals; and (11) would acknowledge she had been trained to administer the tests.

7. In preparation for the 2010-2011 CST, scheduled to occur in May 2011, Respondent began training her students on the first day of school in September 2010, and intensified the preparation one month before the test. Approximately one month after the start of school, she, as she had done in previous years, began holding a math club and a reading club after school, two times a week each, to help the students prepare for the math and language arts portion of the CST. She encouraged her students' parents to permit her students to participate in the math and reading clubs. Of the 21 students in her fifth grade class, approximately 10 to 15 students participated in her math club and reading club, each.

8. In addition, Respondent, who described herself as a stringent and focused teacher, routinely assigned a large homework load to help the students with areas on the CST, and would require students to remain in her classroom during recess if they failed to complete the homework as assigned. She established firm classroom rules, including telling the students they were responsible for completing their own work, not cheating, not lying, working hard, and taking pride in being a hard worker.

9. Throughout the school year, but especially during the month preceding the test, she administered a series of practice tests, shared test-taking strategies, and set aside at least one and one-half hours per day for CST preparation. The practice tests generally occurred in the afternoon, and during the practice tests, she set up testing conditions similar to those the students could expect to find on the actual CST. Respondent, who described herself as the "sticky note queen," checked her students' answers for accuracy, and routinely placed sticky notes on her students' work and practice tests with instructions, reminders for them to check their work, and directives for her students to see her to discuss their work. Respondent routinely held individual conferences with her students to ensure they understood the concepts on the practice tests. In order to help her students grasp concepts, Respondent forewent her recesses and lunches to tutor students, stayed at work late, prepared extensive lesson plans, developed visual aids with animation, used theatrical and performing arts, made up songs, developed academic games based on "Who Wants to Be a Millionaire" and "American Idol," created vocabulary competitions, developed handouts, provided checklists, created power point presentations, made posters, and provided students with highlighters and manipulatives, to name a few.

10. Because many of Respondent's students were English language learners, she believed they required many visual aids. In that regard, Respondent often relied on her

friend of nine years, William Roche, who was a CFO of a manufacturing company, to print posters found or created by Respondent, as well as maps and handouts. Mr. Roche, who testified at hearing, and his company, "adopted" Respondent's class as a way to give back to the community, and sponsored transportation for school trips, in addition to providing printing and materials for Respondent's students.

11. From May 10, 2011 to May 19, 2011, Respondent administered the CST to her fifth grade class, with the assistance of her proctor, Aaron Perez. The CST consisted of questions in the areas of math, English language arts, and science.

12. Respondent received her Academic Growth over Time (AGT) report for 2011, based on the results of the 2011 CST, which provided Respondent's overall AGT results for her work with all of her students. Respondent's students scored in the 5.2 range for English language arts, and in the 6.3 range for math. Four students received a perfect score of 600 on the math portion of the CST. Ten of Respondent's 25 students who took the 2011 CST increased their performance levels in math from the previous years, and eleven had increased their performance levels in English language arts. The 2011 AGT report showed that Respondent was in the "blue" category, which was the highest category, in that Respondent's students scored "far above projected growth" in the areas of English language arts and math.

13. In 2012, Respondent's class met or exceeded Sheridan's goal of attendance for the first semester. Consequently, Sheridan's new principal, Isaias Martinez, presented Respondent with a certificate for inspiring her students to attend school and for teaching them the importance of good attendance.

14. In May 2012, Mr. Martinez received a verbal report from one of Sheridan's sixth grade teachers, Ms. Ly, that there had been some irregularities concerning Respondent's administration of the 2011 CST, based on information disclosed to her by three of her sixth grade students, who had been students in Respondent's class when they were in fifth grade. Mr. Martinez, who testified at hearing, summoned the three students and discussed with them the substance of their disclosures to Ms. Ly. The students told Mr. Martinez that Respondent talked to them about questions they had missed on the CST, and then told them to redo the questions.

15. After his discussion with the three students, Mr. Martinez located all of the sixth grade students who were in Respondent's fifth grade class, with the exception of the few who were no longer enrolled at Sheridan. Mr. Martinez told the students they were not in any trouble, and that he wanted them to write an answer to the following question: "Has there ever been a teacher that you feel helps you during the CST? If yes, tell me about it. If no, tell me how you feel about the CST. Everyone will write at least one paragraph." Seven students reported that Respondent had helped them during the administration of the 2011 CST.

16. Mr. Martinez interviewed the seven students, and they alleged that during the math portion of the test, Respondent (1) told the students which questions were answered

incorrectly and asked them to try to answer the questions again; (2) gave the students the correct answers at times; and (3) allowed them to use a book while taking the science portion of the CST.

17. Four of the seven students testified at hearing. Student B, who is now 13-years-old and in the eighth grade, was in Respondent's fifth grade class during the 2010-2011 school year, and took the CST under Respondent's instruction. Student B explained that, after completing a testing session, he took his answer sheet to Respondent, who checked Student B's answers. For the questions Student B answered incorrectly, Respondent marked the incorrect answers, and then gave the test back to Student B for him to redo the incorrect answers. He also witnessed Respondent do the same with other students in the class. Student B reported that Respondent also kept some students in at lunch and recess to continue taking the CST, including Student B, and never removed examples on the classroom wall, such as multiplication charts. Student B also advised that in preparation for the CST, Respondent "worked [the class] hard" over a period of months, and Respondent required the class to take a number of practice tests. If the students had answered questions incorrectly on the practice tests, Respondent would tell each student which questions they answered incorrectly, and then have the students correct their answers. During the course of his testimony, Student B appeared uncertain about the series of events during the testing of the CST, and repeatedly had to have his memory refreshed by a declaration prepared at the behest of, and written by, District's counsel. As such, Student B's testimony, as it pertained to CST testing, was afforded minimal weight.

18. Respondent disputed Student B's testimony, stating that while she put marks on her students' work, it only occurred during practice testing, and on other school work performed in class. Whenever she placed a mark on a student's work, she would direct the student to correct the wrong answer, and often held conferences with her students to ensure comprehension of certain concepts, especially during the weeks preceding the CST. During the administration of the CST, each test started with one or two sample questions, which she went over with the students, pursuant to CST instructions, and then discussed the correct answers to the sample questions, pursuant to a script provided in the CST testing materials. She engaged in no other discussions with the students regarding answering questions on the CST, and closely followed all CST procedures. In addition, in regard to recess and lunch, Sheridan's administration advised the teachers to use their discretion during the CST in terms of when to dismiss the students for recess and lunch, as they were not required to follow the official recess time during the testing period, and the school provided a modified lunch period. Moreover, Respondent's classroom walls were bare during the administration of the CST, as one week prior, Sheridan's administrators instructed the teachers to remove their posters, which she did.

19. Student J, who is now 13-years-old and in the eighth grade, was in Respondent's fifth grade class during the 2010-2011 school year, and took the CST under Respondent's instruction. Student J explained that after she completed the math testing session, she took her answer sheet to Respondent, who checked Student J's answers, put a sticky note on the incorrect answers, and instructed Student J to change the designated

answers. After changing the answers on her test, Student J gave her test back to Respondent, who checked it again, and asked Student J to return to her seat and correct the answers she still had wrong. Ultimately, Student J received a perfect score of 600 on the math portion of the CST. Student J also reported that Respondent kept about five students in the classroom during recess to continue taking the CST, including Student J, who also had to sometimes stay in during lunch period to finish the CST. Student J also advised that the class "studied really hard" in preparation for the CST. Specifically, Respondent gave the class homework and practice tests, and placed great emphasis on getting prepared for the CST. Respondent required her class to begin studying for the CST at the beginning of the school year in September 2010, and did not end their studying until the time of the CST, in May 2011.

20. Respondent disputed Student J's testimony. While Respondent often used sticky notes to point out mistakes and to give instructions, she did not do so on the CST. However, she did use sticky notes on the practice tests, and taught her students the strategy of "when in doubt, Charlie out," meaning to pick Answer C when students were unsure of the correct answer. She never sent Student J or any other student to their seats to correct incorrect answers during the CST, but she did do so during the practice testing.

21. Student W, who is now 12-years-old and in the eighth grade, was in Respondent's fifth grade class during the 2010-2011 school year, and took the CST under Respondent's instruction. Student W testified that during Respondent's administration of the CST, Respondent checked Student W's answers to the math questions. Respondent did not identify the answers Student W had gotten incorrect, but told him to recheck his answers and make corrections. After Student W made corrections, Respondent checked his answers again, and then sent him back to make more corrections. Student W waited in line with about 10 other students to turn in his test. The line moved slowly because Respondent went over each student's test, and then told them to make corrections. Student W received a score of 584 on the math portion of the CST. Student W advised that there was no science part of the CST when he took the test as a fifth grader in Respondent's class. Student W and the rest of the students in Respondent's class worked very hard to get prepared for the test, as Respondent was a strict teacher and demanded the students to work hard.

22. Respondent disputed Student W's testimony. While it is true that Respondent often told her students to go back and double check answers, she did not do so during the administration of the CST. After taking practice tests, students would sometimes form a line so that Respondent could review their practice tests for accuracy. Also, Student W testified that there was no science part on the CST, but there was, indeed, a science portion on the CST.

23. Student Z, who is now 13-years-old and in the eighth grade, transferred to Sheridan in the beginning of May 2011, one week prior to the administration of the CST, and was assigned to Respondent's class. Because she had already taken the CST at her previous school, she did not have to take the CST when she began attending Sheridan. However, Student Z remained in Respondent's class during Respondent's administration of the CST, and noted that students could not turn in their answers until the answers were correct.

Student Z testified that most of the answers Respondent had students re-check were in the areas of English and science, and saw her classmates use their science textbooks during the science part of the CST. Student Z's testimony was inconsistent with the testimony of the other students, in that Student Z stated that Respondent had provided help in the areas of English and science, while the other students advised that Respondent had asked them to recheck their answers in the area of math.

24. Respondent disputed Student Z's testimony. Respondent did not recall Student Z in the class during the administration of the CST, but she was there during the practice testing given days before the CST. During the practice testing, Respondent did require students to recheck their answers, but not during the actual CST. In addition, Respondent never permitted any students at any time during the CST to use their science textbooks. However, during practice tests, she allowed students to use the periodic table from their science books.

25. On May 10, 2012, Mr. Martinez executed Respondent's 2012 District evaluation, which showed that Respondent had met standard performance. Mr. Martinez noted that Respondent provided "her students with additional academic support outside of regular work hours." Mr. Martinez indicated that Respondent did not need to be evaluated the following year. At the time he signed Respondent's evaluation, Mr. Martinez was aware of the children's allegations, as he was investigating the allegations.

26. On May 21, 2012, Mr. Martinez sent Respondent a written conference request to discuss the allegations made by students regarding her administration of the 2011 CST. Mr. Martinez indicated that Respondent could bring a representative to the meeting, because Respondent could face disciplinary action.

27. On May 23, 2012, Respondent met with Mr. Martinez, and brought her union representative, Anastasia Gonzalez, to the meeting. During the meeting, Mr. Martinez advised that he had become aware that some of her students from the 2010-2011 school year had alleged that she had helped them on the CST. He further advised he had conducted an investigation where he took statements from her students from her 2010-2011 class, and that seven of the students indicated that Respondent failed to comply with the 2010-2011 STAR Security Affidavit. Mr. Martinez provided Respondent with copies of the statements from the seven students, and a copy of the 2010-2011 STAR Test Security Affidavit that Respondent had signed on April 26, 2011. Respondent said nothing at the meeting, as her union representative advised her not to respond. Mr. Martinez advised that, as a result of the students' allegations, he filed a "STAR Program-Irregularity Report Form," and that the Student Testing & Assessment Office may conduct its own investigation.

28. On May 23, 2012, Mr. Martinez wrote a memorandum to Respondent that memorialized what he discussed at the meeting. Mr. Martinez also stated in the memorandum that as part of his investigation, after the students had submitted their statements, that he had asked two of the students if their allegations applied to all components of the CST. Both students said that their allegations applied to only the

mathematics sections, and that Respondent had allowed them to use their science textbooks during the science portion of the CST. Mr. Martinez stated in the memorandum that, if Respondent wished to respond, to do so in writing by May 31, 2012.

29. Mr. Martinez never interviewed Mr. Perez, who served as a proctor every day during Respondent's administration of the 2011 CST. Mr. Perez, who testified at hearing, denied that Respondent engaged in any inappropriate conduct during the administration of the 2011 CST. Specifically, Mr. Perez stated Respondent never provided hints to any students during the testing of the CST, never reviewed for accuracy any questions provided by any students on their examinations during testing of the CST, never instructed or indicated to any of her students to recheck or re-examine specific questions and/or answers during testing of the CST, and never permitted any students to use their science textbooks during the CST. Mr. Perez also stated that the CST was not a timed test, so if he had witnessed students remaining in class during recess or lunch, he would not have considered it an irregularity.² Had he witnessed Respondent committing any irregularities, he would have reported them.³

30. On May 29, 2012, Respondent submitted a written response to Mr. Martinez' memorandum, wherein she denied all of the accusations. Specifically, Respondent denied reviewing students' answers to ascertain whether they were correct, and denied instructing the students to change their answers. However, she did instruct students to show their work on the test so that there was justification for their answer choices. Respondent also denied explaining or translating questions for any students. In regard to the student that remained in the classroom during the lunch period, Respondent reminded Mr. Martinez that the CST was an untimed test, and the student was extremely slow in completing the test and required additional time. Respondent reiterated that she was in complete compliance with the STAR Test Security Affidavit.

31. In May 2012, Respondent administered the CST to her fifth grade class, with the assistance of three proctors: Mr. Martinez, the vice-principal, and another proctor.

32. On June 12, 2012, Ms. Ly sent a letter to Mr. Martinez memorializing what she had reported to him in May 2012 concerning Respondent and the 2011 CST testing. Specifically, Ms. Ly outlined the information three of her students had disclosed to her. One

² Mr. Perez submitted a declaration stating that he did not witness Respondent withholding students in her classroom during recess or lunch.

³ At hearing, Mr. Perez stated that he sometimes read test questions to students when they had a question on the CST, and that he witnessed Respondent do the same. Respondent denied that she read questions to students during the CST, with the exception of the sample questions. Because the Accusation did not charge Respondent with inappropriately reading questions to the students during the course of the CST, it is not necessary to make a factual finding concerning this issue. In addition, Mr. Perez' statement in this regard did not serve to discredit Respondent's testimony.

student reported that Respondent had told her to check over her problems, specifically the ones she had gotten wrong. The second and third students confirmed the first student's account, and the second student added that Respondent pointed out wrong answers, and wouldn't let students turn in the tests until the answers were correct.

33. On June 19, 2012, District issued Respondent a notice of suspension and a notice of unsatisfactory service or acts, pursuant to Mr. Martinez's recommendation, because Mr. Martinez concluded that Respondent's alleged acts were purposeful. Mr. Martinez further concluded that Respondent's actions resulted in inflated CST scores for her students. The Student Testing & Assessment Office never responded to the Irregularity Report Form Mr. Martinez filed, and, to his knowledge, conducted no investigation regarding Respondent's administration of the 2011 CST test. Respondent filed a grievance to challenge the suspension, which is still pending.

34. Respondent received her AGT report for 2012, based on the results of the 2012 CST, which measured Respondent's impact on the academic growth of her students for CST test subjects. Specifically, while the average score for other fifth grade students was in the 3.6 range, students in Respondent's class scored in the 4.2 range for English language arts, and in the 4.3 range for math. These scores were lower than the 5.2 range and the 6.3 range scores for English language arts and math, respectively, on the 2011 CST. Despite this, the 2012 AGT report showed that Respondent fell into the blue category, as her students scored "far above projected growth" in the areas of English language arts and math.

35. When questioned at hearing why her students' scores dropped in 2012, Respondent explained that she had a very different class for the 2011-2012 school year than her students in her 2010-2011 class. Her 2010-2011 students were higher performers in general, higher than in her previous year as a fifth grade teacher, and higher than the subsequent year. In addition, during the 2012 CST, she believed her students were tense and anxious as result of all the proctors in the room, including Mr. Martinez and the vice-principal. Despite this, 21 of her 29 students who took the 2012 CST increased their performance levels in math from the previous years, and eight had increased their performance levels in English language arts.

District's Expert

36. Dr. Cynthia Lim, Executive Director of District's Office of Data and Accountability, testified at hearing. Dr. Lim earned her bachelor's degree in experimental psychology from the University of California at Santa Barbara in 1978. She earned her master's degree in social work from the University of California at Berkeley in 1981, and earned her doctorate in social welfare from the University of California at Los Angeles in 1998. She has several publications and has served as a presenter on the topics of data decisions, literacy, adoption, health and social services, and establishing school-based collaborative teams. Since 2002, Dr. Lim has provided data statistical analysis for District. In her current position as an executive director, Dr. Lim's duties include, but are not limited to, gathering data about District students, overseeing the administration of all District, State,

and federal mandated testing programs, and measuring the academic growth over time (i.e., AGT) of students.

37. Dr. Lim explained that the purpose of the AGT is to be able to track the performance of a student over time. In addition to considering CST results, the AGT considers demographic factors about students, such as gender, ethnicity, socio-economic status, whether they are English language-learners, migrants, or homeless, whether they receive free or reduced price lunches, and a number of other factors, and then uses these factors to compare like students with like students. AGT data can also be reviewed to identify the individual impact of teachers and schools on student learning.

38. Pursuant to District's request, on August 19, 2013, Dr. Lim prepared a memorandum addressing AGT. Dr. Lim explained that District contracted with the University of Wisconsin's Value-Added Research Center (VARC) to develop the AGT model and calculate scores for schools and teachers. The AGT metric uses a value-added approach where a student's prior year achievement on the CST in English language arts and math, along with other demographic, classroom and school variables, is used to predict future performance on the CST. The difference between the "predicted" and "actual" score is considered the value-added "residual." If the residual is positive, it means the student performed better than predicted. If the residual is negative, it means the student performed worse than predicted. If the residual is at or near zero, it means the student performed as well as predicted.

39. Dr. Lim reported that the value-added residuals aggregated across students in a teacher's classroom can help identify anomalies or unusual patterns in student test scores over multiple years. For example, if a student's residuals show a spike one year (performance higher than expected) and a substantial decrease the following year (performance lower than expected), it would be useful to investigate whether the spikes or dips were far higher or lower than all other students in comparable classrooms. Anomalies in the pattern of residual scores may point to situations where test scores do not accurately represent the student's actual skills and abilities at the conclusion of the school year.

40. Dr. Lim explained that growth estimates were provided for each teacher, school, and grade level, compared to the District average, which was set at "3", and then the results were categorized as follows:

1. Far Above Predicted AGT (Blue)
2. Above Predicted AGT (Green)
3. Within the predicted range (Gray)
4. Below Predicted AGT (Yellow)
5. Far Below Predicted (Red)

41. The 2011 teacher AGT report for Respondent categorized her as a "blue" teacher, meaning that, on average, students in her classroom had far above average growth, with an AGT estimate above "4." An examination of the residuals for the 21 students in

Respondent's fifth grade class for the 2010-2011 school year showed that the students made gains higher than expected in English language arts (residuals = .58) and in math (residuals = 1.27). Data for the same students was examined for the previous school year (2009-2010) when they were in fourth grade, and the year after (2011-2012) when they were in the sixth grade. When Respondent's students were in fourth grade, their residuals averaged -.03, meaning they scored slightly lower than predicted in the fourth grade. Their fourth grade classmates who did not have Respondent in the fifth grade, scored slightly higher than predicted, with residuals averaging .09 in English language arts. In math, the reverse was noted. Specifically, students later linked to Respondent scored higher than predicted in fourth grade math, compared to other students who did not have Respondent for fifth grade.

42. Respondent's fifth grade students from the 2010-2011 school year were also followed for the next school year as they completed the sixth grade. Their average value-added residual was lower than the average value-added residual for other students in these classrooms. For students who had Respondent in fifth grade, English language arts and math scores were much lower than predicted, based on the students' prior year test scores. The value-added residual for Respondent's students was on average -0.74 in English language arts, while other students in the same sixth grade classroom who did not have Respondent in fifth grade averaged -.08. In math, students from Respondent's classroom had average residuals of -.84, while other sixth graders in the same classroom had residuals of .01. Dr. Lim opined that the test scores of Respondent's fifth grade class in 2010-2011 may not have served as an accurate predictor of performance in the sixth grade and did not represent the student's actual skills and abilities at the end of the school year.

43. Dr. Lim also noted that in the 2010-2011 school year, there were 37 fifth grade teachers with the categorization of "blue" in English language arts, meaning their average residuals indicated far above average growth, with an AGT estimate above "4." On average, the 654 students in their classrooms had residuals at .73, higher than the average residual for Respondent in the same year. The residuals from the year prior (fourth grade) were near zero, meaning there was little difference between the students who later had "blue" teachers versus those who did not. When these students went to sixth grade, the average residuals of the students from "blue" teachers was -.50. In contrast, students in Respondent's classroom had average residuals of -.74. Therefore, Dr. Lim concluded there was no statistically significant difference between Respondent's average residuals and all other "blue" teachers in English language arts.

44. In math, however, there was a statistically significant difference between Respondent's average residuals and all other "blue" teachers. Specifically, Dr. Lim explained that there were 101 fifth grade teachers with the categorization of "blue" in math. The 1,880 students in the "blue" classrooms in the 2010-2011 school year had residuals averaging .80, far higher than what would be predicted based on their fourth grade scores. In the following year, those students performed lower than predicted, with an average residual of -.36. The students in Respondent's classroom performed lower than the average of all students of "blue" teachers, with average residuals of -.84. The difference in the average

residuals between Respondent and all other "blue" teachers was statically significant, meaning this result was most likely not due to chance.

45. While Dr. Lim could not state whether the statically significant difference in math was due to cheating, she did state that cheating would result in inflated scores, and higher residuals. However, Dr. Lim noted that she did not look at the quality of the teachers the students had in sixth grade, whether students had parents who had divorced since their fifth grade CST, whether a parent had died, or whether a parent had been accused of a crime, or any other possible variables within students' lives that could have caused them not to perform as well on the CST in sixth grade as they did in fifth grade. Dr. Lim also noted that it is possible that Respondent was a "great teacher," which could have resulted in the higher residual scores. In addition, there could have been good classroom dynamics, good preparation, a good learning environment, and a host of other possibilities that could explain Respondent's high residual scores.

Character Testimony

46. Respondent's colleague and fellow fifth grade teacher at Sheridan, Bernardino Mercado, testified at hearing. Mr. Mercado has known Respondent for nearly 14 years, ever since he began teaching at Sheridan. Mr. Mercado described Respondent as a very good, highly qualified, honest, professional teacher, who works very hard for her students. Mr. Mercado holds Respondent in high esteem, because she focuses on improving the instructional needs of her students, collaborates regularly with other teachers, and demonstrates a passion for working in the community and in the school. Respondent is highly respected, held in high esteem by her colleagues, is hardworking, and honest. Based on his high regard for Respondent, Mr. Mercado believes Respondent did not commit the violations set forth in the Accusation. In addition, Respondent, along with all other teachers, had received detailed training on how to administer the CST, and advised that administrators routinely walked through the classrooms during CST testing to ensure compliance with CST rules.

47. Another colleague and teacher, Anastasia Gonzalez Zimara, who also served as Respondent's union representative at the May 23, 2012 meeting with Mr. Martinez, testified at hearing. Ms. Zimara has been a teacher for the District for approximately 14 years, and has been at Sheridan for six years. Ms. Zimara worked closely with Respondent from 2009 through 2012 as a fellow fifth grade teacher, and often collaborated together to develop lesson plans, review grade level data, and share best practices. She always considered Respondent as honest, fit, committed, and a model teacher. As a rule, Respondent arrived to school early in the mornings, often stayed late, and routinely went above and beyond the call of duty for the benefit of her students. Respondent had the reputation for being a very strict teacher. Ms. Zimara believes Respondent did not commit the violations set forth in the Accusation, because Respondent would not risk everything to cheat, especially given how hard she worked to get her students prepared for the CST, and how Respondent truly believed in her students to achieve. Like Respondent's class, Ms. Zimara's class took an "extra long time" to complete certain portions of the CST, which

resulted in their classes going past their regular lunch time before the students were allowed to leave for lunch. During the CST, Sheridan provided extra lunch sessions in order to accommodate students' potential late release for lunch. Ms. Zimara also noted that while many teachers generally want their students to do well on the CST, most teachers at Sheridan do not consider the CST "the end all, be all." Teachers are not paid extra money if their students perform well on the CST.

48. Janice Ormand, a fourth grade teacher who worked collaboratively with Respondent when Respondent taught fourth grade, provided a reference letter lauding Respondent as an active team player who developed many valuable, innovative lesson plans that met the needs for low, middle, and high functioning students. Ms. Ormand considered Respondent an extremely hard working teacher, who expected her students to be academically successful through hard work.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The "burden of proof" means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; Evid. Code, § 115.) "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

3. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Sections 44932, 44934, and 44944.)

4. Under section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

5. When a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (Section 44944, subdivision (c)(1)(3).)

6. Section 44932 provides in part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(3) Dishonesty.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

[¶] . . . [¶]

7. Section 44932, subdivision (b) provides that a district may suspend a permanent employee without pay for a specific period of time if it follows the same procedures as for dismissal of a permanent employee.

8. Section 44939 provides in part:

Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, . . . with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that

30 days after service of the notice, he will be dismissed, unless he demands a hearing.

9. Here, District failed to prove by a preponderance of the evidence that Respondent demonstrated unprofessional conduct (section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), dishonesty (section 44932, subdivision (a)(1)), evident unfitness for service (section 44932, subdivision (a)(5)), willful refusal to obey reasonable regulations (section 44932, subdivision (a)(7)), or willful refusal to perform regular assignments without reasonable cause (section 44939). All of District's charges stem from allegations of cheating, based on the testimony of four of seven students who claimed that during Respondent's administration of the exam, she marked or placed sticky notes on incorrect answers on the students' exams, according to Student B and Student J, or simply asked students to recheck answers after students stood in line for her to review their answers, according to the testimony of Student W, or would not allow students to turn in their exams without correcting certain answers, according to the testimony of Student Z, or permitted students to use their science textbooks during the exam, according to the testimony of Student Z, or would not allow students to leave during recess or lunch so that they could continue taking their tests, according to the testimony of Student B and Student J. However, given Respondent's credible testimony about how she administered a number of practice tests, routinely checked her students' answers on the practice tests, required them to correct their incorrect answers on the practice tests, and permitted them to use the periodic chart in their science textbooks on the practice tests, it appears that Students B, J, W, and Z confused Respondent's actions on the practice tests for those that occurred on the actual CST. This notion is supported by the sheer number of students who did not claim that Respondent had engaged in any inappropriate behavior during her administration of the CST. In other words, had Respondent actually engaged in the alleged misconduct during the CST, and in such a public way, as the four students had testified, it naturally follows that substantially more than seven of the 21 students would have supported those claims in their own statements submitted to Mr. Martinez. Surely, if there had been approximately 10 students in line waiting for Respondent to review their answers on the CST, as Student W testified, more students would have advised Mr. Martinez of that fact, including the other three students who provided testimony at hearing. In addition, if Respondent had permitted students to use their science textbooks during the CST, certainly there would have been other students who conveyed such information to Mr. Martinez. Moreover, if Respondent had required students to remain in class during recess and lunch, District failed to show that such action was inappropriate, given Ms. Zimara's testimony, who engaged in a similar practice, the provision of an extra lunch period to accommodate the students taking the CST, and the fact that the CST was not a timed test, as supported by the testimony of Respondent, Mr. Perez, Mr. Mercado, and Ms. Zimara. Given these factors, District failed to meet its burden.

10. Notwithstanding the above, District contends that its expert, Dr. Lim, established that the high scores achieved by Respondent's students on the 2011 CST in math, which resulted in a statistically significant difference between Respondent and all other "blue" teachers, was most likely not due to chance. As such, it argues that the anomaly in Respondent's test results demonstrated that Respondent cheated, or otherwise engaged in

inappropriate conduct that artificially inflated her students' scores, supported by the students' less than stellar performance in math in the following year. However, this position is not persuasive, given the number of possible and reasonable variables that could have impacted the students' performance as fifth graders on the 2011 CST, and as sixth graders on the 2012 CST.

11. Specifically, as Respondent credibly testified, she engaged in extensive work preparing her students for the 2011 CST, such as holding a math club and a reading club after school, two times a week each, to help the students prepare for the math and language arts portion of the CST; routinely assigned a large homework load to help the students with areas on the CST; required students to remain in her classroom during recess if they failed to complete the homework as assigned; administered a series of practice tests; shared test-taking strategies; set aside at least one and one-half hours per day for CST preparation; routinely held individual conferences with her students to ensure they understood the concepts on the practice tests; Respondent forewent her recesses and lunches to tutor students; stayed at work late; prepared extensive lesson plans; developed visual aids with animation; used theatrical and performing arts, made up songs; developed academic games based on "Who Wants to Be a Millionaire" and "American Idol;" created vocabulary competitions; developed handouts; provided checklists; created power point presentations; made posters; and provided students with highlighters and manipulatives. In addition, Respondent had a history of demonstrating CST effectiveness, evidenced by her "value-added" rating noted in the Los Angeles Times in 2009 and 2010, based on her students' progress on the CST in math and English, ranking Respondent in the most effective overall category, the most effective in math category, and the most effective in English category.

12. Respondent's hard work is supported by the testimony of Mr. Mercado and Ms. Zimara, who described Respondent as a very good, hard-working, highly qualified, honest, fit, committed, professional teacher, who works very hard for her students, and who Ms. Zimara considered a model teacher. Both acknowledged that Respondent was held in high esteem, because, as Mr. Mercado testified, Respondent focuses on improving the instructional needs of her students, collaborates regularly with other teachers, and demonstrates a passion for working in the community and in the school. Even Respondent's 2010 District evaluation, executed by Sheridan's principal Genaro Carapia, noted that Respondent devoted "countless, extra unselfish hours to address student learning."

13. Indeed, even District's expert, Dr. Lim, noted that it is possible that Respondent was a "great teacher," which could have resulted in the higher residual scores. In addition, Dr. Lim acknowledged there could have been good classroom dynamics, good preparation, a good learning environment, and a host of other possibilities that could explain Respondent's high residual scores.

14. The fact that the same students did not perform as well on the CST in sixth grade could be attributed to just as many factors and variables as the reasons for their stellar performance in fifth grade. Specifically, as Dr. Lim testified, she did not look at the quality of the teachers the students had in sixth grade, whether students had parents who had


divorced since their fifth grade CST, whether a parent had died, or whether a parent had been accused of a crime, or any other possible variables within students' lives that could have caused them not to perform as well on the CST in sixth grade as they did in fifth grade. Moreover, the evidence showed that Respondent's fifth grade students who took the 2012 CST, though they did not perform as well as her 2010-2011 fifth grade class, still scored high enough for District to again classify Respondent as a "blue" teacher. Such "blue" categorization for 2009, 2010, 2011, and 2012, without any allegations of cheating during those years prior or the year subsequent to 2011, suggests that Respondent is simply an effective teacher who knows how to help her students reach their full potential, and not one who engages in inappropriate conduct during the administration of the CST. The District simply failed to establish that Respondent should be dismissed for the acts alleged in the Accusation.

15. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an 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." The court concluded that a teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness. However, as it has been determined that the conduct was not proven as alleged, it is not necessary to discuss the "*Morrison* factors" as they relate to that conduct.

ORDER

The Accusation is dismissed.

DATED: December 30, 2013


CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: December __, 2013

NANCEE FINE
Commission Member

DATED: December __, 2013

HILDA RODRIGUEZ
Commission Member

divorced since their fifth grade CST, whether a parent had died, or whether a parent had been accused of a crime, or any other possible variables within students' lives that could have caused them not to perform as well on the CST in sixth grade as they did in fifth grade. Moreover, the evidence showed that Respondent's fifth grade students who took the 2012 CST, though they did not perform as well as her 2010-2011 fifth grade class, still scored high enough for District to again classify Respondent as a "blue" teacher. Such "blue" categorization for 2009, 2010, 2011, and 2012, without any allegations of cheating during those years prior or the year subsequent to 2011, suggests that Respondent is simply an effective teacher who knows how to help her students reach their full potential, and not one who engages in inappropriate conduct during the administration of the CST. The District simply failed to establish that Respondent should be dismissed for the acts alleged in the Accusation.

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ORDER

The Accusation is dismissed.

DATED: December __, 2013

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: December 31, 2013

Nancee Fine
NANCEE FINE
Commission Member

DATED: December __, 2013

HILDA RODRIGUEZ
Commission Member

of the teachers the students had in sixth grade, whether students had parents who had divorced since their fifth grade CST, whether a parent had died, or whether a parent had been accused of a crime, or any other possible variables within students' lives that could have caused them not to perform as well on the CST in sixth grade as they did in fifth grade. Moreover, the evidence showed that Respondent's fifth grade students who took the 2012 CST, though they did not perform as well as her 2010-2011 fifth grade class, still scored high enough for District to again classify Respondent as a "blue" teacher. Such "blue" categorization for 2009, 2010, 2011, and 2012, without any allegations of cheating during those years prior or the year subsequent to 2011, suggests that Respondent is simply an effective teacher who knows how to help her students reach their full potential, and not one who engages in inappropriate conduct during the administration of the CST. The District simply failed to establish that Respondent should be dismissed for the acts alleged in the Accusation.

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ORDER

The Accusation is dismissed.

DATED: December __, 2013

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: December __, 2013

NANCEE FINE
Commission Member

DATED: December 30, 2013

Hilda Rodriguez
HILDA RODRIGUEZ
Commission Member