

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
SAN DIEGO UNIFIED SCHOOL DISTRICT

In the Matter of the Dismissal of:

EDWARD ROSENBERG,

A Permanent Certificated Employee,

Respondent.

OAH No. 2010040926

**DECISION OF THE  
COMMISSION ON PROFESSIONAL COMPETENCE**

On January 5 and 6, 2011, a Commission on Professional Competence heard this matter in San Diego, California. The Commission included James Ahler, Haywood Finder, and Jamie Holding.

Katherine E. Allison, Associate General Counsel, and Amy J. Bozone, Assistant General Counsel, represented Complainant, Sandra Huezo, Chief Human Resources Officer, San Diego Unified School District, San Diego County, State of California.

Carlos R. Perez, Attorney at Law, represented Respondent, Edward Rosenberg, a permanent employee of the San Diego Unified School District, who was present throughout the administrative hearing.

On January 6, 2011, the matter was submitted.

**PRELIMINARY STATEMENT**

The San Diego Unified School District is located in San Diego County, California. The District has employed Edward Rosenberg as an English teacher at Morse High School since 2002.

On January 21, 2009, Mr. Rosenberg met individually with students in his first period English class to advise them of their first semester grades and to suggest methods by which they might improve them. One student was MC, a 16-year-old female. Mr. Rosenberg told MC that she was failing the class. Mr. Rosenberg advised MC about what she could do to

improve her grade. Mr. Rosenberg permitted MC to come into his classroom later that day, during his prep period, to discuss the matter further.

When Mr. Rosenberg met with MC in his classroom, the blinds were drawn and the door was closed. What happened next was disputed: MC claimed that Mr. Rosenberg rubbed and squeezed her right breast, rubbed her buttocks, attempted to put his hand down the front of her pants, made sexual noises, and breathed heavily in her ear; Mr. Rosenberg denied engaging in any inappropriate conduct.

When MC was inside Mr. Rosenberg's classroom, two students from the classroom next door surreptitiously looked through the blinds. A female student, BS, who was MC's close friend, saw Mr. Rosenberg touch MC, but not with his hands. BS was shocked. A few seconds later, PM, a male student who knew MC but was not a close friend, observed Mr. Rosenberg's hand caressing MC's buttock. He, too, was shocked. BS and PM returned to the classroom next door. A few moments later, MC left Mr. Rosenberg's classroom and returned to the classroom next door.

Within a couple of days, allegations related to the incident became known to administrators and District law enforcement. On January 23, Officer Doris Devowe interviewed Mr. Rosenberg, who denied any wrongdoing. Mr. Rosenberg's classroom was searched following the interview. A videotape was found in his briefcase that, in part, depicted a student reciting a poem in the 2002-2003 school year that included some inappropriate content. The video was seized. *Stuff* magazines were seized from a closet in Mr. Rosenberg's classroom. Mr. Rosenberg was placed on administrative leave.

The Accusation in this matter alleged that Mr. Rosenberg engaged in immoral conduct, that such conduct established Mr. Rosenberg's evident unfitness for service, and that Mr. Rosenberg committed persistent violations of school regulations. To support the allegations, Complainant called MC, BS, PM, Officer Devowe, and a few other witnesses.

In this proceeding, Mr. Rosenberg admitted that having *Stuff* magazines in his classroom was inappropriate, but he asserted that the presence of those magazines in his classroom did not justify his dismissal from employment. In defense to the more serious charges, Respondent established that MC was a difficult and often histrionic student, that MC had a history of being disruptive, and that she was sometimes untruthful. Mr. Rosenberg categorically denied engaging in any inappropriate behavior. He asserted that he is a highly ethical educator and the misconduct alleged was inconsistent with his character. Mr. Rosenberg testified that he did not make any inappropriate comments to any student and that he never touched the intimate parts of any student, including MC.

Based on a preponderance of the evidence and the application of relevant *Morrison* factors, the Commission on Professional Competence concludes that Mr. Rosenberg touched MC's buttock when Mr. Rosenberg and MC were alone in his classroom on January 21, 2009, that the touching of MC's buttock involved immoral conduct, that Mr. Rosenberg is unfit to serve as a high school teacher, and that his employment with the San Diego Unified School District should be terminated.

## FACTUAL FINDINGS

### *Respondent's Education and Employment with the District*

1. Edward Rosenberg (Respondent or Mr. Rosenberg) obtained a bachelor's degree in English from San Diego State University in 1999. He obtained a teaching credential from San Diego State University thereafter. He is CLAD certified. Mr. Rosenberg obtained a master's degree in English from San Diego State University in 2004.

2. The District employed Mr. Rosenberg full time as an English teacher at Morse High School since the 2002-2003 school year. At all times relevant to this matter, Mr. Rosenberg was a permanent certificated employee of the San Diego Unified High School District. During his employment with the District, Mr. Rosenberg developed and followed the practice of leaving his classroom door open and the blinds up whenever he met alone with a student for an extended period of time.

### *Student MC*

3. MC lived in San Diego with her mother and siblings. MC admitted that she was not a particularly good student, that she failed many classes, and that she was subject to various disciplinary actions. District records established that MC was held out of class for two days in May 2007 for being disrespectful and failing to follow classroom rules; that she was given detention and was counseled in October 2007 for being disrespectful; that she was defiant and had to be escorted to the detention area (which she left without authorization) in February 2008, which resulted in a five day suspension; that she was off task and disruptive in the classroom and engaged in conduct that resulted in minor injury to a teacher in March 2008; that she was disruptive in the classroom several times in and before April 2008, which resulted in five days detention; and that she engaged in mutual combat with a classmate after school and was suspended for three days in April 2008.

In late April 2008, MC filed a written complainant with Vincent Derek Morris, the Principal at Kearney High School. MC complained that a male teacher was harassing her. In her three-page handwritten letter, MC outlined what the teacher had done; however, MC did not allege that the teacher engaged in any form of sexual harassment. Principal Morris testified that MC "was not a truthful student," that she was loud and boisterous, and that she possessed an "exaggerated emotionality."

MC transferred from Kearney High School to Morse High School after the 2007-2008 school year.

### *The Events Occurring in December 2008 and January 2009*

4. Mr. Rosenberg taught American Literature at Morse High School during first period in the 2008-2009 school year. MC was one of his students. She was 16 years old at the time. MC was frequently late to the American Literature class. She rarely completed her assignments.

When MC arrived late, Mr. Rosenberg sometimes said, “Well, here is my favorite student.” Mr. Rosenberg made the same comment to other students who arrived late. Mr. Rosenberg did not, as alleged, tell MC that she was “looking good,” or ask her to walk so he could watch, or tell her that she could earn extra credit by dancing in the classroom, or suggest that she to provide him with pictures of herself. Mr. Rosenberg never asked MC if she “was wearing a wire.”

MC did not keep up with the assignments. She failed to do the required reading and did not turn in homework. MC knew, by mid-January 2009, that she was not doing well in Mr. Rosenberg’s class.

5. On January 21, 2009, Mr. Rosenberg called each of his first period American Literature students to his desk at the back of the classroom to discuss their grades. During the discussions, Mr. Rosenberg suggested methods by which a student might raise his or her grade or obtain extra credit.

6. When Mr. Rosenberg met with MC, some students were milling about the classroom. Mr. Rosenberg’s desk was easily seen from all areas within the classroom. On occasion before meeting with MC, students approached Mr. Rosenberg’s desk and asked him questions even though he was meeting with another student.

When Mr. Rosenberg met with MC, he told her that she was failing the class. He told her that the only way she could pass the class was to do very well on the final examination and complete a packet of assignments. Mr. Rosenberg told MC that he would accept her assignments even if they were turned in late.

MC was very upset when she realized how hard it would be for her to do all the work in the next week or so. MC asked Mr. Rosenberg about extra credit. Mr. Rosenberg told MC that they could discuss extra credit during second period, which was his prep period.

A preponderance of the evidence did not establish that Mr. Rosenberg rubbed MC’s leg during their first period conference. A preponderance of the evidence did not establish that Mr. Rosenberg asked MC if she was “wearing a wire.” A preponderance of the evidence did not establish that Mr. Rosenberg told MC, “You give me a video, I’ll give you a C,” or that Mr. Rosenberg told MC, “You are a smart girl, you can figure it out” when MC asked him about extra credit.

There was no dispute that Mr. Rosenberg told MC that she could visit him in his classroom during the second period – his prep period – to discuss extra credit.

7. MC’s second period at Morse High School involved an AVID class. Katherine Banuelos was the AVID teacher. Ms. Banuelos’s classroom was located next door to Mr. Rosenberg’s classroom. BS and PM were also in the second period AVID class.

8. On January 21, 2009, during the second period AVID class, MC asked Ms. Banuelos if she could to Mr. Rosenberg's classroom. Ms. Banuelos gave MC permission. A few moments later, BS, a female student who was a friend of MC's, asked Ms. Banuelos if she leave class to get a drink of water. Ms. Banuelos gave BS permission, and BS left the classroom. Around the same time, PM, a male student, asked Ms. Banuelos's permission to leave the classroom to use the restroom. Ms. Banuelos gave PM permission, and he left the classroom.

9. BS did not need of a drink of water. Instead, BS wanted to look inside Mr. Rosenberg's classroom. BS wanted to do this because MC told her at the start of the second period AVID class that Mr. Rosenberg had rubbed her leg and made her feel uncomfortable during first period, that she was thinking about going to see him during second period to talk about extra credit, and that she was afraid. MC had asked BS what she should do; in response, BS (thinking MC was making this up) told MC to go into Mr. Rosenberg's classroom and that BS would look into the classroom two to three minutes later to make sure everything was fine. BS thought Mr. Rosenberg was a "decent citizen" and that there would be no wrongdoing.

10. BS testified that after she left Ms. Banuelos's classroom, she walked to Mr. Rosenberg's classroom. The door was closed. The vertical blinds were drawn, but not so much that BS could not see inside if she crouched down and was "kind of spying." BS could not see everything that was going on, but she recognized the clothing that MC was wearing. BS saw MC facing Mr. Rosenberg (whom she knew as a result of being in Mr. Rosenberg's class for about a month before transferring to an AP English class). BS was flipping a book that was on a table. MC and Mr. Rosenberg were very close, "skin to skin, clothing to clothing." There was touching, but no touching with the hands. BS was shocked. There was no question in her mind that something inappropriate was taking place.

BS stepped away from the window. She saw PM approaching down the hallway. BS told PM not to look inside the classroom. PM, who was curious, took this as an invitation to look and proceeded to look inside Mr. Rosenberg's classroom.

BS went back to Ms. Banuelos's classroom.

11. PM was unaware of MC's concerns. Unlike BS, PM was not a MC's good friend. He was simply returning to Ms. Banuelos's classroom when he saw BS standing outside Mr. Rosenberg's classroom. He asked BS, "What's going on?" In response, BS said, "Don't come over here."

According to PM, the door to Mr. Rosenberg's classroom was closed, and the vertical blinds were adjusted upwards, but not so far as to prevent him from having a partial view of the interior of the classroom. PM looked inside the classroom for five or six seconds. He saw MC standing near a table. He saw Mr. Rosenberg's hand caressing MC's buttock. He did not hear anything. PM was shocked. PM hopped back from the window and went back to Ms. Banuelos's classroom.

12. MC testified that she knocked on Mr. Rosenberg's door during second period, that he unlocked the door, and that she went inside the classroom. She testified that Mr. Rosenberg asked her what she was going to do to obtain extra credit, and that she replied she was going to do her work. According to MC, Mr. Rosenberg told her that he preferred she not do any work, after which he approached her, rubbed her arms, put his hands in her shirt, rubbed her right breast, played with her nipple, and moaned in her ear. MC said that she was frightened and asked Mr. Rosenberg if she could leave, after which Mr. Rosenberg said, "Wait for a second." According to MC, "I couldn't move, it didn't feel like me anymore, I was just stuck." MC testified that after she left Mr. Rosenberg's classroom, she felt "nasty and dirty and wanted to go home . . . I didn't want to be at school anymore." She spoke with BS and PM in Ms. Banuelos's classroom, and "they thought they seen something."

13. Before second period ended, Ms. Banuelos observed a cluster of students around MC after MC returned to the classroom. She heard one of the students, PM, ask MC, "You only got a C for that?"

At the end of second period, one of Ms. Banuelos' students approached Ms. Banuelos and told her that something bad may have happened involving MC. Ms. Banuelos was concerned, but she could not contact MC before MC left the classroom. Ms. Banuelos decided to speak with MC the following day.

14. MC remained at school that day. She took a shower when she got home. She did not have dinner. She did not tell anyone what happened.

15. The next day, January 22, MC went to school and stayed in the bathroom during first period. During second d period, Ms. Banuelos took MC aside and asked her if anything was wrong. MC initially denied anything was wrong, but she broke down when Ms. Banuelos questioned her again and said that Mr. Rosenberg had touched her. Ms. Banuelos told MC to meet with her during the lunch period.

During the lunch period, Ms. Banuelos met with MC, who provided an account of what she claimed had taken place in Mr. Rosenberg's classroom the day before. Ms Banuelos filed a report with the Morse school administration and Child Protective Services at the end of the school day.

16. MC texted her mother after meeting with Ms. Banuelos. MC told her mother that she had to come to school, that they needed to talk because she had been sexually touched by a teacher. MC's mother immediately came to Morse High School.

MC met with family members and school authorities after lunch. MC was very emotional. At the request of Officer Jarvis Gresham, MC composed a declaration. In that declaration, MC stated that the incident involving Mr. Rosenberg occurred on January 21, 2009, during second period. She claimed that Mr. Rosenberg told her that she "would have to do something illegal with him" to raise her grade and that she told a friend about that. She claimed that during the second period, Mr. Rosenberg rubbed her arm, put his arm on her waist and tried to put his hand down her pants, grabbed her right breast and played with it,

played with her buttocks, and breathed in her ear and made sexual noises. Officer Gresham reported the matter to his supervisors.

17. Officer Devowe met with Officer Gresham on January 23, 2009. She reviewed MC's handwritten declaration. Officer Devowe then met with Mr. Rosenberg.

Officer Devowe told Mr. Rosenberg that she was investigating allegations related to what appeared to be Mr. Rosenberg's inappropriate behavior with a female student. Officer Devowe told Mr. Rosenberg that he was under no obligation to speak with her, but if they spoke about the allegations, Mr. Rosenberg had the right to stop the interview whenever he wanted. Mr. Rosenberg agreed to speak with Officer Devowe.

Mr. Rosenberg provided Officer Devowe with background information. In response to Officer Devowe asking him if he knew MC, Mr. Rosenberg said that MC was a student in his first period English class, that she was frequently late to his class, that she was failing his class, and that he recently told MC what she could do to raise her grade. Mr. Rosenberg told Officer Devowe that he knew BS, that she was a "perfect" student, and that he had a good relationship with her when she was in his classroom. Mr. Rosenberg told Officer Devowe that he did not know PM.

Officer Devowe told Mr. Rosenberg of MC's allegations. Mr. Rosenberg denied having any inappropriate contact with any student, and he told Officer Devowe that he had no idea why MC would make those allegations. Mr. Rosenberg said that MC knocked on his classroom door during his prep period and entered his classroom. According to Officer Devowe's report, "Rosenberg stated he remembered specifically going to the door and propping it open and that the blinds were open making it easy to look into his room from the outside and see anyone inside." Mr. Rosenberg denied touching MC in an inappropriate manner, and he specifically denied touching her breasts or buttocks.

Mr. Rosenberg was placed on paid administrative leave following the interview.

18. District personnel searched Mr. Rosenberg's classroom. Five *Stuff* magazines were seized, as were several videotapes. Officer Devowe did not conduct the search and her report did not mention where these items were seized.

Mr. Rosenberg testified that the *Stuff* magazines<sup>1</sup> were taken from a paper bag that was inside closed cabinet behind his desk, and that the video was taken from his briefcase.

There was no evidence to the contrary.

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<sup>1</sup> Notice is taken that *Stuff* was a magazine targeted towards young males. *Stuff* did not contain nudity, though it contained photographs of scantily clad young women, as well as humor, trivia, and product reviews of goods such as computers, sports cars, video games, and cell phones, and other high tech products.

19. One videotape was marked “Dad.” According to the Accusation:

One tape showed a black juvenile male reading a poem in Rosenberg’s classroom. The poem references telling girls to take off their clothes so they may show their nipples, telling them not to worry about being called a “ho” for what they do. The tape includes other inappropriate comments concerning sexual acts.

The Accusation did not allege that there was any other inappropriate material in any of the other videotapes that were seized.

20. Officer Devowe testified that the District established that the student depicted in the videotape was LG. What Officer Devowe did not mention, and what was not included in her report, was the fact that LG was a Special Education student in Mr. Rosenberg’s class in 2002-2003 school year, that the videotape was taken during that school year, that Mr. Rosenberg had taped over most of the videotape with other material including a memorial for his recently deceased father, and that the videotape was seized from his briefcase.<sup>2</sup>

21. Five *Stuff* magazines were seized from a shopping bag found in a closed closet behind Mr. Rosenberg’s desk. The cover of each *Stuff* magazine depicted a scantily clad young woman. The magazines had very little educational value. While it was not established that students had access to the magazines, the presence of the magazines in the classroom was inappropriate.

22. Officer Devowe interviewed MC, BS, PM, Ms. Banuelos, and several other persons in the days following her interview with Mr. Rosenberg. Photographs were taken of the interior of Mr. Rosenberg’s classroom and the hallway outside his classroom.

#### *Mr. Rosenberg’s Evidence*

23. Principal Morris established those matters set forth in Factual Finding 3 that were related to his evaluation of MC’s character.

24. Paula Johnes, an experienced teacher and Mr. Rosenberg’s colleague, believed that Mr. Rosenberg was “an amazing teacher,” a smart, calm, consistent, and truthful person. Ms. Johnes believed that MC was “emotionally fragile,” and that her perception of truth was based on feelings rather than fact.

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<sup>2</sup> Allegations related to the videotape were dismissed because the videotape was not maintained in the classroom, because the videotape was taken more than four years before the date of the filing of the notice of intent to dismiss, and because the videotape’s content was irrelevant to the issue of Mr. Rosenberg’s character.



25. Mary Scanlon, an experienced teacher, was Mr. Rosenberg's peer coach. Ms. Scanlon found Mr. Rosenberg to be professional in his demeanor and a humorous and joyful individual. He was conscientious and hardworking. Mr. Rosenberg understood boundary issues.

26. Mr. Rosenberg was in a position to see, hear, and testify about his interaction with MC during first and second periods on January 21, 2009. Mr. Rosenberg testified in a calm manner, although he became quite emotional when reflecting upon all that he has gone through as a result of MC's allegations. He was very respectful of this proceeding. Mr. Rosenberg also had the difficult burden of establishing that what MC testified took place in his classroom did not, in fact, occur, a burden that was made even more difficult given BS and PM's testimony.

27. Mr. Rosenberg flatly denied engaging in any inappropriate conduct with MC. His description of his meeting with MC during first period was reasonable, and no witness other than MC testified that Mr. Rosenberg made suggestive comments or rubbed MC's leg. The conditions in the classroom during first period – some students milling about and all students having a clear view of MC at Mr. Rosenberg's desk – support a finding that Mr. Rosenberg did not make suggestive comments and did not rub MC's leg as alleged.

28. Mr. Rosenberg testified that MC's charges were sickening, and that the inappropriate conduct MC described was antithetical to his strongly held beliefs about the manner in which students and women should be treated.

29. There was no dispute that MC entered Mr. Rosenberg's classroom during second period. Mr. Rosenberg flatly denied making suggestive comments to MC and he flatly denied engaging in inappropriate touching of MC. No one other than Mr. Rosenberg and MC were in the classroom at the time.

Mr. Rosenberg testified that the blinds were down when he spoke with MC. There were metal screens over the windows. The credible testimony of BS and PM established that the blinds were not completely drawn, and that each could see areas within the classroom despite the presence of screens on the windows.

Mr. Rosenberg testified in this proceeding that he could not remember if the classroom door was open. This testimony was inconsistent with his statement to Detective Devowe on January 22, 2009, when he stated that he specifically remembered going to the door and propping it open, making it easy to look into his room before MC entered the classroom. When Mr. Rosenberg made this statement, he was unaware that BS and PM were outside his classroom when he met with MC. BS and PM testified the door was closed, and their testimony corroborated MC's testimony that Mr. Rosenberg closed the door after she entered his classroom during second period. There is no doubt that the door was closed.

30. What exactly occurred behind the closed door is uncertain. MC's account was quite dramatic and seemed exaggerated. According to MC, Mr. Rosenberg rubbed her arms,

put his hand in her shirt, rubbed her right breast, played with her nipple, moaned in her ear, and made sexual comments. Mr. Rosenberg categorically denied engaging in this conduct.

31. BS's testimony about what she saw was not particularly compelling. She was unable to describe with any specificity what she saw, other than to say that she observed Mr. Rosenberg touching MC, although not with his hands. In testimony in a prior proceeding,<sup>3</sup> BS testified she did not observe Mr. Rosenberg touching MC. BS provided dramatic commentary, claiming that Mr. Rosenberg "appeared to be a good citizen" and that MC appeared to be "violated and distressed" after the incident. This commentary was unsolicited and demonstrated bias.

BS was MC's friend, and what MC told BS before going to Mr. Rosenberg's classroom could have influenced BS' perception of what actually occurred inside the classroom. BS's testimony, although not totally believable, certainly corroborated a portion of MC's account.

32. The most telling testimony in this proceeding was provided by student PM, who had no significant relationship with BS. PM was completely unaware of MC's alleged concerns before he looked inside Mr. Rosenberg's classroom on January 21. PM did not know Mr. Rosenberg and bore him no ill will. PM was a truly independent witness.

When PM was returning to Ms. Banuelos's classroom, he became intrigued when he saw BS staring through a window into Mr. Rosenberg's classroom. He took the opportunity to peer through the blinds and see for himself what was occurring. PM saw Mr. Rosenberg's white hand caressing MC's buttock.

PM recalled the circumstances surrounding his observation. The degree of specificity he provided concerning his observation was entirely appropriate to the circumstances. PM did not exaggerate what he saw by claiming that he was able to see more than was actually visible through the partially closed blinds. He did not exaggerate by claiming that he looked inside the classroom for more than a few seconds.

PM had no reason to provide false testimony. His testimony in this proceeding was respectful and reasonable. It was consistent with testimony that he previously provided. PM's manner in testifying was not dramatic. He responded directly to the questions he was asked. He was clearly shocked by what he observed.

PM's spontaneous comment to MC in Ms. Banuelos' classroom after the incident, which was overheard by Ms. Banuelos, supported his testimony.

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<sup>3</sup> Two criminal trials arose out of the incident involving MC and Mr. Rosenberg. The parties had transcripts from those trials.

33. Mr. Rosenberg testified that he subscribed to *Stuff* magazine. He said kept those magazines in his home until he came to believe that it was inappropriate for him to keep them there, and then took them to school where he kept them in a shopping bag in a closed closet behind his desk. He said he looked at the magazines from time to time to find information that might help him relate to male students in his classroom, such as current video games and the names of popular artists. Mr. Rosenberg testified that there might have been some content in the magazines that he could have used in his classroom, although he was unable to identify that content. It was not established that the magazines were available to his students. Mr. Rosenberg admitted that it was inappropriate for him to maintain the magazines in the classroom.

#### *Administrative Procedure No. 7046*

34. The District enacted Administrative Procedure No. 7046, entitled Professional Responsibilities of Certificated Employees. Section C, item 20, provides:

Professional Relationships with Students. All certificated employees are to maintain a professional relationship with students of the school district. Certificated employees are specifically prohibited from dating, making sexual advances to, engaging in sexually provocative or exploitive conduct with, or having sexual relations with district students.

#### *The Contentions*

35. Complainant argued that two independent witnesses corroborated MC's version of the events, and that MC's testimony established immoral conduct, Mr. Rosenberg's evident unfitness for service, and his persistent violation of District policy. Complainant conceded that it was not established that MC suffered post-traumatic stress syndrome, severe stress, depression, anxiety, sleeplessness, mood swings, and nervous behavior. Complainant dismissed allegations related to the videotape. Complainant argued that Mr. Rosenberg had, in some fashion, convinced himself that he had not engaged in any wrongdoing and was in denial.

Complainant argued that Mr. Rosenberg's dismissal from employment was the only appropriate disciplinary outcome.

36. Respondent argued that MC was a highly emotional, disruptive, vindictive, untruthful student. Respondent argued that no testimony, other than MC's unreliable testimony, supported allegations related to Mr. Rosenberg making suggestive comments to MC. Respondent argued that nothing corroborated the allegation that Mr. Rosenberg rubbed MC's leg during first period. With regard to the testimony about what occurred during

second period, Respondent asserted that nothing corroborated MC's account other than PM's testimony that he thought he saw a hand on MC's buttocks when he looked through a partially closed blind for five or six seconds. Respondent argued that his character was wholly inconsistent with the improper conduct that was alleged.

Respondent asserted that dismissal from employment for having *Stuff* magazines at work was unwarranted, and that no other disciplinary allegations were established.

### *Evaluation*

37. Before January 21, 2009, Mr. Rosenberg was a highly respected English teacher at Morse High School. There is no history of any prior discipline.

A preponderance of the evidence established that during second period on January 21, 2009, Mr. Rosenberg permitted MC to be with him alone in his classroom. The door to the classroom was closed and the blinds were partially drawn, although not to the extent that persons peering through the blinds from outside the classroom could not see some activity inside the classroom. When Mr. Rosenberg met with MC, he placed his hand on her buttock and caressed it. Mr. Rosenberg's conduct was sexually abusive. Nothing more was required to establish that Mr. Rosenberg engaged in immoral conduct.

It was not established that Mr. Rosenberg's solitary act of immoral conduct was the result of a fixed character trait. It was not established that Mr. Rosenberg's act of immoral conduct involved a persistent violation of District policy. It was not established that Mr. Rosenberg's keeping *Stuff* magazines in his classroom supports his termination.

A preponderance of the evidence established that Mr. Rosenberg engaged in immoral conduct with student MC during second period on January 21, 2009. Based upon the application of the *Morrison* factors, the Commission concludes that Mr. Rosenberg is unfit for continuing service with the District.

### *Jurisdictional Matters*

38. The Commission on Professional Competence in this matter included James Ahler, Administrative Law Judge, Office of Administrative Hearings, Haywood Finder, a high school English teacher employed by the Anaheim Unified School District, and Jamie Holding, an assistant principal with the Grossmont Unified High School District. Mr. Finder and Ms. Holding each held a valid teaching credential and had more than five years teaching experience as a high school English teacher in the last ten years; neither was employed by the San Diego Unified School District, and neither was related to Edward Rosenberg.

All jurisdictional requirements were met. The matter was submitted on January 6, 2011.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.)

A party required to prove something by a preponderance of the evidence need prove only that it is more likely to be true than not true. This simply means that the evidence on one side outweighs, preponderates over, and is more than the evidence on the other side. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

### *Due Process under the Education Code*

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).)

Hearings to determine if a permanent public school teacher should be dismissed are held before a Commission - a three-member administrative tribunal consisting of one credentialed teacher chosen by the school board, a second credentialed teacher chosen by the teacher facing dismissal, and an administrative law judge of the Office of Administrative Hearings who serves as chairperson and a voting member of the commission and who is responsible for assuring that the legal rights of the parties are protected at the hearing. The Commission's decision is deemed to be the final decision of the district's governing board. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 331.) A Commission has broad discretion to determine the issues before it, including whether dismissal is the appropriate sanction. (*Ibid.*, at p. 343.)

### *Relevant Statutory Authority*

3. Education Code section 44932 provides in part:

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

(1) Immoral . . . conduct.

...

(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. . . .

### *Immoral Conduct*

4. Education Section 44932, subdivision (a)(1) lists “immoral conduct” as a cause for dismissal. Immoral conduct is not considered in the abstract, but must be considered within the context in which the Legislature considered it; more specifically, the term refers to conduct which is hostile to the welfare of the school community. Its objective is to protect students from corruption. The phrase “immoral conduct” as used the Education Code denotes immoral conduct that renders the teacher unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224-225.)

Since the term “immoral conduct” is vague and broad, whether conduct demonstrates an unfitness to teach must be measured against seven criteria: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the employee involved; (5) the extenuating or aggravating circumstances, if any; (6) the likelihood of the recurrence of the questioned conduct; and (7) the extent to which the imposition of disciplinary action may have an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. (*Governing Board of ABC Unified School District v. Haar* (1994) 28 Cal.App.4th 369, 383.)

### *Evident Unfitness for Service*

5. “Evident unfitness for service” is not synonymous with “unprofessional conduct,” and the term means clearly not fit for teaching, ordinarily by reason of temperamental defects or inadequacies; it connotes fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet expectations of the school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) “Evident unfitness” includes in its definition “unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies”. In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all *Morrison* factors need be examined, only the pertinent ones. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.)

The District did not establish the existence of a fixed character defect or a temperamental inadequacy. However, the District certainly established Mr. Rosenberg’s inappropriate behavior on one occasion.

### *Persistent Violation or Refusal to Obey School Laws or Regulations*

6. The word “persistent” is defined by lexicographers as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” And, in the judicial decisions, the word has been interpreted to mean “continuing or constant.” (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 82.) The *Morrison* factors should be applied in determining whether a permanent certificated employee’s persistent violation or refusal to obey laws and regulations supports the employee’s termination. (*San Dieguito Union High School Dist. v. Commission On Professional Competence* (1985) 174 Cal.App.3d 1176, 1182.)

The District did not establish Mr. Rosenberg’s persistent violation of Administrative Procedure No. 7046. The District did establish that on a single occasion Mr. Rosenberg engaged in sexually provocative and exploitive conduct with MC.

### *The Morrison Factors – Immoral Conduct*

7. A preponderance of the evidence established that on January 21, 2009, during a second period meeting in which Mr. Rosenberg was alone with MC in his classroom, Mr. Rosenberg placed his hand on MC’s buttock and caressed it, sexually provocative and exploitive conduct. The misconduct was offensive to MC and to the two students who surreptitiously witnessed it. The misconduct had the potential of causing great emotional distress to MC and causing alarm in the Morse High School community. The misconduct certainly betrayed the community’s trust in teachers. Mr. Rosenberg’s improper behavior was inconsistent with the functions and duties of a credentialed high school teacher. No extenuating circumstances were established. The likelihood of recurrence was not established, although Mr. Rosenberg’s account of what happened can only be attributed to intentional dishonesty or his being in a state of extreme denial, neither of which suggests rehabilitation. No teacher has a constitutional right to sexually abuse a student.

Based upon the application of the *Morrison* factors, the Commission unanimously concludes that Mr. Rosenberg engaged in immoral conduct by caressing the buttocks of MC on January 21, 2009, and that Mr. Rosenberg is currently unfit to teach by reason of this immoral conduct.

### *Cause Exists to Dismiss Mr. Rosenberg from Employment*

8. The Commission of Professional Competence unanimously finds by a preponderance of the evidence that cause exists under Education Code section 44932, subdivision (a)(1), to dismiss Edward Rosenberg from his employment with the San Diego Unified School District. Mr. Rosenberg engaged in immoral conduct and is presently unfit to teach.

This conclusion is based on the Factual Findings and the Legal Conclusions herein.

## DISPOSITION

Edward Rosenberg shall be dismissed from his permanent employment with the San Diego Unified School District. Each of the commission members authorized the administrative law judge to sign this decision on their behalf.

DATED: \_\_\_\_\_

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JAMES AHLER  
Administrative Law Judge,  
Office of Administrative Hearings,

DATED: \_\_\_\_\_

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HAYWOOD FINDER  
Certificated English Teacher,  
Anaheim Unified School District

DATED: \_\_\_\_\_

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JAMIE HOLDING  
Certificated English Teacher/Administrator,  
Grossmont Union High School District