

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SAN DIEGO UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

THEODORE McCOLL,

A Permanent Certificated Employee,

Respondent.

OAH No. 2010020349

**AMENDED DECISION OF THE
COMMISSION ON PROFESSIONAL COMPETENCE**

On June 7-10, 2010, a Commission on Professional Competence (Commission) heard this matter in San Diego, California. The Commission consisted of the following members: Mary Agnes Matyszewski, Administrative Law Judge, Juan Neria, selected by the governing board, and Ray Andrzejewski, selected by respondent.

Andra Donovan and Katherine Allison, Attorneys at Law, represented the San Diego Unified School District.

Jon Vanderpool, Attorney at Law, represented respondent Theodore McColl, a permanent certificated employee of the San Diego Unified School District, who was present throughout the administrative hearing.

On August 16, 2010, the matter was submitted.¹ On September 15, 2010, the Decision of The Commission on Professional Competence (Decision) was transmitted by mail to the Governing Board of the San Diego Unified School District (District) with a copy to Respondent's counsel. On October 20, 2010, the Office of Administrative Hearings received a request from respondent for "reconsideration" of the decision. On October 21, 2010, the District's opposition to the request for reconsideration was received. On October

¹ The parties' request to submit written closing arguments was granted and the panel members selected a day for deliberations. Thereafter complainant objected to portions of respondent's closing argument and a briefing schedule was established. The matter was deemed submitted on August 16, 2010. This court's ruling on complainant's opposition to respondent's closing brief is incorporated herein.

22, 2010, respondent's reply to the opposition was received. On November 10, 2010, the Office of Administrative Hearings issued an Order Granting Request for Correction of Mistake in Decision. On November 12, 2010, the Office of Administrative Hearings issued an Order of Correction. Consistent with those Orders, the Commission issues this Amended Decision.

ISSUES

1. Did respondent Theodore McColl demonstrate evident unfitness to serve as a teacher within the San Diego Unified School District (District) or persistently violate or refuse to obey the school laws of the state or the 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 Theodore McColl?

2. If so, is Theodore McColl's outright dismissal from employment with the District an appropriate disciplinary result under all the circumstances?

FACTUAL FINDINGS

Jurisdictional Findings

1. On October 29, 2009, the District notified respondent Theodore McColl (McColl) pursuant to Education Code sections 44934 and 44936 of its intent to dismiss him.

2. On January 19, 2010, the District filed an accusation seeking McColl's dismissal. The accusation and other jurisdictional documents were served on McColl, who timely filed a notice of defense, affirmative defenses and requested a hearing.

3. On June 7, 2010, the record in the administrative action was opened. The motions in limine were argued and decided before the administrative law judge outside the presence of the other two Commission members. After ruling on the motions in limine, the Commission heard the parties' opening statements. Sworn testimony and documentary evidence were received on June 7, 8, 9, and 10, 2010. Written closing arguments were submitted on July 16, 2010. The District objected to portions of McColl's closing argument and a briefing schedule was established. On August 16, 2010, the record was closed and the matter was submitted.

Ruling on the District's Motion to Strike Portions of McColl's Closing Brief

4. The District's objection to McColl's closing brief was denied. The Commission reviewed and considered the briefs in its deliberations.

Motions in Limine

5. McColl's motion in limine to exclude all evidence pertaining to matters occurring more than four years prior to the filing of the notice of intent to dismiss was denied without prejudice. The Supreme Court in *Atwater Elementary School District v. California Department of General Services (Truitt real party in interest)* (2007) 41 Cal.4th 227, 233-235, held that a school district may introduce evidence that occurred more than four years before the notice was filed if it can establish it was equitably estopped from discovering the acts within four years before filing its notice.

The court reserved its ruling on McColl's motion in limine to preclude statements not produced in discovery, pending witness testimony.

McColl's motion in limine to exclude the introduction of McColl's e-mail communications to his attorney sent on the District's computer servers was denied. The District's servers advised all employees that the District reserved the right to monitor all network activity and that no employee had a right to privacy when using the network. McColl waived his attorney client privilege when he used the District's servers to communicate with his attorney.

McColl's motion in limine to exclude the introduction of evidence not pled in the accusation was granted. Education Code section 44934 requires the District to specify the charges against a certificated employee.

McColl's motion in limine to exclude evidence of prior misconduct for which McColl was previously disciplined was granted in part and denied in part. No findings on those charges will be made in this decision but the evidence of those prior charges may be introduced for the purposes of establishing mitigation, aggravation and rehabilitation.

McColl's motion in limine to preclude the introduction of hearsay evidence was denied without prejudice. Government Code section 11513 permits the introduction of hearsay evidence to supplement or explain other evidence, but such evidence is insufficient by itself to support a factual finding.

McColl's Background and Employment

6. McColl graduated from Patrick Henry High School² in 1984. He attended a military prep school in Texas for one year and then attended the United States Naval Academy where he graduated in 1989 with a bachelor of science in history. McColl attended officer candidate school and the Marines Corps engineer school and served five years and two months in the Marine Corps, achieving the rank of captain. McColl was honorably discharged from the Marine Corps in 1994.

² Patrick Henry High School is located in the San Diego Unified School District.

McColl obtained his CLAD credential from National University and began substitute teaching for the District in 2000. McColl possesses single subject credentials in introductory business, history, physics, geoscience, and student government. From 2003-2008, he was a mentor teacher with the UCSD School of Education and National University, where students came to observe his classes and taught under his supervision. McColl began teaching at Serra High School (Serra) in the 2005-2006 school year, teaching five courses in physics and advanced physics. McColl received his Gifted and Talented Education (GATE) certification in 2006. McColl received an Air Force Association Teacher of the Year Award in 2008.

McColl testified that at the end of the 2006-2007 school year when the next year's assignments were being discussed, McColl was informed that there were going to be two new offerings at Serra, earth science and advanced placement environmental science. Serra's principal advised the teachers that the District was going to track the lower achieving mathematics students in the earth science class and that those students would be "hand picked" by the District because of their low math and science scores. The District referred to those students as "8 1/2 students." McColl testified that Serra's principal stated that he did not expect any one teacher to teach all four of the earth science classes since those classes would only contain the 8 1/2 students. However, McColl testified that because he believed he was the only one credentialed to teach earth science he offered to teach all four courses in exchange for also being allowed to teach the advanced placement environmental science course so that he could get an "earth science synergy going with his labs, coursework, etc." During the 2007- 2008 school year McColl taught all four earth science courses but was not assigned to teach the advanced placement course.

McColl was a San Diego Education Association (SDEA)³ assistant representative at Serra from 2005-08. He served as an SDEA site representative for Serra for the 2008-2009 school year. McColl contended that many of the District's charges against him were in retaliation for his union activities.

The district placed McColl on administrative leave at the end of the 2008-2009 school year. McColl testified that since being removed from the classroom he has been placed at six different work locations.

Evidence Received Regarding the District's Allegations

7. The District alleged several incidents where McColl either acted inappropriately or made inappropriate comments to staff or students. The district called several witnesses in support of its allegations. McColl denied that some of the events had taken place, apologized for the statements he admitted he did make, or argued that the events and statements were taken out of context and mischaracterized by the District. McColl also argued that he had already been disciplined for several of the incidents alleged in the accusation. McColl called several witnesses in support of his defenses. A summary of the allegations and the evidence presented by the parties follows below.

³ SDEA is the local teacher's union.

April 23, 2009 Allegation

8. The District alleged that on April 23, 2009, **McColl** said in the presence of students, “The security at this school is no good and they are so lazy. They never do their work, especially Adrian. He is always in the cart and never walks. He (Mr. Vazquez) is fat because he couldn’t reach and touch his hands behind his back.” McColl said that “the security are not worth working here.”

Michael Jimenez, the principal at Serra and McColl's supervisor, testified that students informed Adrian Vazquez, Campus Security Assistant, that McColl made inappropriate comments about Vazquez to his class. Vazquez reported the incident to Jimenez, and wrote that two students informed Vazquez that McColl stated that Vazquez was “no good and lazy” and “could not touch his hands behind his back.” Vazquez felt that McColl’s comments were unprofessional and unacceptable. Jimenez testified that McColl’s comments undermined Vazquez's authority, his relationships with students and were unprofessional. When Jimenez attempted to discuss the matter with McColl, he refused to discuss it.

Adrian Vazquez, Serra Campus Security Assistant, testified that students approached him regarding McColl's comments. The students felt the comments were inappropriate. Vazquez testified that he did not feel comfortable around McColl because of the comments and he was upset which is why he filed his complaint. Vazquez did not believe that teachers or staff should make derogatory comments about other staff, especially to students. Vazquez testified that he had a previous run-in with McColl where McColl questioned why Vazquez was not at his assigned post. Vazquez admitted that ever since that incident he has avoided McColl and although McColl tried to apologize to him for making these comments, Vazquez did not want to speak with him and avoided doing so. On cross-examination Vazquez admitted that McColl did apologize.

McColl acknowledged making the statements and admitted that making these statements was a “misstep.” McColl apologized to the class and to Vazquez for the statements and told Vazquez that he had apologized to his class.

April 20, 2009, Allegation

9. The District alleged that McColl duplicated and distributed confidential material, including sensitive disciplinary documents to the staff. McColl had previously been directed by the administration to discontinue this type of behavior as it worked to destroy staff morale.

Jimenez testified that McColl copied and distributed documents regarding the District’s disciplinary actions against McColl. Jimenez testified that McColl had previously been instructed not to discuss or distribute the information to staff members as it was upsetting and demoralized staff. Jimenez testified that staff members informed him that they did not want to receive the documents.

In his notice of defense, McColl asserted that he was making copies of materials related to SDEA association rights issues.

April 4, 2009, Allegation

10. The District alleged that on April 4, 2009, McColl berated and degraded the vice principal and the supervision staff while in the presence of a visiting teacher and students. McColl stated that the vice principal was derelict in her duties.

Jimenez' Testimony

Jimenez, who was not present for this incident, testified that McColl was upset with the way a class was behaving with a substitute teacher and he contacted Eric Gonzales, campus security. Gonzales investigated and determined that the students were a little more talkative than usual but that nothing was amiss. When Gonzales attempted to leave, McColl would not let him. Vice Principal Lauren Basteyns was called to the classroom and agreed with Gonzales' assessment at which point McColl told her that she was "derelict in your duties." Basteyns reported the incident to Jimenez. The District introduced the memoranda prepared by Gonzalez and Basteyns documenting the incident. Gonzalez also documented that he was uncomfortable working with McColl as McColl's "behavior is unpredictable and he shows a lot of anger." Gonzales did not feel that "McColl's reaction to the situation matched the reality of what was taking place in the classroom" and McColl was unable to calm down. Gonzalez feared what McColl "may do in another situation involving other staff members and students."

Gonzales' Testimony

Gonzales testified that he received a radio call to come to a classroom that was "out of control." When he arrived, he was met by McColl in the substitute teacher's classroom. Gonzales looked around and observed that the students were calm and it appeared as though things were under control. When McColl told Gonzales not to leave, Gonzales went to get Basteyns. When Gonzales returned to the classroom with Basteyns, McColl was still upset, complaining the class was out of control and that Gonzales had "left an explosive situation." The substitute teacher verified that all was under control. Gonzalez felt that McColl's descriptions did not match Gonzalez's observations and that McColl was overreacting. Gonzalez did not believe that Basteyns was derelict in her duties. On cross-examination Gonzales could not explain why he could not stay to supervise the classroom.

Basteyns' Testimony

Vice Principal Basteyns testimony corroborated Gonzales' testimony. Basteyns testified that she accompanied Gonzales to the classroom after he came to the office and informed her of the situation. When Basteyns got to the classroom she found it to be calm and she spoke with the substitute teacher who told her that the students were exhibiting "typical substitute teacher behavior." As Basteyns was leaving the classroom McColl "charged towards her" and asked why she was leaving. McColl appeared visibly upset and told her that a student was "shell-shocked" and indicated that a traumatic event had occurred. McColl was angry that Basteyns was going to

leave and told her the area was a “crime scene.” When Basteyns again explained that the classroom was calm, McColl told her that if she was going to be “derelict in her duties that was fine” but he was not leaving the class. McColl said there would be “bodies piling up in the nurse's office” if Basteyns left.

Basteyns testified that when she went to the nurse's office to speak with the injured student, she recognized the student as one who had an IEP, wore earplugs, was ultra sensitive to noise and got headaches from noise. Basteyns spoke with the student who denied she had been scared and Basteyns determined that the student was fine. Basteyns testified that McColl's reaction to the situation was “not rational” and he seemed “very exaggerated.” Basteyns testified that McColl's actions in the classroom made her nervous.

Basteyns prepared a memo regarding this incident in which she noted that McColl had requested assistance with a classroom that was “out of control,” with one student having been “traumatized by the class” and gone to the nurse's office. McColl was visibly upset when Basteyns arrived. Upon reaching the classroom Basteyns noted that the students were watching a movie, there was no talking and no moving around and the substitute teacher advised that all was in control, although she did admit that at the beginning of the period the students were loud and some were throwing paper. The substitute teacher admitted it had taken a little while to get the class under control but that she was completely comfortable with the class and it was nothing more than “typical substitute teacher student behavior.” McColl accused Basteyns of being “derelict in her duties” by leaving a classroom which was in such an “explosive situation.”

Basteyns testified that she was extremely uncomfortable by McColl's behavior and decided to leave the classroom to prevent his behavior from escalating any further. Basteyns checked on the student who had gone to the nurse's office and recognized her as an IEP student who had a history of severe headaches triggered by an unusual sensitivity to noise. Basteyns noted that the student had well documented medical issues including ultra sensitivity to noise for which she wore ear plugs. Basteyns believed the classroom was in total control when she arrived and that McColl had created a scene that was inappropriate for students. Basteyns felt extremely uncomfortable with McColl's demeanor; he was not in control of his emotions and was acting unprofessionally.

McColl's Testimony

McColl testified that the incident happened during first period, his prep period. McColl was walking out of his classroom when he observed a female student in the hallway sobbing. She was crouching on the floor with her head to her knees and her hands on her head. McColl realized the student should be in the substitute teacher's classroom. The student did not respond to McColl's inquiry about what was wrong. The student could not communicate with McColl at all. McColl wrote her a hall pass to go to the nurse, which she did. McColl did not know, and did not notice, that the student wore earplugs. McColl did not know the student had sensitivity to noise or that she had an IEP.

McColl testified that when he was in the hallway with the student, he could hear a “cacophony of noise” coming from the classroom, but he could not see the substitute teacher

because it was dark. McColl walked to the doorway and the substitute teacher came towards him. McColl asked if she needed help. The substitute was unaware that the female student had been crying in the hallway. McColl flicked on the room lights and shut off the movie which caused the students to “boo and hiss.” McColl picked up the seating chart which had pictures of the students on it and placed them in their assigned seats. When McColl arrived the classroom was “really out of control” but he was able to calm the situation.

McColl testified that he dialed the hotline/panic number because he thought the incident was serious, the female student could not communicate with him and he did not know if she had been physically harmed. A few moments later Gonzales arrived. McColl asked Gonzales to stay because he thought there was a crime scene as the female student had been very upset, could not communicate with McColl and may have been the victim of an assault. McColl testified that he was the legal officer for his battalion so he thought the scene should be secured. McColl wanted Gonzales to stay as McColl believed there was going to be some sort of investigation about what had occurred. Gonzales refused to stay and told McColl that he had to patrol the campus.

McColl testified that he did not believe he overreacted to the situation. He was thinking that if the school did not handle the situation correctly the District could get sued if a crime had occurred.

March 16, 2009, Allegation

11. The District alleged that a parent reported an incident involving a sibling of one of McColl’s students. McColl attempted to reach the parent by telephone, but was informed by the student’s sibling that the parent was not home. McColl continued to interrogate the sibling, eventually telling the sibling to yell at the top of her lungs, “I am home alone!”

The parent complained about the incident and Jimenez agreed it was ridiculous and unprofessional. The parent was very upset because she thought it put her daughter in danger. Jimenez discussed the incident with McColl who advised him that it was a strategy he used to verify if the student is truly home alone or simply trying to prevent McColl from talking to the student's parent. Jimenez informed McColl that this was not an appropriate technique to be used with students.

McColl admitted that he asked the child to yell out “I’m home alone” because it is a technique he used all the time and no one had ever complained about it before. On cross examination McColl acknowledged that it was a bad tactic which he would no longer use. He apologized for it and felt that he was wrong.

January 21, 2009, Allegation

12. The District alleged that while on paid status, and during a staff meeting, McColl stood up and yelled “stop!” He then proceeded to declare, “You don’t have round table anymore!” McColl was advised that if he wished to make an announcement at these meetings, he needed to make a request prior to the meeting. McColl responded angrily, and

referring to another staff member said, "I gave him the information!" Subsequently, on January 26, 2009, McColl was sent a letter of reprimand regarding this incident.

Jimenez' Testimony

Jimenez testified that during a staff meeting McColl stood up and yelled "stop," pointed and looked at Jimenez and stated that Jimenez did not have round table anymore.⁴ Jimenez informed McColl that he could make his request to the facilities coordinator to which McColl replied that he had made two requests to that individual who acknowledged receiving the requests but admitted that he "forgot." Jimenez testified that this was not the first time McColl had disrupted meetings and that other staff members had raised concerns about his behavior at staff meetings.

Jimenez introduced a letter of reprimand he prepared regarding the incident in which he informed McColl that his behavior was unprofessional. Jimenez also stated that McColl's conduct negatively impacted the workplace because McColl had demonstrated a failure to reasonably work with his colleagues in a professional manner and "created and endorsed a hostile, uncomfortable, and unprofessional environment." McColl was directed to stop his unprofessional conduct and promote and maintain a safe, comfortable and risk free environment that encouraged collaboration with staff and students.

McColl's response to the letter of reprimand was introduced in which he stated that he thought the meeting was ending and so he stood to make his announcement. McColl also asserted that he had scheduled his union meeting for the end of the workday and that he had made two requests to the facilities manager to get the meeting scheduled.

Skinner's Testimony

Susan Skinner, Head Counselor at Serra, testified that during a staff meeting McColl began yelling "roundtable." Skinner testified that the meeting was still in progress, the agenda was on the overhead projector, and a guest from the Princeton Review was making a presentation regarding the PSATs. Skinner was uneasy during the meeting and embarrassed for the staff.

McColl's Testimony

McColl testified that he thought the meeting was over. His recollection was that the projection screen was blank. Because he thought the meeting was over, McColl stood up and said, "Stop," as he wanted to have roundtable to make announcements. McColl denied directing his comments to Jimenez, and testified that he directed them to the entire assembled staff. McColl told the staff that he had a guest coming to speak to them regarding union

⁴ "Roundtable" was a time at the end of staff meetings where staff could discuss various issues and where union matters could be addressed.

matters. McColl did not recall that during the meeting the staff member admitted he forgot about McColl's requests; McColl believed that he learned that later.

Henry's Testimony

Tom Henry, a Serra math teacher, was present at the "roundtable" meeting and it appeared as though the meeting was over when McColl asked about the round table. Henry testified that based on McColl's actions at the meeting, it appeared as though McColl also thought the meeting was over and that he was not going to have an opportunity to conduct his union meeting. It was obvious that McColl was frustrated and used a louder voice because he thought he would be unable to hold his union meeting. Henry also thought the meeting was over. Henry did not believe that McColl acted rudely and nothing that McColl did scared or threatened him. Henry was eight to 12 feet away from McColl during the meeting and he did not observe McColl doing anything rude or inappropriate to other staff members.

Uebel's Testimony

Ralf Uebel, a physics teacher at Serra, testified that nothing about the "roundtable meeting" stands out in his mind as being inappropriate. Uebel did not observe anyone being upset by McColl's actions or reacting negatively to McColl's actions. During that meeting Uebel was situated in the middle of the room and had a full view of everyone and nothing about that meeting stood out in his mind.

Gushlaw's Testimony

Julie Gushlaw, a special education teacher, observed that during the staff meeting McColl became frustrated because he thought the meeting was over and he would be unable to speak to the staff about union issues. McColl did stand up and yell, "Roundtable, roundtable!" thinking the meeting was over and not wanting it to adjourn. Gushlaw admitted that McColl could probably have handled it in a better way, but nothing about McColl's actions threatened her and she was sitting behind McColl.

On October 16, 2008, Allegation

13. The District alleged that on October 16, 2008, while on paid status, McColl attended a meeting with a student and the student's mother, a vice principal, two counselors, the school nurse, and the school psychologist, wherein McColl pointed his finger at the mother and stated her child was special education and basically needed help. At this point the child immediately "shut down." McColl then proceeded to state that teachers should not have to deal with this type of behavior from students. McColl exclaimed, "This is exactly the behavior I can't stand!" when the student was not looking at any adults during the meeting and showing quiet defiance through eye-rolling. When the mother attempted to respond to McColl, he got up from the table abruptly, pushed the chair into the table, forcefully stated, "I've heard enough!" and stormed out of the room. The district further alleged that McColl's conduct at the meeting also included the following: (a) McColl

explained the student requires an exorbitant amount of attention and redirection stating, “It’s not good for me.” McColl went on to explain the class is large and that it bothers McColl to have to spend so much time concentrating on this student’s behaviors; (b) McColl emphatically stated the class is “remedial with all remedial students.” At this point the student put her head down and refused to make eye contact with anyone; (c) McColl leaned across the table and emphatically explained to the mother that McColl could not tolerate the student’s behavior because it was not good for McColl and other students. McColl expressed concern that the other students may begin to wonder why this student gets special treatment.

The District introduced memoranda prepared by the parent, counselor, and vice principal who had attended the meeting, all of whom were upset by McColl's behavior.

Jimenez’ Testimony

Jimenez testified that he was not at the meeting, but the purpose of such meetings is to advise the parents of the supports the District has in place to assist a student with special needs. Jimenez admitted that he does not know the student involved or her discipline history or academic record. Jimenez testified that he investigated the matter and determined that McColl's behavior was inappropriate, unprofessional and unbecoming. Jimenez prepared a memorandum summarizing his meeting with McColl about the incident in which he advised McColl that his behavior was inappropriate. Jimenez also advised McColl that by referring to these types of students as “special ed” he violated their right to privacy and stigmatized them. McColl told Jimenez that he possibly holds his students to a higher standard than other teachers, that it is difficult to teach so many students with Individual Education Plans (IEPs), and that the students feel that they are entitled to misbehave which is frustrating for McColl and makes it difficult for him to teach. Jimenez advised McColl that teachers do not have the luxury of selecting their students; they have to educate everyone who comes to school.

Jimenez testified that he referred the matter to the human resources department and recommended that McColl be suspended. Jimenez also recommended that McColl contact the Employee Assistance Program (EAP) because he had not seen improvement in McColl’s professional behavior when interacting with students and parents.

Allen’s Testimony

Jannette Allen, a school counselor at Serra, prepared a memo regarding the incident because she was dismayed by McColl’s actions and had concern for other students who would have to attend such conferences. During her testimony, Allen admitted that McColl always came to the parent teacher conferences and at those meetings he had never been aggressive or acted like he did at this meeting. During the meeting in question McColl leaned forward, slammed his hands down on the table, got out of his chair and said, “This is the kind of behaviors I am talking about” in response to the student’s actions. The student became very withdrawn and “fell in on herself” in response to McColl’s statements. Allen admitted that she could not recall that the student disassembled a pen and blew into it like a whistle during the meeting and was unaware of other instances when the student was

escorted to the office because of behavior problems.⁵ Allen also testified that the student drew all over herself as “a way of distraction for her,” it was “how she dealt with life.” Allen explained that the student had many different colored pens and would “draw all over her face, hands and body; something she did constantly, in class, at home, everywhere.” Allen conceded that the student was most likely displaying “some behavior” during the meeting. However, Allen felt that nothing about the student’s behavior justified McColl’s reaction. Allen testified that the student’s mother was just as stunned as everyone else by McColl’s behavior.

Reiche’s Testimony

Scott Reiche, Serra school psychologist, prepared a memo regarding the incident to express his concern about McColl’s actions. Reiche testified that all in attendance at the meeting were the target of the student’s inappropriate behavior and statements, however only McColl reacted negatively. Reiche testified that McColl’s actions made it difficult for the meeting to have a positive outcome. Reiche recalled that the student’s mother was extremely grateful that Serra was addressing the student’s issues so early in the school year, but that after McColl had his outburst, the mother began to cry. Reiche thought it was “pretty egregious” that McColl was already “writing this student off” at the beginning of the school year. Reiche testified that McColl had complained at other meetings about having to teach special education and English language learner students. Reiche testified that those types of comments have a negative impact on the students and that if the teacher does not expect more from a student, the teacher will not get more from the student.

On cross examination Reiche admitted that all six of the student’s teachers had been invited to the meeting but not all attended. Reiche acknowledged that in his memo he noted that McColl showed a sincere effort and he acknowledged the difficulties of teaching this student. Reiche also admitted that this student continued to have behavioral issues throughout the school year, even after she was removed from McColl’s classroom, and that she was eventually placed in a special education classroom.

McColl’s Testimony

McColl testified that the parent conference meetings are voluntary, but he went out of his way to attend as many of these meetings as he could and believed they are beneficial. McColl went to this meeting with his documents, wanting to help, hoping to see a change in the student’s behavior. McColl testified that he was at another meeting so that when he arrived at the meeting at issue it was already in progress. During the meeting the student dismantled a pen and began blowing on it, and making whistling sounds. McColl said, “Wait, see this, she’s blowing on the pen, this is the kind of distraction I get every day in class.” McColl testified that during most of the meeting the student’s mother was crying long before McColl made his comment about the pen. McColl testified that the mother did not start crying while he was talking. McColl admitted that he was very frustrated during

⁵ Documents introduced at hearing indicated that the student had been referred by other staff for her behaviors.

this meeting. It seemed as though the points he was making were not being heard or acknowledged; so he dismissed himself from the meeting.

McColl admitted that he was probably too focused at this meeting. He had been struggling with this student for weeks; he had documented her behavior issues and had communications with her family. McColl testified that he did not ask that the student be removed from his class, he merely inquired during the meeting if possibly the student should be moved. McColl testified that the intention of his comments about transferring the student were because he was aware that there are supports for students with special needs and he thought the student could benefit from those supports, which include smaller classrooms, more help and other options. McColl testified that the student was defiant and disruptive. McColl testified that every student has the right to learn and every teacher has the right to teach and that this student made it extremely difficult for McColl to teach. In fact, other students in his class requested that the student not be assigned to their lab group because she did not participate, she was no help and she repeatedly interrupted the other students. The other students asked why she was even in the class. McColl testified that he was frustrated and his students were frustrated.

McColl submitted a memorandum to the district in which he alleged that none of the memos prepared by those in attendance at the meeting alleged that McColl raised his voice; rather this was something which Jimenez mentioned for the very first time in his memorandum, despite the fact that Jimenez was not at the meeting.

On cross examination McColl testified that he felt the meeting “snowballed.” It seemed like the participants were more interested in documenting his behavior and less interested in helping him improve his classroom management of the student. It appeared as though the district was more interested in gathering a paper trail against McColl than helping him improve his classroom techniques. McColl felt that small things were being “ratcheted up.”

Henry’s Testimony

Tom Henry, a Serra math teacher, who was present at the meeting, testified that McColl did not do anything inappropriate during the meeting.

May 23, 2008, Allegation

14. The District alleged that on May 23, 2008, while on paid status, McColl said “no shit” to a student after the student indicated that she did not have her rubric. On September 22, 2008, McColl received a Letter of Reprimand for his unprofessional conduct. In addition, the student reported that McColl frequently made inappropriate comments such as, “You know Mexicans only make \$5.00 an hour. Like every other Mexican, you guys do not give a shit about your life or appreciate anything.” McColl received a letter of reprimand for this incident. He was instructed to discontinue the use of inappropriate remarks/interactions and to promote a comfortable learning environment. McColl was also directed to various written resources to help

him with his classroom management skills and was directed to EAP to address his frustrations with students and his job.

Jimenez' Testimony

Jimenez testified that McColl admitted that he had made the “no shit” comment, but denied making derogatory comments about Mexicans. McColl admitted using profanity as a way to build a relationship with the student and using “lighthearted talk.” Jimenez informed McColl that this was unacceptable. Jimenez could not recall if the student ever alleged that McColl made racial remarks and no mention of such remarks was contained in the student’s statement. Jimenez admitted that he was never able to substantiate that McColl made any racist comments. The district introduced other witness statements indicating that McColl used profanity in his classroom. Jimenez testified that it is unprofessional conduct for a teacher to ever use profanity in front of students. Jimenez also suggested that McColl get counseling and Jimenez intended to establish weekly workshop meetings to assist with strategies in the classroom, but those workshops never came to fruition.

J ■■■ Z ■■■'s Testimony

J ■■■ Z ■■■, a student in McColl’s earth science class during the 2007-2008 school year, testified that McColl’s face looked serious when he made the “no shit” comment to her. Z ■■■ testified that a teacher is supposed to be a role model, not curse at students and that, out of respect, she does not curse when talking to a teacher, although she does curse with her friends. Z ■■■ testified that she cried after school because of McColl’s “no shit” comment. Z ■■■ received an “F” in McColl’s class and repeated the course in summer school where she got an “A.” Z ■■■ testified that she studied and did her homework but received “F’s” on her test scores and test taking is one of the issues listed on her IEP. Z ■■■ believed that McColl favored Caucasians, and disfavored African-American, Hispanic and Latino students. Z ■■■ admitted on cross examination that she did not know that McColl’s wife was Hispanic but that photos of his children posted in the classroom did not look Hispanic.

M ■■■ Z ■■■'s Testimony

M ■■■ Z ■■■ testified that her daughter began crying during dinner saying that she did not want to go to school and eventually told her mother that it was because of comments made by McColl during science class. Her daughter also told her that McColl made several derogatory comments regarding Mexicans. Mrs. Z ■■■ testified that a teacher should be a role model to students and that if McColl did not want students to curse he should not curse.

McColl's Testimony

McColl testified that the freshman class at Serra is divided into four houses. At the end of the year there is a freshman exhibition where a three ring binder containing the best student work is displayed. There is a grading rubric on the front of the notebook and the students each have individual notebooks containing their best work. McColl taught students in the “Energy House” and the teachers had developed a rubric for the materials to be contained in that notebook.

McColl testified that it was the end of the year and when he was reviewing Z [REDACTED]'s notebook there was nothing in it, that she had prepared nothing all year long. When McColl asked for her work Z [REDACTED] handed him the rubric that McColl had passed out to the class. McColl admitted making the comment but testified that he meant it as a joke, that everyone laughed when he said it and that it was later taken the wrong way. McColl acknowledged that it was a poor choice of words, but that he heard other faculty use similar language although he acknowledged a difference between student and teacher language.

McColl testified that when he received the letter of reprimand during the next school year he was surprised because he thought the issue was over. In fact, each school year he kept a file of all his teacher communications and referrals and he had a file for Z [REDACTED] documenting the many issues he had with her, including her failure to do her classroom assignments, but he discarded those files at the end of the 2007-2008 school year. Had he known he was going to receive a letter of reprimand the following school year for this incident he would have kept Z [REDACTED]'s file.

The letter of reprimand indicated that McColl was not an effective teacher, something with which he took issue because he was assigned to the 8 1/2 students and a review of their test scores indicated that they had dramatically increased. The District's test score documents submitted by McColl at this hearing corroborated his testimony. McColl also testified that during a staff meeting when improvements in test scores were shown, McColl was "taken aback" by the fact that the earth science scores, which showed such improvement, were not included in the presentation. Those test scores had improved by several strata.

April 18, 2007, Allegation

15. The District alleged that while on paid status, McColl forced a student to call his mother to ask if he could go to the bathroom. The mother then spoke with McColl on the telephone and McColl explained that the student wanted to use the bathroom. The mother asked if the class had just started and McColl said, "Hell no." At a subsequent conference between the parents and McColl on April 26, 2007, McColl acknowledged that he "blew it" and informed the parent that what he had done was "unacceptable."

A memorandum prepared by the District summarizing the conference between McColl and the student's parents documented that the student's mother indicated that her son had called her 40 minutes after class had started, not 10 minutes as McColl alleged, and that McColl twice admitted to the parents that his conduct was unacceptable. McColl stated that he was trying out a new classroom policy that was not working. McColl was directed to manage these types of situations in a more professional manner to ensure that he did not embarrass or humiliate students. McColl was not to have students call their parents to request using the bathroom and he was not to use inappropriate language with parents. Given McColl's prior personnel issues, the matter was referred to human resources for an investigation to determine if disciplinary action should be taken. After reviewing the matter, the District did not impose discipline.

McColl testified that the official school rule is that students may not leave the classroom to use the bathroom 15 minutes before or after the bell rings. McColl implemented the bathroom policy on a case-by-case basis and testified that he did make the

student call his mother to use the bathroom. In his notice of defense McColl asserted that he took responsibility for his tone with the parent.

January 27, 2006, Allegation

16. The District alleged that on January 27, 2006, while on paid status, McColl made inappropriate comments to a number of students by stating: “Are you selfish, stupid or prone to be on welfare or all three?” One student’s response was, “Who are you talking to? I didn’t say anything to you.” The student’s parent expressed anger and concern over the situation and filed a complaint against McColl. McColl received a three day suspension for the incident.

Jimenez testified that McColl's statement was extremely inappropriate and should not have been made. Jimenez individually met with both McColl and the student’s parent and documented his meetings. McColl stated that he did not feel as if anyone was on his side and he felt that the administration was “snowballing a series of complaints against him.” Jimenez denied that allegation and explained that it was his duty to investigate all parent complaints and instructed McColl to apologize during the parent meeting. Jimenez documented that during the parent meeting McColl was very sincere and apologetic and acknowledged that there was no reason for his unprofessional behavior. Jimenez also documented that the student’s parent was very receptive of McColl's apology and inquired as to why McColl had behaved in that manner to which McColl explained that his job was very much like that of a farmer in a white suit working in a muddy field all day trying to keep his suit clean. McColl explained that over the course of time language previously considered unacceptable had become acceptable to which the student’s parent replied that it was still unacceptable for teachers to use that language in front of students. McColl again reiterated the stress of his profession. Jimenez documented that McColl appeared to become visibly sad, frustrated and upset during the conference, which concerned Jimenez who recommended that McColl take a day off to rest. McColl advised Jimenez that the problem was that McColl attaches himself too much to his students. At the conclusion of the meeting Jimenez and McColl agreed that McColl should take the following day off.

McColl testified that the incident occurred when the class was grading a lab, explaining that there were stations set up around the classroom for students to conduct experiments. McColl heard an “electronic pop” and turned to observe that the student had cut the power cord.⁶ McColl described the student as a very good student, and he thought he could use the incident as a “teaching moment.” McColl purchased a replacement cord and was intending to teach the student how to repair the electric cord but she never came after class to perform the repair. McColl testified that he attended the parent meeting and that “ninety percent” of the District’s memo summarizing the meeting is accurate. McColl testified that he apologized to the student's mother who “did not seem to extend much grace to me.” He told the mother that teaching is a tough job and explained that the students’ swearing and derogatory comments “sticks to you” and he analogized teaching to being a farmer in a white suit.

⁶ Jimenez testified that respondent never mentioned that the student had cut the power cord until after the parent teacher meeting.

McColl was initially given a 10 day suspension for the incident which was later reduced to three days. McColl testified that on one of the three days he went to an airplane museum with his father-in-law so that he could create an extra credit lab for his students when he returned to the classroom. McColl testified that the time he spent with his father-in-law was very valuable as he greatly values the relationship with his father-in-law and the advice his father-in-law provides to him. McColl testified that he returned to the classroom with a “different outlook.” McColl testified that he believed his 2006-2007 school year was one of his best years as he had “gotten in a groove” with teaching, his labs, his equipment and his assignments. He described this as “probably one of my better years.”

On cross examination McColl denied losing his temper at the parent meeting, although he admitted that at one point he put his hand down on the table and he walked out to take a breather. McColl testified that he was going to apologize for his comment whether or not the principal asked him to do so.

Additional Witness Testimony

17. Jimenez testified that he recommended McColl's dismissal because McColl was rude, disrespectful to staff, mean, had difficulty establishing working relationships with students who could not learn, and had created a hostile environment. Jimenez testified that since at least November 2005 he had tried to work with McColl, requesting McColl seek counseling, read literature and observe other teachers in their classrooms, all to no avail. Jimenez testified that despite attending counseling, he did not notice any change in McColl's behavior, and in fact he believed that McColl's behavior escalated inappropriately over time. Jimenez described McColl's negative impact on the students and staff at Serra.

Jimenez denied that McColl's union activities had any impact on his decision making, testifying that he has had other union representatives on campus who have not received any type of discipline. Jimenez denied that any of McColl's classroom assignments were retaliatory and alleged that McColl began receiving earth science assignments during the 2007-2008 school year because he was the only one credentialed to teach that course. Jimenez testified that McColl complained about his earth science assignments because McColl felt it was unfair that he had to teach “the lower-level kids.” Jimenez testified that beginning in 2007, the District created what became known as the “8 1/2 class,” students who should have been held back in eighth grade but whom the District promoted to ninth grade. These students had extremely low grade point averages and were specifically assigned to McColl for earth science classes in ninth grade.

Jimenez introduced a “warning of unprofessional conduct” which McColl gave him documenting that on February 18, 2009, Jimenez violated traffic rules when he entered the parking lot through the exit, which jeopardized student safety. At hearing Jimenez acknowledged his actions and testified he has never driven in the exit again. Jimenez testified that it was highly unusual for him to receive such a warning from a teacher.

The District introduced several e-mails and memos sent to McColl regarding his excessive referrals for student behavior. Jimenez testified that McColl submitted an “excessively high” number of student referrals. On average, teachers submit three to five referrals per year, but McColl submitted 38 during the 2008-2009 school year which indicated that McColl was having behavioral and classroom management issues. An e-mail from Jimenez to McColl documented the principal’s concern regarding McColl’s numerous referrals. McColl replied that he believed it was his duty, as well as the duty of other teachers, to enforce the school rules. Jimenez conceded on cross examination that it did not appear that any of McColl’s referrals were included in the total number of referrals for the 2006-2008 school year.⁷ Jimenez attempted to determine why McColl’s referrals were not acted upon by the counseling office and he believed it was because so many had been received it was difficult to process them all.

On cross examination Jimenez was shown his April 28, 2009, memo summarizing his April 28, 2009, observation of McColl’s classroom. Jimenez made several “suggestions for improvement” but did not record any “strengths observed.” Jimenez admitted that he did not review his observations with McColl as the matter had already been referred to human resources for further handling. Jimenez acknowledged that the times recorded in the memo documenting when he was in the classroom were inaccurate.

18. Susan Skinner, Head Counselor at Serra, testified that she observed several interactions between McColl and students. She typically “heard them before she saw them.” She testified that McColl often had students backed up against the wall and was typically trying to get them to hand over a hat or cell phone or other prohibited device. She does not believe that backing students into a corner is productive. Skinner testified that she was growing increasingly uneasy with McColl which is why she wrote a memo to Jimenez.

The District introduced Skinner’s January 22, 2009, memo in which she stated that she had been “growing increasingly uneasy with the aggressive comments” made by McColl at staff conferences and was “feeling very uncomfortable and fearful for the safety of myself and my colleagues.” Skinner testified about a staff meeting in which the vice principal “in a light hearted manner” told the staff to “shut up” at which point McColl got very angry, told the vice principal she was not professional and that if the vice principal expected teachers to be professional she should act professionally. This was the first time Skinner can recall feeling uncomfortable at a staff meeting.

Skinner testified about another time when McColl was upset that his referrals had not been entered into the computer and Jimenez told McColl that he would look into the situation. Skinner testified that counselors complained about the amount of referrals McColl sent and that the referrals were “picky.” Skinner testified that if a student has respect for the

⁷ It did not appear that many of respondent's referrals were addressed by the counseling office, nor were they included in the studies used to demonstrate that the total number of referrals, and hence discipline issues, was decreasing at Serra.

teacher in the classroom most students will respond appropriately to teacher requests. In December 2009 Serra had two counselors who were out on leave, which accounted for a large backlog of the referrals being processed. Skinner acknowledged that many of McColl's referrals were not processed. She admitted that the "loop is not clear" for following up on a student who was referred for detention and letting the teacher know that the detention had been served. Skinner's testimony established that there is no follow up to ensure that students referred for Saturday detention actually attend that detention. Skinner testified that since she is not an administrator it is not her duty to ensure that policies at the school are followed through.

Skinner testified that she changed the way in which she conducted parent teacher conferences if McColl was involved. She admitted that when she spoke with McColl in a one-to-one situation, he was not adversarial and could be "very pleasant and reasonably cordial." She also admitted that McColl's attitude toward her did not change after she wrote her memo to the principal.

19. Peggy Spates, a teacher at Serra, and a union representative, testified that during her meetings with McColl and administrators, McColl "never lost his cool," was never red in the face, never had veins popping, and never raised his voice. Part of the job of the union representatives is to meet with the District to discuss issues. Spates taught in the classroom adjacent to McColl's classroom, and both of them often had their doors open so she could hear things from his classroom. There has never been a time when she has passed his classroom and observed anything out of the ordinary. Occasionally she walked into the back of his classroom to observe because she "likes to see good teaching." Spates testified that she did this quite often and she had never seen anything that caused her any concern. McColl was very passionate regarding student learning and student achievement and at lunch and after school McColl could often be found tutoring students. Spates, who is African-American, never heard McColl use any racially derogatory terms. She would want her child to have McColl as a teacher if her child attended Serra.

Spates attended staff meetings and on occasion McColl would raise his hand and bring up issues but she has never seen him behave inappropriately. McColl was concerned that his referrals were not being processed and he voiced his frustrations about that during meetings but not in an inappropriate manner. As a union representative, other teachers have also complained to Spates about the lack of follow-up on their referrals. Spates herself has written approximately three referrals per week or approximately 100 per school year so she does not find McColl's 38 referrals to be excessive. Spates recalled the "roundtable incident" and McColl did not do anything inappropriate or unprofessional.

20. Celia (Mija) Smith, an 11th grade student at Serra, testified that she had McColl for earth science during the 2008-2009 school year. She received an "A" both semesters and testified that McColl allowed students to do lots of extra credit and a student could do well on tests because he allowed students to use their notes, flash boards and homework. McColl never made any derogatory comments regarding Hispanics; if he had she would have reported it because her mother is Hispanic. Students were often defiant in the classroom, using profanity, chewing gum, and using their cell phones. She never heard

McColl use profanity and she hears “other teachers use it a lot.” She doubted that any students are shocked when teachers use curse words and she has heard students curse at their teachers. McColl never identified a student as a “special ed student.” In fact, one of Smith’s friends is a special education student and McColl wrote “nice job” on one of her assignments which made her very happy. McColl was very nice and often wrote positive notes to students. Students were often disrespectful in class which was annoying because it slowed down learning. Students who obeyed did well in McColl’s class. Smith had no concerns regarding McColl as a teacher and was excited at the prospect of having him for physics prior to his being placed on leave.

Smith was interviewed by the District’s attorneys regarding McColl and her impression was that the attorneys’ questions were designed to make her say negative things about McColl. On cross examination Smith testified that she thought McColl was a good teacher. She testified that her mother often “shadows” her at school and has sat in McColl’s class on numerous occasions. Although she is aware that her mother has filed a complaint against the school district she does not know the nature of that complaint, although it is related to a school dance.

21. Tom Henry, a Serra math teacher, testified that he taught in the classroom next to McColl and shared students. He has observed McColl’s classroom on occasion and it always appeared that the students were engaged, that McColl had a love for the subject matter and that he was describing things physically and manually to the students. Henry never observed any inappropriate or unprofessional actions by McColl, he never heard him use profanity and he has heard almost every teacher use profanity.

It was Henry’s impression that McColl has been “called on the carpet by the school.” It appeared as though McColl was frustrated and thought he was being treated unfairly and he was being singled out unfairly, while other teachers engaging in the same conduct were not. Henry did not believe that anything McColl did was disrespectful. At a staff meeting McColl held up a bunch of referrals that he had written and asked why none of them had been addressed. Henry recalled that during the school year he was also writing a lot of referrals which were not being processed. A counselor told Henry that referrals were being held up, which the counselor did not feel was appropriate. It was being done, Henry was told, because the counseling office did not want those numbers counted into the system as they were trying to demonstrate that behaviors were decreasing. During the 2008-2009 school year Henry was writing many referrals as it was a very difficult year. Henry described both his and McColl’s frustration with the students’ behavior and he has observed the students plotting how to get McColl fired.

Henry has found McColl to be a dedicated team player: McColl “is there for his students one hundred percent,” he is “excited for everything he teaches” and “he is a man of total integrity.” Henry described McColl as one of the best science teachers at Serra. Henry has never heard McColl make any discriminatory remarks. On cross examination Henry testified that he observed McColl’s students outside conducting experiments and from what he observed Henry would have “loved to have had [McColl] as a teacher.”

22. L■■■■ P■■■■, a student at Serra, testified that she had McColl for physics. She is Hispanic and testified that McColl never discriminated against Hispanics, never made derogatory comments about Mexicans or Hispanics and never identified any students as being “special education students.” McColl did use personal anecdotes to engage the students in the subject; he had traveled a lot and brought in items from his travels which he incorporated into his lesson plans. When he wrote referrals it was for inappropriate conduct in the classroom. P■■■■ has heard profanity used in all of her classrooms but she has never heard McColl use profanity. P■■■■ never observed McColl being any more frustrated than other teachers. She testified McColl was never angry with the class.

23. Ralf Uebel, a physics teacher at Serra, testified that she was located in the same building as McColl. He has collaborated with McColl and attended many meetings with McColl. He has never observed McColl do anything inappropriate at staff meetings. He recalled McColl making different announcements at the end of meetings because he is the union representative and needed to address staff on various union issues. McColl’s demeanor was more passionate on some days than others, but he never acted inappropriately or in a way that concerned Uebel. McColl had questions regarding his referrals not being processed and he was frustrated by this and assertive but nothing that he did made Uebel or anyone else in the room uncomfortable that Uebel observed.

24. Julie Gushlaw is a special education teacher who was assigned to various classrooms to assist students who had IEPs. She spent the 2007-2008 school year in McColl’s classroom. Gushlaw never had any concerns regarding McColl’s language or racial comments and although she was Z■■■■’s special education teacher, Z■■■■ never raised any concerns with her regarding McColl. She had many discussions with McColl regarding Z■■■■’s progress, mainly centered on trying to get Z■■■■ to turn in her assignments. Gushlaw never felt that Z■■■■ was being unfairly treated by McColl. Contrary to Z■■■■’s testimony, Z■■■■ never turned in her homework and McColl never made derogatory comments. He never made any derogatory Mexican comments. McColl did become frustrated with some students in the class who were not doing the work and stated they were going to be down in the unemployment office if they did not put forth an effort and he did say that there were people who are coming from China and Mexico who were going to take their jobs because they wanted to work and the students did not want to put forth the effort but he never made derogatory comments about those ethnic groups.

At one staff meeting where they were reviewing referrals McColl wanted to know what was happening with his referrals. He was frustrated and had an angry look but the group was also joking about what had happened to all of their referrals. Much that was said about referrals during that meeting with said in a joking manner.

25. Kent Tartt testified that McColl was his mentor-tutor when he was a student-teacher and substitute teacher at Serra during the 2006-2007 school year. Tartt described McColl as an outstanding instructor. McColl had a well-organized class, especially the way he put the materials on the board. Tartt always thought that Serra was “a great place to be and a great opportunity to learn.” Tartt had no criticisms of McColl. He was an outstanding mentor. McColl taught Tartt many great things on how to organize a class. He taught him how to have great patience with students. Tartt, like McColl, is a former military man, and is

used to giving orders and having people follow them. However, the chain of command style of authority does not work well in a classroom and the key to having authority is patience and trying to find a way to connect with students. McColl taught Tartt how to do that. Tartt, who is African-American, never heard McColl use racial terms or do anything inappropriate.

On cross-examination Tartt testified that he attended a meeting between Jimenez and McColl because McColl requested that he attend. Tartt was very impressed with how Jimenez handled the meeting, in an extremely calm manner. He recalled that it was tense for him during the meeting and it was a very difficult position to be in because he did not know all the details of the meeting, he was just there as McColl's friend and "prayer partner." All Tartt could recall about the meeting was that it had something to do with McColl's future as a teacher; McColl's ability as a teacher was not questioned.

26. Vice Principal Basteys could not recall any specific student referrals received from McColl but stated that sending 38 referrals was "very unusual." Basteys recalled that McColl was upset that his referrals were not being processed and she told him to follow up with the counseling department or the vice principal in charge of referrals. Basteys testified that she felt uncomfortable interacting with McColl at staff meetings and described one incident where she told the staff to shut up at the start of the meeting and McColl jumped up and told her that her words were inappropriate. Basteys described times where she has observed McColl becoming very upset when students use profanity and she felt his interactions with students were harsh. Basteys testified that she really felt "on pins and needles, nervous, and scared" by McColl because she believed his actions and reactions were unpredictable.

27. Eric Gonzales testified that he is uncomfortable around McColl and there have been other instances when McColl demonstrated anger towards Gonzales. Gonzales has observed times when McColl yelled at other students for breaking school rules. Once Gonzales was escorting students to another teacher's classroom and McColl ran up to him angrily and told him that he was undermining McColl's authority because McColl had told the students not to use that hallway. Another patrol officer with Gonzales commented that he thought that McColl was so upset that he was going to punch Gonzalez. Gonzales did not know how McColl will react to future interactions between the two. McColl testified that he has known Gonzales for years because the two used the staff locker room to change in the mornings and he never gave McColl a sense that he was uncomfortable around him.

28. McColl denied ever making a comment that students would end up on welfare or making derogatory comments about Mexican or Chinese individuals. He testified that his wife is Hispanic and he is not prejudiced. McColl denied identifying a student as a special education student. McColl explained that he had a specialized report card for the student which McColl would submit to the administration regarding whether or not the student used his cell phone, iPod or cursed during class. McColl testified that in response to his addressing the student about a behavior issue, the student replied, "Fuck you, I am special ed," self disclosing to the class that he was a special ed student.

McColl testified that the subject of vasectomy once came up during a class discussion regarding world population. The class was studying average birthrates in different countries

and one of the students asked why birthrates were so much lower in the United States to which McColl replied that our country is industrialized and can control its population. McColl testified that this prompted several questions from students regarding how population is controlled which led to a discussion about vasectomies and when one student asked if McColl had undergone a vasectomy, McColl honestly answered.

McColl testified that he was doing all he could to minimize the referrals from his classroom. He conducted parent conferences, he met with students, he sent e-mails to parents, and he used a series of consequences in his classroom which he followed before he wrote a referral. McColl testified that based upon his experience in the Marine Corps he always tried to handle things at the lowest level so that when he had to write a referral it was clearly “a call for help” from him to the administration. McColl testified that “academic performance often goes hand-in-hand with citizenship,” which explained why he had to write as many referrals for behavior as he did. McColl testified that he “met pretty regularly” with the administration to discuss the behavior problems he was having in the classroom. McColl testified that at the staff meeting where there was the bar graph depicting a decrease in discipline incidents he noted that none of his referrals were included and he questioned that but he testified that he did not direct his comments to Skinner and Basteyns but merely queried about the graph.

McColl testified that he felt his referrals were ignored and it seemed to him like his classroom was just a “holding tank.” He was teaching a new subject matter, earth science, but was not provided with lab equipment, had no books, was not given any support, and did not have a special education aide. The coverage he was given by the special education aide was “spotty at best.” McColl testified that it “really seemed unfair to the students that they had been tracked into the classroom.” Given that these students were specifically tracked because of their poor performance in school, they should have been provided with textbooks and equipment and other resources to help them learn. McColl introduced documents he previously sent the District which corroborated his testimony that he advised the District that he had inadequate supplies in his classroom.

McColl testified that he did not learn about the PAR⁸ referral until reviewing documents with his attorney in preparation for this hearing. McColl was never offered PAR during the 2007-2008 school year, or any other school year. During the 2008-2009 school year he was directed to go to a counselor but was never required to submit documentation demonstrating that he had sought counseling.

At hearing McColl introduced a May 6, 2009, letter from Antonio Marotta, Ph.D., LMFT, written to the District in which Dr. Marotta advised that McColl was referred to him and began attending outpatient counseling on February 25, 2009. Dr. Marotta saw McColl over the course of the semester a total of eight sessions. Dr. Marotta opined that McColl

⁸ Official Notice is taken that on PAR’s website it states that PAR is a company that provides a professional team of assessment consultants who are trained to offer knowledgeable product information and to assist school districts and other large institutions with designing assessment programs tailored to meet their specific needs.

“demonstrated a willingness to be open and receptive in attending to the issues that led to this referral.” McColl “has been able to be acutely aware of and has been able to demonstrate abilities to work on these issues.” McColl “never missed a scheduled session and always participated in the sessions.” Dr. Marotta's professional opinion was that McColl had “taken the skills he has acquired in counseling and has been able to use them in his professional development.”

McColl testified that he is a passionate person.⁹ He is intense, focused and results oriented. He loves teaching and he loves his students. McColl wants to keep his job in the District. He is a good teacher and “no one has disputed his teaching techniques.” He believed that he is an asset, and that teachers appreciate the efforts he makes. McColl admitted that he has shown some poor judgment and made some poor word choices. However, he does not think he has damaged any of his students, he has not damaged anyone personally, and he did not damage any of the students involved in these incidents. McColl testified that no one can teach without making mistakes. It is a tough environment. There is lots of bad language and negativity. He tried to let it roll off his back as much as possible. McColl testified that he has been praying about the situation and that when someone makes a mistake they go back and try harder and that trying is as much as you can expect from anyone.

McColl testified on cross-examination that he believes he has changed his behavior. He has tried to change. One thing he has realized is that previously he wanted to be the one to go in and be the one who helps. He now realizes that he is not the “full solution.” He needs to activate the support network. He must communicate with counselors, parents and school psychologists. He needs to activate that support network early. McColl admitted that he is part of the problem but believed he is also part of the solution. There are some things he did wrong and some things he did right. He is neither the whole problem nor the whole solution; he needs that support network.

29. Jimenez admitted that during one of the staff meetings Basteyns did tell everyone to “shut up.” Janette Allen testified that McColl’s reaction to the “shut up” comment made her very uncomfortable. McColl testified there when Basteyns said “shut up” at the staff meeting it seemed to him as though there was a double standard because other people were allowed to speak like that but he was not. He also thought the comment was unprofessional and he said so during the meeting.

McColl’s Performance Evaluations

30. McColl’s performance evaluations were introduced at hearing. On his 2004-2005 evaluation McColl received “effective” scores in all six areas evaluated,¹⁰ the highest

⁹ Jimenez believed that respondent was “frustrated” with his job, not “passionate” about it.

¹⁰ The six areas evaluated were (1) progress of students toward established standards, (2) instructional techniques and strategies, (3) adherence to curriculum objectives, (4)

score attainable. The “Comments by Evaluators” section noted that McColl puts “large amounts of energy into creating environments, demonstrations, activities, and extra credit experience above and beyond the common unit of study in which he participates.” McColl’s “peers often use his activities. His ideas are creative, engaging and connect concepts to the ‘here and now.’ This year, [McColl] has grown instructionally, improving on his ability to engage students through the efforts mentioned above. He has also responded to coaching in the area of classroom management. His demeanor in class has become increasingly relaxed, respectful, and open. A result of this is that his students are comfortable calling him over and seeking his help, as well as his approval. Nevertheless, [McColl] has been overly intense in some interactions with adults this year. Such situations usually arise when he has a pressing issue to resolve or when he is otherwise under stress. We have discussed this. His improved ability to handle classroom stress gives me hope that his resolve to master stress outside the classroom will be fruitful.” Over all, McColl received an “effective” evaluation, the highest score attainable, and “achieved” the stated objective of “connecting students’ prior knowledge, life experience and interest with learning goals.”

On his 2006-2007 performance evaluation McColl again received “effective” scores in all six categories. The comment section indicated McColl “met the above components of teaching.” McColl “met” his three objectives of “engaging students in problem solving, critical thinking, and other activities that make subject matter meaningful,” planning and implementing “classroom procedures and routines that support student learning,” and “communicating with students, families and other audiences about student progress.” Jimenez testified that he gave McColl “effective” scores on this evaluation because Jimenez had missed the April 30 deadline to complete the evaluation and pursuant to be contract between the union and the District, Jimenez was required to rate McColl “effective.” No explanation was offered as to why Jimenez wrote that McColl achieved his three objectives.

In McColl’s 2009-2010 performance evaluation he again received “effective” scores in all six categories, but the comment section indicated that although McColl was receiving an effective evaluation “there is concern with his professional conduct in regard to his behavior and interaction with staff, students, and parents.” McColl’s “behavior has caused concern in the area of establishment and maintenance of a suitable learning environment and performance of non-instructional duties and responsibilities. Further observations and support will be necessary to monitor his progress in these areas.” Overall McColl received an “effective” evaluation, the highest score attainable. McColl testified that he never saw this evaluation until reviewing discovery at the district office in preparation for hearing.

Jimenez explained the discrepancy between the evaluations and this disciplinary action by stating that the evaluations pertained to McColl’s instruction in the classroom whereas the memoranda introduced as part of this proceeding documented McColl’s interactions with staff, parents and students.

establishment and maintenance of a suitable learning environment, (5) performance of non-instructional duties and responsibilities, and (6) achievement of stated objectives.

Class Rosters

31. Class rosters for the 2005 through 2009 school years documented the number of students in each class McColl taught. Jimenez admitted that many of the students in McColl's earth science classes had IEPs, were English Language Learner (ELL) students and/or were special education students. The documents demonstrated that McColl had extremely large class sizes consisting of many students with learning difficulties.

LEGAL CONCLUSIONS

Due Process under the Education Code

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.)

Under Education Code 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 McColl and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (c)(1)-(3).)

Burden and Standard of Proof

2. 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.) This standard requires a party to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

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:

...

(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 . . . ”

Relevant Regulatory Authority

4. San Diego Unified School District Administrative Procedure 7046, paragraph C.20, states in part:

“All certificated employees are to maintain a professional relationship with students of the school district.”

Relevant Judicial Authority

5. The seminal case for teacher dismissals is *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. There the Supreme Court held that where charges of unprofessional conduct are raised in teacher dismissal cases, the applicable standard is whether the person is fit to teach. The *Morrison* criteria also apply where “evident unfitness for service” is at issue. The criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates an unfitness for service. (*Id.*, at 229.)

6. Evident unfitness for service under Education Code section 44932, subdivision (a)(5), is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) As a threshold matter, the *Morrison* criteria must be examined to ascertain whether the conduct in question indicates unfitness for service. “If the *Morrison* criteria are satisfied, the next step is to determine whether the ‘unfitness’ is ‘evident,’ i.e., whether the offensive conduct is caused by a defect in temperament.” (*Id.*, at 1445.)

7. The applicable standard or determinative test in teacher discharge cases is whether the person is fit to teach. “Fitness to teach” is probably a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.)

8. A violation of Education Code section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that McColl’s refusal to follow the laws or regulations was “persistent,” i.e., “stubborn and continuing.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) “Persistent” has been defined as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) A single violation is not sufficient to warrant dismissal, apparently to allow for correction; “it is the persistent disregard” of school

rules that the subdivision is designed to regulate. (*Id.*, at.84.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (See, e.g.: *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

Evaluation

9. April 23, 2009 Allegation

The Commission concluded that while McColl’s comments were both insensitive and irresponsible, McColl accepted responsibility for them and apologized to Vazquez and the students. The comments demonstrated a lapse in judgment. However, the Commission felt that the likelihood of recurrence was remote and that it had not greatly affected staff morale as several teachers testified on McColl’s behalf.

10. April 20, 2009, Allegation

The Commission concluded that there was nothing improper about McColl distributing his own disciplinary documents to fellow staff members. The Commission was concerned with the District’s instruction to McColl not to distribute his own personnel documents as the Commission believed this infringed on McColl’s right to discuss his issues with fellow staff members.

11. April 4, 2009, Allegation

The Commission concluded that McColl’s explanation for why he reacted as he did in the situation was perfectly reasonable. McColl encountered a non-communicative, distraught, female student in the hallway outside a classroom where chaos was ensuing and a substitute teacher was teaching. While the situation may have been calm by the time either Gonzalez and Basteys arrived, that was only because McColl had restored order to the classroom. McColl still being upset because of the situation he initially encountered was perfectly understandable and he would have been derelict in his duties if he had ignored the situation. It was relatively easy for Basteys to dismiss McColl’s reaction as being an “overreaction” because she knew the distraught student; McColl did not. Given the scene when McColl first arrived, it was unfair to label McColl’s reaction as being “an exaggeration.” Moreover, the Commission was concerned by the fact that Gonzalez could not adequately articulate during his testimony why he did not remain at the scene to assist McColl.

12. March 16, 2009, Allegation

The Commission concluded that McColl’s technique of having a child yell out, “I am home alone,” in order to verify that a parent was not present, was inappropriate and not a good technique. However, McColl acknowledged that his method was not a good one and testified that he would not repeat it in the future. The Commission concluded that this incident did not rise to the level of requiring that McColl be dismissed from service.

13. January 21, 2009, Allegation

The Commission concluded that there were two very different versions of what transpired at this staff meeting. The more persuasive testimony was from McColl and his witnesses that it appeared the meeting was over and that McColl did nothing inappropriate during the staff meeting. In light of McColl's reasonable assumption that the meeting was over and because as the union representative he had issues he needed to discuss, his actions appeared reasonable. The Commission was also concerned with this allegation as they felt that staff meetings were the appropriate forum for teachers to voice concerns and for union issues to be discussed and the District's allegation appeared to be an attempt to stifle McColl's ability to engage in such protected activity.

14. On October 16, 2008, Allegation

The Commission thought it was commendable that McColl attempted to go to each parent teacher meeting with school counselors. The Commission felt that McColl should be able to state at these meetings what he is observing and encountering in his classroom, as the purpose of having the teachers present at these meetings is to obtain that type of information and feedback. During the meeting the student dismantled a pen and demonstrated the types of behaviors displayed in the classroom which McColl pointed out. Henry did not observe McColl act inappropriately during the meeting and the Commission felt that McColl's leaving the meeting after becoming frustrated was an appropriate response.

15. May 23, 2008, Allegation

The evidence did not establish that McColl ever made any derogatory comments about Mexicans. J [REDACTED] Z [REDACTED]'s testimony was not credible. The Commission believed that McColl's "no shit" comment was inappropriate but he was using the student's language in an attempt at humor and was trying to motivate the student. McColl apologized for his word choice and acknowledged it was not appropriate for a teacher to use that language with students. The Commission concluded that this incident did not rise to the level of requiring that McColl be dismissed from service.

16. April 18, 2007, Allegation

The Commission concluded that requiring a student to call his mother for permission to use the bathroom was not an appropriate technique, but sympathized with McColl's frustration that students were abusing the bathroom privilege. The Commission felt that McColl would benefit from training designed to provide him with techniques to better manage his classroom, but the Commission did not believe that this incident rose to the level of requiring that McColl be dismissed from service.

17. January 27, 2006, Allegation

The Commission concluded that McColl's comments were inappropriate but the evidence of exactly what was said was unclear. Again, the Commission felt that McColl would benefit from training designed to provide him with techniques to better manage his classroom, but the Commission did not believe that this incident rose to the level of requiring that McColl be dismissed from service.

Cause Does Not Exist to Dismiss Theodore McColl

18. Cause was not established under Education Code section 44932, subdivision (a)(5) to dismiss Theodore McColl from his teaching position with the San Diego Unified School District. The preponderance of the evidence did not establish his evident unfitness for service as a result of a defect in his temperament.

19. Cause was not established under Education Code section 44932, subdivision (a)(7) to dismiss Theodore McColl from his teaching position with the San Diego Unified School District. The preponderance of the evidence did not establish that Theodore McColl persistently violated or refused to obey the school laws of the state or the 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 Theodore McColl.

It was clear that many issues were at play. The very lowest performing students were specifically tracked into McColl's classes and then he was given no support to address the many behavioral issues he encountered. The District did not offer an adequate explanation for why McColl's referrals were not processed. It appeared as though McColl was set up for failure. That being said, the Commission believes that McColl would benefit from additional training directed at improving his peer to peer interactions, his student/teacher relations, his interactions with students on a 1:1 basis, and his language choices with students. However, the Commission did not believe that any of those issues or the evidence presented rose—either discretely or collectively—to the level of requiring that McColl be dismissed from service.

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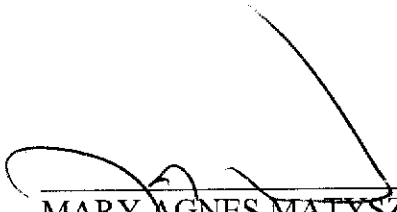
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This conclusion was based on all Factual Findings and Legal Conclusions.

DISPOSITION

The Accusation and Statement of Charges filed against Theodore McColl are dismissed.

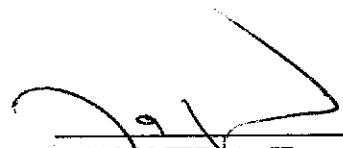
DATED: 11-19-10


MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

DATED: 11/23/2010


RAY ANDRZEJEWSKI
Commission Member

DATED: 1-10-11

 for
JUAN NERIA, JR.
Commission Member

per his e-mail
authorization