

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

In the Matter of the Accusation Against:

BARBARA WOLAK,

Respondent.

OAH No. 2009120040

DECISION

This matter was heard by the Commission on Professional Competence (Commission) in Santa Ana, California, on May 25-27, 2010. The Commission consisted of Shanti Gallegos, Mimi Gaudette, and Administrative Law Judge Amy C. Lahr, Office of Administrative Hearings, State of California, who presided.

Eric Bathen, Attorney at Law, represented the Santa Ana Unified School District (District).

Carlos R. Perez, of Reich, Adell & Cvitan, represented Barbara Wolak (Respondent).

At the close of the hearing, the District moved to amend the Statement of Charges, to conform to the proof regarding incidents with students D.A. and J. For the reasons discussed below, the District's motion is granted in part.

The case was deemed submitted for decision at the conclusion of the hearing on May 27, 2010.

MOTION TO AMEND

1. At the close of the hearing, the District moved to amend the Statement of Charges, to conform to the proof regarding incidents with students D.A. and J. Respondent objected on the grounds that the District did not provide a reasonable opportunity for her to prepare a defense.

2. Government Code section 11507 states

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare

his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

3. Although Section 11507 permits the amendment of an accusation prior to the submission of the hearing, it also requires that a respondent must be given a reasonable opportunity to prepare a defense. With regard to D.A., the Statement of Charges sufficiently identifies D.A., albeit by the wrong initials and gender, to provide Respondent with notice of the charges against her. In addition, Respondent cross-examined D.A. during the hearing. Thus, Respondent had a reasonable opportunity to lodge a defense against the charges regarding D.A. The same cannot be said for the charges regarding student J. The Statement of Charges does not identify issues with student J. Given that the District's amendment was at the close of the hearing, Respondent's contention that she did not have adequate time to present a defense is valid. To the extent that the statute gives the ALJ discretion to deny the motion to amend, the ALJ finds that the prejudice to Respondent outweighs the District's interest in amending the Accusation. Accordingly, the District's motion to amend the Accusation with respect to student J. is denied.

FACTUAL FINDINGS

4. Jane Russo, District Superintendent, made and filed the Accusation and Statement of Charges in her official capacity.

5. Respondent is a permanent certificated employee of the District. Her most recent position was that of a second-grade teacher at Santiago Elementary School. Respondent holds a clear multi-subject credential.

6. The District filed the Accusation and Statement of Charges on or about November 4, 2009. Respondent requested an administrative hearing on or about November 5, 2009; she filed a Notice of Defense on or about December 14, 2009.

7. The District seeks to dismiss Respondent for allegedly engaging in immoral conduct, and displaying evident unfitness for service.

Zip Fizz Incident

8. On March 13, 2008, Respondent provided her students with small water bottles and containers of "Zip Fizz" energy drink mix, and required them to drink the concoction. Respondent told her students that it would help them focus and make them smarter when they were taking a test. Respondent also informed her students that if they did not drink the Zip Fizz cocktail, they would be "benched," meaning they would have to skip recess. Two students refused to drink the mixture, and they were benched. Respondent required the two students who refused to drink the mixture to stay after the school, in order to drink the mixture. Respondent told student K.G. that if she didn't finish it that day, she

would have to drink it the following day. Respondent also instructed K.G. to lie to her parents, by explaining that the reason she was delayed after school was because she was sick in the bathroom, rather than telling the truth that she failed to drink the Zip Fizz mixture. L.L. stated that he did not like the taste of Zip Fizz and only drank half of it. Respondent detained him after school and told him to say that he was in the bathroom. L.L. told his mother the truth when he got home.

Student B.N. testified at the hearing. He stated that Respondent gave the energy drink to the class to help them with a test, and she told them that they had to drink it, or else they would have to stay in class. During his testimony, B.N. broke down into tears while describing the Zip Fizz incident.

9. The Zip Fizz container states that the product is “[n]ot recommended for children, pregnant women, people sensitive to caffeine, or people with a health condition.” Respondent did not read this label before administering the product to her students.

10. In the fall of 2007, Principal Linda Bell had previously admonished Respondent for giving energy drinks and vitamin water to her students. Ms. Bell specifically instructed Respondent not to give energy drinks to children, and she thought that Respondent was in agreement with her. In a written undated rebuttal, Respondent responded:

I was confused why Ms. Bell told me “Don’t give the students anything.” I questioned if that meant junk food and sodas. She repeated, “Just don’t give them anything.” I also mentioned that I have a treasure box full of pencils, erasers, stickers, flashcards, and workbooks as part of my behavior/homework incentives. Since then I have returned 82 workbooks, three class sets of flashcards, 100’s of glitter pencils and numerous erasers and stickers fearful that she may find something wrong with them. Although I did not agree with Ms. Bell I was trying to comply with her demands.

11. a. Respondent explained that she was conducting a unit on bravery, and thought it would be a good strategy to have the students try “weird, yucky foods.” Respondent had attended a boys’ soccer game the weekend before, and claimed that she observed the team members, who were approximately the same ages as her students, consume Zip Fizz during their game. Respondent recognized that in hindsight, it was a bad idea to have her students drink Zip Fizz.

b. Respondent denied that she forced her students to drink Zip Fizz; she claimed that she gave them a choice about whether or not to drink it. Respondent also denied that she told her students that they would be benched if they did not drink it. Her testimony is contradicted by the testimony of the students and their parents. As noted above, the students stated that Respondent did not give them a choice about whether to drink the Zip Fizz. The parents of both students also testified at the hearing. K.G.’s mother corroborated K.G.’s testimony, and noted that she had previously told her daughter not to drink energy drinks. K.G.’s mother explained that K.G. was very upset that Respondent forced her to

drink something that she knew she wasn't supposed to consume. L.L.'s mother was upset that Respondent had given Zip Fizz to her son, because he has Attention Deficit Hyperactivity Disorder (ADHD), and ingesting high levels of caffeine and other substances could have serious repercussions on his condition. Their testimony is credited.

c. Respondent demonstrated abusive and immoral conduct by requiring her students to consume Zip Fizz.

12. The District initially suspended Respondent for fifteen days because of the Zip Fizz incident. It ultimately negotiated a shorter suspension, of three days, in exchange for Respondent's voluntary transfer to another school site.

Running Laps as Punishment for Missing Vocabulary Words

13. On May 26, 2009, Respondent required her students to run laps around a school field because they were not able to read certain words from their decodable books. A decodable book is a book that emphasizes certain sounds and spellings, which are supposed to be appropriate for the target age-group. Respondent's class had several students who were English-Language Learners, and Respondent knew or should have known that some of them struggled with the English language. Respondent became frustrated with her students because she thought they should know certain words from the decodable books. At the end of the school day, Respondent took the entire class outside for physical education. Respondent instructed the students who had missed words in their decodable books to run laps around the field, while the other students played in another area. At dismissal time, Respondent assigned student S.G. to be in charge of the running students, while Respondent took the other students to the dismissal area. Essentially, Respondent left a second-grade student to supervise other second-grade students. Eventually the students left the field and went to their respective dismissal areas; however, one student was so late that she missed her bus.

14. Respondent admitted that she required the students to run laps for missing their vocabulary words. She claims that she instructed them to run until the bell rang, which would have been approximately twenty minutes. Respondent claimed that upon dismissal time, she waved to the students as a signal to them that it was time to go. Respondent said that she saw some of the students shake their heads, but she did not remain there until all of the students were off of the field.

15. Respondent did not grasp the gravity of her punishment for the students that had missed their vocabulary words. The concept of physical punishment for academic errors is inappropriate. In addition, Respondent compromised her students' safety when she left them alone on the field. Respondent's conduct was abusive and immoral and demonstrated unfitness for service.

16. As a result of the running laps incident, the District suspended Respondent for eight days without pay. The District warned Respondent not to leave students unattended, and that she would face dismissal if she did so in the future.

Unsupervised Student

17. a. On May 28, 2009, Respondent had a disruptive student, A.V., in her class. A.V. was not doing his work, so Respondent gave him a “time out,” and sent him to another teacher’s classroom to complete his work. Shortly before recess, A.V. was sent back to Respondent’s classroom. While Respondent was taking her class to recess, she saw A.V. by the water fountain. He was visibly upset, and she told him to calm down. Respondent claimed that she gave him a choice of whether to go to the office with a friend or go play, and that A.V. chose to play. She claimed to watch him walk around the corner and head toward the playground. Respondent’s story is contradicted by other evidence. Another teacher, Pauline Cole, was also going to recess during that time. Ms. Cole found A.V., alone, by the water fountain, in a very distressed state, hitting his head on the wall and the fence. He was violent and injuring himself, and muttering to himself, and would not stop. Ms. Cole unsuccessfully tried to calm him down, and bring him to the office, but he would not listen. She then went immediately to the office to report the incident.

b. Respondent claimed that she had to go to the bathroom very badly, and that she first went to the office, and then the bathroom. Maggie Miller, another teacher, testified at the hearing. Ms. Miller stated that she was in the break room at recess time, and she recalled that Respondent came into the lounge and said that she was entitled to a break too. Eventually, Ms. Cole found Respondent and told her that her student was alone by the drinking fountain and was very upset. Ms. Miller stated that Respondent remained in the lounge area. Ms. Miller was amazed that Respondent did not handle the situation properly, because there was a child hurting himself and she did not help. Respondent claimed that she went outside at some point thereafter and found A.V. playing by the lunch tables.

c. Respondent’s conduct represented poor judgment and evident unfitness for service; she left a child alone when he could potentially harm himself. There were other ways that Respondent could have addressed the situation that would have protected his safety.

18. The District suspended Respondent for eight days as a result of her leaving a student unsupervised.

Book Throwing

19. On October 20, 2009, Respondent threw a science book, which weighed approximately three pounds, at student A.T., from approximately several feet away. The book hit A.T.’s arm, and left a bruise. A.T. told her parents about the incident when she returned home from school that afternoon. The following morning, A.T.’s father reported

the incident to the principal and the school police. In writing his report, the police officer, Dermot Chambers, did not question Respondent regarding the incident.

20. On another occasion, Respondent threw a folder at student D.A. The folder hit the student in his chest and left a bruise.

21. Student G.R. testified at the hearing. She witnessed both events, where Respondent threw items at A.T. and D.A. G.R. stated that she was afraid that Respondent would throw something at her.

22. Respondent could not recall throwing books at students D.A. and A.T. Her testimony is contradicted by that of the students A.T., D.A. and G.R. The students' testimony was consistent, and is credited. Respondent's actions were careless and demonstrated unfitness for service.

Parent Complaints

23. In September and October 2009, the District received numerous complaints from Respondent regarding her conduct and teaching practices. Student G.R., and her mother, C.W., testified at the hearing. They explained that Respondent embarrassed G.R. by announcing errors that G.R. had made in front of the whole class. C.W. stated that G.R. has consistently been an above-average student who enjoys school, and when she entered Respondent's class, her grades began to fall, and she began acting insecure and afraid with regard to school. C.W. stated that she talked with Respondent on multiple occasions, and felt that Respondent's attitude was dictatorial, and C.W. felt that Respondent ignored her concerns.

24. Respondent kept a color-coded behavior chart in her classroom. At the beginning of the day, the students began with a green color. If they misbehaved, the color would change to yellow, and then red; with corresponding consequences. When a student asked to use the restroom during Respondent's class, Respondent required a color change on the student's behavior chart; i.e., Respondent imposed negative consequences whenever a student used the restroom. Respondent contended that she had this policy throughout her teaching career, and saw nothing wrong with it. She changed her policy after being instructed to do so by the District.

25. The District alleged that Respondent set the air conditioner on high and would not permit students to put on sweaters. The evidence did not support this contention. Respondent stated that the District controlled the air conditioning, and that she could not adjust it. She spoke to the custodian several times, and to the principal at a staff meeting; to no avail.

26. The District also alleged that Respondent "yells and is always angry." The evidence did not support this contention.

27. Finally, the District alleged that Respondent “is inflexible with her students and creates negative pressure.” Respondent’s initial bathroom policy lends support to the allegation that she is inflexible with her students. Respondent’s reaction to Principal Bell’s admonition not to give anything to the students also indicates her inflexibility. Respondent’s use of physical punishment for academic errors, and announcement of student errors before the entire class, forcing students to drink an energy drink, and throwing of books demonstrated that she created negative pressure.

28. Respondent contended that she did not know about many of the parent complaints, and that she addressed those of which she was aware.

Rehabilitation

29. Respondent has been employed as a teacher for 28 years. She has been teaching in the District since 1987. Respondent has received positive notes in many of her evaluations. She was nominated for teacher of the year in 2008-09. Respondent stated that she maintained a good relationship with many parents. She acknowledged that she made mistakes, and stated that on the whole, she’s a good teacher. Respondent believes that teaching is her passion.

30. Respondent presented two character witnesses, Danh Nguyen and Martin Hernandez. Both witnesses had children in Respondent’s class. They had high praise for Respondent and her teaching abilities.

LEGAL CONCLUSIONS

31. Cause exists to dismiss Respondent as a certificated employee of the District under Education Code section 44932, subdivision (a)(1), (immoral conduct) based on Factual Findings 1 through 28, and Legal Conclusions 33 through 37.

32. Cause exists to dismiss Respondent as a certificated employee of the District under Education Code section 44932, subdivision (a)(5), (evident unfitness for service) based on Factual Findings 1 through 28, and Legal Conclusions 33 through 37.

33. In this case, Respondent engaged in immoral conduct by forcing her students to drink a substance that is specifically not recommended for children, and by using physical punishment for academic errors. This conduct is specifically set forth in Factual Findings 8 through 16.

34. “Evident unfitness for service requires that unfitness for service be attributable to a defect in temperament . . .” (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445.) Such temperamental defect “connotes a fixed character trait, not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district. (*Id.* at 1444). A determination of

evident unfitness requires an analysis based on criteria set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.

35. In *Morrison*, the Supreme Court of California held that the determination of whether a person is fit to teach must be based on an objective and analytical approach, consisting of a review of the teacher's conduct and an assessment of a variety of specific factors including: (1) the likelihood of recurrence of the questioned conduct; (2) the presence of extenuating or aggravating circumstances; (3) the effect of notoriety and publicity; (4) the likelihood that the conduct adversely affected students or fellow teachers; (5) the disruption of the education process; (6) the motive underlying the conduct; and (7) the proximity or remoteness in time of the conduct.

36. As applied to this case, the *Morrison* factors suggest the following conclusions: first, Respondent's conduct reflects poor judgment on multiple occasions, and demonstrated that she does not use foresight when making decisions. Based on the evidence presented, it is likely that Respondent would engage in similar conduct. Next, no extenuating circumstances existed that would explain Respondent's actions. With regard to the Zip Fizz incident, an aggravating factor is the fact that Principal Bell had previously admonished Respondent for giving similar substances to students. The evidence showed that Respondent's conduct affected numerous students and their parents, as well as her colleagues. Finally, Respondent's conduct was very recent, having occurred in 2008 and 2009.

37. The *Morrison* factors as applied in this case support Respondent's dismissal. Respondent engaged in immoral conduct and repeatedly demonstrated unfitness for service, and her lack of sincere remorse or recognition that she has endangered students demonstrates a lack of rehabilitation.

ORDER

The determination of the Governing Board of the Santa Ana Unified School District to dismiss Respondent Barbara Wolak as a permanent employee of the District pursuant to Education Code sections 44939 and 44932 is affirmed.

Respondent Barbara Wolak is dismissed from her position as certificated employee of the Santa Ana Unified School District.

DATED: _____

AMY C. LAHR
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

SHANTI GALLEGOS

Commission Member

DATED: _____

MIMI GAUDETTE
Commission Member