

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OF THE RIVERBANK UNIFIED SCHOOL DISTRICT
STANISLAUS COUNTY, CALIFORNIA

In the Matter of:

JERRY PIEF,

A Permanent Certificated Employee,

Respondent.

OAH No. 2014010467

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Riverbank Unified School District on September 22, 23, and 24, 2014, in Riverbank, California. The Commission included Kathy Cronin, Lara Robinson, and Marcie Larson, Administrative Law Judge, Office of Administrative Hearings, presiding.

Attorneys Megan E. Macy and Gabriela Flowers, with the Lozano Smith law firm, appeared on behalf of the Riverbank Unified School District (District).

Ernest H. Tuttle, IV, Attorney at Law, appeared on behalf of Jerry Pief (respondent), who was present throughout the hearing.

Berta DeFrench, certified Spanish interpreter, was present and provided Spanish interpreting services.

This matter was submitted for decision when the Commission concluded its deliberations on November 17, 2014.¹

¹ At the conclusion of the hearing, the record remained open for written closing arguments. On October 24, 2014, OAH received respondent's closing brief, marked for identification as Exhibit A. On October 27, 2014, OAH received the District's closing brief, marked for identification as Exhibit 33. On October 31, 2014, OAH received respondent's reply brief, marked as Exhibit B, and the District's reply brief, marked as Exhibit 34.

FACTUAL FINDINGS

1. Respondent is a permanent certified employee of the District. He was assigned as a resource specialist program (RSP) teacher at Cardoza Middle School, in Riverbank, California.

2. On December 10, 2013, Daryl Camp, Ph.D., District Superintendent signed a Notice of Intent to Dismiss; Placement on Immediate Unpaid Suspension Pending Outcome of Disciplinary Proceedings; and Statement of Charges (Statement of Charges). Thereafter, the District's Governing Board approved a Statement of Charges against respondent and directed the District to dismiss respondent from his position with the District and to place him on unpaid suspension pending the outcome of the disciplinary proceedings. On December 13, 2013, the District served respondent with the Statement of Charges.

3. On December 17, 2013, respondent demanded a hearing to determine if there was cause to dismiss him from his position with the District.

4. On December 31, 2013, Dr. Camp signed and thereafter filed and served on respondent, the Accusation against respondent, based upon and incorporating the Statement of Charges. Thereafter, the matter was set for hearing.²

Summary of Allegations

5. The District alleged that during the 2013-2014 school year, respondent inappropriately touched two female students, M.S and L.I. Specifically, the District contended that from August 7, 2013 until August 30, 2013, respondent repeatedly touched both girls on their shoulders and hands, and touched M.S. on her breasts and stroked her hair.

6. The District also alleged that on November 24, 2010, respondent was issued a 45-day notice to improve his unprofessional conduct, after he hit a student, and grabbed the student's forearm and bent it back, which caused the student to fall to the ground. The District alleged that respondent's behavior constituted corporal punishment in violation of the District policies and the Education Code.

7. The District contends that respondent's actions constituted immoral conduct, evident unfitness and persistent and willful violations of the school laws or regulations governing his employment. The District seeks respondent's dismissal from his position as a permanent and certificated employee in the District.

² A Notice of Defense signed by respondent was not entered into evidence. However, there was no dispute at hearing that respondent timely requested a hearing.

Background

8. Respondent has been employed as teacher for the District for approximately 25 years. He holds a multiple subject credential, a specialist and Senate Bill 395 certificate, and a resource certificate. Respondent obtained his Master's degree in special education and fine and dramatic arts. Respondent also served as a wrestling coach for many years. Respondent has no history of engaging in inappropriate sexual conduct with students.

9. Respondent has worked at Cardoza the entire time he has been employed with the District. Cardoza is a middle school with sixth, seventh and eighth grades. In August 2013, Kevin Bizzini was the principal at Cardoza. Respondent was an RSP teacher. The resource program at Cardoza consisted of a "push in/pull out" system. Depending on a student's need, special education resource services were provided in a general education class. If a student needed more time and attention to meet the goals of their Individual Education Plan (IEP) the student would be pulled out of the general education class for one class period per day to work with the RSP teacher.

10. During the 2013-2014 school year, respondent was assigned to work with students from all three grade levels. He worked with students based upon their IEP goals in all areas of curricula as needed. There were seven academic periods per day. Respondent worked in the Cardoza resource room with students for three periods per day; one period per grade level. The remaining periods he rotated through the general education classrooms to work with resource students.

Events Between August 7, 2013 and August 29, 2013

11. On Wednesday, August 7, 2013, the 2013-2014 Cardoza school year began. Respondent was assigned four sixth grade students who were "pulled out" to receive resource services: two female students, M.S. and L.I., and two male students, A.R. and J.R. Amelia Luna was the general education teacher for M.S., L.I., and A.R. J.R. was assigned to a different general education teacher. M.S. and L.I. did not attend respondent's class until approximately the second week of school.

12. M.S. and L.I. were new to Cardoza. Respondent had never met either girl prior to the start of the school year. M.S. was born in Riverbank. Her parents are Spanish-speaking. M.S.'s first language is Spanish, although she typically spoke English at school. L.I. also spoke Spanish and English. M.S. and L.I. are friends. They ate lunch together and played at recess.

13. Prior to the 2013-2014 school year, respondent was assigned an instructional aide to work in his classroom. In 2013, the decision was made by Mr. Bizzini to place the resource aide in the general education classrooms. However, in the first week of the 2013 school year, there were times Ms. Hernandez, the instructional aide, worked in respondent's classroom.

14. Once respondent began to work with the sixth grade resource students, they spent the majority of their school day with their general education teacher. Five days per week the students met with respondent in the resource classroom during seventh period. The seventh period lasted approximately 45 minutes. On Thursdays, the two male students attended speech services. The male students initially met with respondent and then went to speech services if the speech therapist sent for them. Between August 7, 2013, and August 29, 2013, A.R. only attended speech services one time.

15. The resource room was equipped with four computers which were placed close together on long tables in one row. Four chairs were placed in front of the computers. The resource room also had a whiteboard at the front of the room and four large work tables. The computers chairs were approximately one foot from the edge of the work tables.

16. Initially, respondent had the students work on mathematics. The students used math programs on the computers to improve their math fluency. In order to familiarize the students with the computers, respondent had the students sit in front of a computer and he showed them where buttons on the computer were located. Once the computers were warmed up, respondent showed the students where the mouse and cursor were located. He used the mouse to move the cursor and showed the students which programs to use.

17. Respondent also logged on to the computers for the students. Typically, the students sat in front of their computer and respondent moved his hand onto the mouse to open the appropriate window. He then reached to the side of the student to type in their name and password. If respondent stood near the student, he would reach over the top of the student or along the side of the student to log into the computer. Respondent did not ask the students to stand up and let him sit down to log into the computer or move the students out of the way, because he wanted the students to see what was on the computer screen and what information he typed into the computer, so that they would know how to do it in the future.

18. The resource classroom computers used older versions of the mouse that contained a rollerball mechanism to move the cursor. All four students had difficulty using the mouse. At times respondent had to wiggle the mouse to get it to work. He would guide the mouse and move the students' hands. Respondent did not ask M.S. or L.I. to move their hands to take control of the mouse. As a result, there were times that respondent made contact with their hands when he moved their mouse. There were also times that respondent placed his hand on top of the students' hands to move the mouse.

19. At times, respondent sat at the tables behind the students and watched the students' computer monitors while they completed their math fluency exercises. Respondent also worked with the students at the tables and walked around the room to check their work. He did not typically stand immediately behind students to check their work. He often stood to the side of the students and bent down to check their work. He also did not typically sit in between students at the computers or tables.

20. During the approximately three weeks that respondent met with the students, occasionally M.S. and L.I. would be off task. Typically it was because M.S. and L.I. talked

to each other in class. In most cases, respondent would first verbally redirect M.S. and L.I. He asked them to turn back to the computer or the task. If they ignored respondent, he tapped on their shoulders to get their attention and again asked them to go back to the task. If M.S. and L.I. were seated at a table, he tapped on the table to get their attention. At least one time respondent pushed L.I.'s shoulder with his hand in an effort to direct her to face the computer screen and work on the assigned program. At hearing, respondent described it as a "gentle push" of her shoulder to redirect her attention. He had not given her verbal direction before he pushed her shoulder to redirect her attention. Respondent used the same physical redirection and tapping techniques with A.R. and all of his students as needed. He did not use this technique with J.R. because he complied with respondent's directions.

21. Respondent did not believe that any of his actions towards M.S. or L.I. were inappropriate. Neither M.S. nor L.I. ever asked respondent not to touch them. Respondent denied that he made any physical contact with M.S. during the times that he reached for her keyboard. Respondent acknowledged that there may have been inadvertent contact, but he did not recall that there was any. On one occasion respondent walked passed M.S. on his way to the computers and "flicked" M.S.'s hair which was in a braid. Respondent testified that he did so because he was "having a good day" and because her braid was "well done." L.I. saw respondent flick M.S.'s hair and said "Ew." Respondent put up his hands and said "okay." In hindsight, respondent realized that flicking M.S.'s braid may have been unwelcome. Respondent denied that he ever touched M.S. or L.I. on her breasts.

22. The last day that M.S. and L.I. attended respondent's class was Thursday, August 29, 2013.

August 30, 2013 Report Made by M.S. and L.I.

23. On Friday, August 30, 2013, at approximately 11:00 a.m., M.S. and L.I. went to the main office at Cardoza. They spoke with Martha Lopez, Secretary to Mr. Bizzini. Mr. Bizzini was not in the office at that time. The girls told Ms. Lopez that respondent had touched them. M.S. stated that respondent put his hand on her shoulder and then moved it on to her breast. L.I. told Ms. Lopez that respondent put his hand on her hand and shoulder.

24. Shortly after the girls left the main office, Mr. Bizzini arrived at the office. Ms. Lopez informed Mr. Bizzini that two students reported that respondent had inappropriately touched them and that he should follow-up with the students immediately.

Interviews Conducted by Keven Bizzini

25. Mr. Bizzini called M.S. and L.I. to the office. Initially, he met with the girls together and asked them what had occurred. He then met with the girls individually.

INTERVIEW OF M.S.

26. Mr. Bizzini met with M.S. first. During the course of the meeting he prepared handwritten notes concerning the information she provided. Afterward he typed his notes. M.S. told Mr. Bizzini that respondent placed his hand on her shoulder or neck area first and then let his hand fall across her chest. Mr. Bizzini asked M.S. to demonstrate. M.S. then showed Mr. Bizzini that respondent let his hand brush against her chest. She did not demonstrate any type of grab of her breast. She stated that respondent would touch her almost every day she was in class, but that it was worse on Thursdays when J.R. and A.R. were pulled out of the class for speech services. When the boys were in class, respondent would put the boys to work so that they would be distracted and then respondent would touch her and L.I. Respondent touched her while she was seated at the computer stations and at the tables in the middle of the room. Respondent would sit between M.S. and L.I. when they were seated at the computer stations and touch them. Mr. Bizzini also noted that M.S. reported that respondent "stroked" her hair.

27. Mr. Bizzini directed M.S. to write a statement concerning what occurred in the classroom. Shortly after M.S. met with Mr. Bizzini, M.S. wrote that respondent told her and L.I. to sit on the chairs near the computer so that he could touch her on the shoulder and chest. M.S. also wrote that the touching occurred when J.R. and A.R. were present, but occurred more when the boys were not present. M.S. did not mention that respondent touched her hair.

INTERVIEW OF L.I.

28. After Mr. Bizzini completed his interview with M.S., he met with L.I. She reported that respondent squeezed or grabbed her shoulder to get her attention back to the computer she was working on. L.I. explained that she had a bruise on her shoulder from an unrelated incident, and it hurt when respondent touched her shoulder.

29. L.I. also stated that when she and M.S. worked at the computers, respondent touched their hands as they tried to move the computer mouse. This made L.I. uncomfortable. L.I. also reported that she saw respondent let his hand fall across M.S.'s chest about seven times. L.I. denied that respondent touched her chest. Mr. Bizzini prepared handwritten and typed notes concerning his meeting with L.I.

30. Mr. Bizzini directed L.I. to write a statement concerning what occurred in the classroom with respondent. That same day L.I. wrote that respondent touched her and M.S. when J.R. and A.R. were not in the classroom and that she and M.S. were scared to be alone with respondent. L.I. wrote that respondent touched her on the hand and the shoulder. L.I. did not write that she had observed respondent touch M.S. on the chest or breast.

INTERVIEWS OF J.R. AND A.R.

31. After Mr. Bizzini completed his interview of M.S. and L.I., he interviewed J.R. and A.R. Initially, Mr. Bizzini met with both boys at the same time to determine if they

had any information about the allegations made by the girls. J.R. did not recall seeing anything or knowing about anything inappropriate occurring in the classroom. J.R. explained that M.S. and L.I. talked a lot and as a result they had to be separated. He also stated that the girls were "always late" and that respondent made them write sentences.

32. J.R. also reported that he saw respondent pat all of the students on the back or shoulders and that it usually occurred when he was praising a student for doing a good job. He never saw respondent touch the girls in any different way from the way that he touched him and A.R. Mr. Bizzini allowed J.R. to return to his class.

33. Mr. Bizzini then spoke to A.R. alone. A.R. also stated that the M.S. and L.I. talked a lot. The previous week, while they were in Ms. Luna's class, M.S. and L.I. asked him not to leave the room to attend speech class. M.S. told him that respondent had touched L.I. "weird." The girls indicated to A.R. that they were scared to be in the room alone with respondent. A.R. never saw respondent touch M.S. or L.I.

Steps Taken by Marcus Wirowek on August 30, 2013

34. After Mr. Bizzini conducted interviews, he telephoned Marcus Wirowek, Human Resources Director for the District. Mr. Bizzini informed Mr. Wirowek that two students had provided written statements concerning alleged misconduct by respondent. Mr. Bizzini read Mr. Wirowek the statements written by M.S. and L.I. Due to the serious nature of the allegations, Mr. Wirowek informed Mr. Bizzini that he would come to Cardoza to meet with him and investigate the matter.

35. Mr. Wirowek was hired by the District in September 2012. Prior to working for the District, Mr. Wirowek had no experience working for a school district or with children. Part of Mr. Wirowek's duties as the human resources director for the District included investigating complaints concerning employee misconduct.

36. Shortly after speaking to Mr. Bizzini, Mr. Wirowek arrived at Cardoza. He met with Mr. Bizzini and they spoke about the interviews Mr. Bizzini conducted. Mr. Wirowek reviewed the written statements prepared by M.S. and L.I. Thereafter, Mr. Wirowek and Mr. Bizzini decided to contact the parents of M.S. and L.I. and to interview the girls again.

37. Mr. Wirowek conducted interviews with M.S. and her mother and L.I. and her father. Mr. Bizzini, Ms. Lopez, and Darlene Ribeiro, Secretary to Dr. Camp, attended both interviews. Ms. Lopez is fluent in Spanish. During the interviews, she interpreted as needed. Ms. Ribeiro took notes of the interviews. She wrote down the questions asked by Mr. Wirowek and the responses given by the girls and their parents.

INTERVIEW OF L.I.

38. At approximately 1:30 p.m., Mr. Wirowek interviewed L.I. Mr. Wirowek informed L.I. that he reviewed the statement she wrote concerning respondent. Mr. Wirowek

asked L.I. if respondent had touched her "from the waist up?" L.I. replied that respondent had touched her shoulder and hand. Specifically, that respondent touched her collarbone and her hand when she had it on the computer mouse. When he touched her shoulder he turned her around. This had occurred every day since the start of school.

39. L.I. stated that the day before the interview, respondent had touched M.S. "the most" when J.R. and A.R. went to speech services. She further stated that respondent touched M.S. on the chest and that it had occurred since the start of school, but that respondent does not touch M.S. when J.R. and A.R. are in the classroom, which contradicted M.S.'s statement that respondent touched her and L.I. when the boys were in the classroom.

40. Mr. Wirowek asked L.I. if she knows why respondent would touch her shoulder to turn her around. She responded that "he puts us to practice some math problems; he gives a difficult math problem and we get it a little bit." L.I. did not tell respondent that she did not like to be touched.

41. L.I.'s father, who is Spanish-speaking, informed Mr. Wirowek that L.I. told him the evening before the interview that respondent put very hard pressure on her shoulder. L.I. and her father had been playing and she bruised her shoulder. As a result, it hurt when respondent touched her shoulder. The interview concluded at 1:50 p.m.

INTERVIEW OF M.S.

42. At approximately 1:56 p.m., Mr. Wirowek met with M.S.'s mother, who is Spanish-speaking. Mr. Wirowek explained that he received a written statement prepared by M.S. in which she stated that she had been inappropriately touched by respondent. He read the statement to M.S.'s mother and Ms. Lopez translated. Afterwards, M.S.'s mother stated her daughter had an "attitude" and would not communicate and locked herself in her room. When M.S.'s mother asked her how school was, she stated it was "fine." Mr. Wirowek asked the mother how long this had occurred. She responded "not very long, just in the last couple of days," but then stated it had been about two weeks. Her mother also stated that M.S. did not want to be kissed.

43. After Mr. Wirowek spoke to M.S.'s mother, M.S. was interviewed. Mr. Wirowek told M.S. that he wanted to talk to her about the statement she wrote. He read the statement out loud. He then asked M.S. what teacher she was talking about in the statement. She stated respondent. The questions and answers as transcribed by Ms. Ribeiro continued, in relevant part, as follows:

Marcus Wirowek:	how does he touch you or your shoulders?
Student:	he rubs my shoulder
Marcus Wirowek:	does he say anything to you?
Student:	no he just rubs it
Marcus Wirowek:	at the computers?
Student:	sometimes at the table

[¶] . [¶]

Marcus Wirowek: when he touches you at the computer
Student: yes
Marcus Wirowek: numerous times? Is he coming from behind you?
Student: yes
Marcus Wirowek: you said when you sit at the table he has touched you
Student: yes
Marcus Wirowek: where do you sit?
Student: anywhere we want
Marcus Wirowek: when did he touch you last?
Student: I don't remember
Marcus Wirowek: Did he touch you yesterday?
Student: no we had a sub
Marcus Wirowek: did he touch you Tuesday?
Student: yes
Marcus Wirowek: where did he touch you?
Student: Shoulder.
Marcus Wirowek: did he touch you on your chest?
Student: yes.
Marcus Wirowek: multiple times one side both [sic]?
Student: both sides
Marcus Wirowek: when he touched you on your chest were you in front of
[sic] computer?
Student: yes
Marcus Wirowek: at tables?
Student: yes
Marcus Wirowek: last week did he touch you?
Student: yes
Marcus Wirowek: where? Chest?
Student: yes.
Marcus Wirowek: did he touch your shoulder and go down across the
chest?
Student: he went down
Marcus Wirowek: did he pause?
Student: he left it there a few seconds
Marcus Wirowek: anyone else in [sic] classroom?
Student: yes, [L.I.]
Marcus Wirowek: does he touch her?
Student: yes
Marcus Wirowek: on shoulder?
Student: on chest.
Marcus Wirowek: Tuesday?
Student: yes

[¶] ...[¶]

Marcus Wirowek: except for [L.I.] has anyone seen it? Has he touched you multiple [sic]? Does he come up touch you, go away and come back and touch you?

Student: no he doesn't do that

Martha Lopez: mom asked why she didn't tell her

Student: said sorry

Marcus Wirowek: have you told anyone else about it?

Student: no

Marcus Wirowek: has anyone come in when it is happening and he's walked away? Last time he touched you was Monday?

Student: Tuesday

Marcus Wirowek: Substitute was in on Tuesday

Student: Mr. Pief was there then Sub came in and Mr. Pief left

Marcus Wirowek: last week? Did he touch you?

Student: indicated shoulder chest

Marcus Wirowek: shoulder and chest at least one time everyday [sic] on the shoulder and chest

Student: yes sometimes on the shoulder and the chest

Marcus Wirowek: how many times on the chest?

Student: I don't know.

Marcus Wirowek: how many times? 5? How about 6?

Student: maybe 5

[¶] ...[¶]

44. M.S.'s mother asked M.S. if she could explain why she did not say anything to her about what was occurring. M.S. explained that she did not tell her mother because she was afraid respondent would find out and she would be threatened. M.S.'s mother asked if there was any help for her daughter. Mr. Bizzini informed her that there was a District psychologist. The interview concluded at 2:30 p.m.

45. Based upon the interviews, Mr. Wirowek was not able to determine the time or date in which respondent touched the girls. M.S. contradicted L.I.'s statement that respondent had touched her the day before he interviewed them. Mr. Wirowek also could not determine who was in the classroom when respondent touched the girls. Mr. Wirowek was aware that Mr. Bizzini spoke to J.R. and A.R. and made the decision not to interview them as part of his investigation.

46. Mr. Wirowek determined that respondent did not inappropriately touch L.I. It was not inappropriate for respondent to touch L.I.'s shoulder or hand. At hearing, Mr. Wirowek contended that because L.I. saw respondent touch M.S. on the chest, it caused her to be afraid that she may be touched inappropriately as well, therefore respondent's conduct towards L.I. was inappropriate.

47. Mr. Wirowek and Mr. Bizzini spoke about the interviews. Mr. Wirowek then spoke to Dr. Camp. Thereafter, Mr. Bizzini called Child Protective Services (CPS), concerning the allegations made by the girls. He felt that as a mandated reporter he was

required to do so. CPS instructed Mr. Bizzini to contact law enforcement. At approximately 3:40 p.m. Mr. Bizzini faxed a report to CPS which stated that M.S. had reported that respondent had touched her several times on the chest.

48. After Mr. Bizzini spoke to CPS, Mr. Wirowek called the non-emergency number for Stanislaus County Sheriff's Department. He informed the Sheriff's Department about the statements made by M.S. and L.I. Thereafter, Deputy Joe Knittel arrived at Cardoza.

49. After Mr. Wirowek conducted the interviews with M.S. and L.I. he met with respondent. Mr. Wirowek told respondent about the allegations made by the girls. He informed respondent that he would discuss the issue with him in more detail the following week. The decision was also made to remove the girls from respondent's class and put them into a physical education class while the investigation was pending.

September 4, 2013 Interviews Conducted by Nelarie Romo

50. Nelarie Romo is a psychologist for the District. She was hired by the District in the fall of 2012. Ms. Romo obtained a certificate in applied behavioral analysis and an education specialist degree from Fresno State University. Her degree is specifically for individuals who want to work as a school psychologist. Ms. Romo is a Nationally Certified school psychologist. She also holds a pupil personnel services teaching credential.

51. Ms. Romo's duties as the District's psychologist included conducting individual and group therapy for students. She handled crisis situations at District school sites and conducted psychological evaluations on students who threaten to harm themselves or others. Ms. Romo conducted psychoeducational evaluations and also attended all IEP meetings. On at least 20 occasions, Ms. Romo has counseled or interviewed possible victims of sexual abuse. Ms. Romo is fluent in Spanish.

52. At approximately 8:10 a.m. on Tuesday, September 3, 2013, Ms. Romo's supervisor, Karen Young, Director of Student Services for the District, called Ms. Romo and asked to meet with her at the District office. Ms. Romo arrived at the District office at approximately 9:00 a.m. Ms. Young informed Ms. Romo that there were allegations of "child molestation" by respondent. Ms. Young then asked Mr. Wirowek to join the meeting. During the course of the meeting, Ms. Romo learned that M.S. and L.I. were the students that had alleged that respondent touched them inappropriately. Ms. Romo had never met M.S. or L.I. Although, she was aware that M.S. and L.I. received special education resource services. At some point Ms. Romo learned that A.R. had been in respondent's class with M.S. and L.I. Ms. Romo was familiar with A.R. Ms. Romo also knew respondent. He had been on Ms. Romo's hiring panel and they became work friends. Respondent was someone whom she respected.

53. Ms. Young and Mr. Wirowek instructed Ms. Romo to meet with M.S., L.I. and A.R. individually to ensure that the "fidelity" of their version of events was accurate. Ms. Romo was not asked to conduct an investigation or render any conclusions regarding the

allegations made by M.S. or L.I. Rather, her role was to counsel the girls, to see how they interpreted the events, and to address their needs. At hearing, Ms. Romo did not explain what her role was concerning A.R.

54. On Wednesday, September 4, 2013, at approximately 7:50 a.m., Ms. Romo arrived at Cardoza to meet with the students. She then wrote out questions to ask M.S. and L.I., because she had never interviewed a child that alleged a co-worker had done something inappropriate.

55. At approximately 9:00 a.m., Mr. Bizzini spoke with Ms. Romo and asked her about her plan for meeting with the students. She informed Mr. Bizzini that per the directions provided by Ms. Young and Mr. Wirówek, she would have the children called to the office together, so that they did not have time to talk. She would then meet with the children individually. Mr. Bizzini then informed Ms. Romo about the series of events and meetings that occurred on Friday, August 30, 2013, concerning the allegations made by M.S. and L.I. He also stated that he let the children's parents know that they would see a school counselor to "help them cope" and that the parents had given their consent.

56. At approximately 9:15 a.m. L.I. and A.R. were called to the office to see Ms. Romo. At approximately 9:20 a.m. M.S. was called to the office. Ms. Romo met with M.S. first. An intern sat with L.I. and A.R. in the office waiting room until Ms. Romo met with them.

INTERVIEW WITH M.S.

57. Ms. Romo introduced herself and asked M.S. information about her background. She then asked M.S. if she liked her teachers. M.S. stated that she did not like respondent. M.S. told Ms. Romo that respondent had touched her and L.I. and that they had told Mr. Bizzini about it. M.S. explained that their parents were called and they met with another person. After the meetings she was moved out of respondent's class and into a physical education class.

58. M.S. stated that on the first day of school, respondent touched her shoulder. M.S. then placed her hand over her breast and stated that during the second week of school respondent had touched her "right here" for two to three minutes. Ms. Romo then clarified this statement. Ms. Romo counted seconds out loud and asked M.S. to tell her when to stop to demonstrate how long respondent held his hand on her breast. She told Ms. Romo to stop at three seconds. M.S. demonstrated that respondent placed his hand like a "semi-folded like cup" over her breast, which was inconsistent with how M.S. demonstrated the touching to Mr. Bizzini. M.S. also stated that respondent touched her breasts when she and L.I. were alone in the room with respondent and a couple of times when the boys were in the room, but the boys did not see. M.S. did not know the exact number of times respondent touched her or the days in which it occurred, but it happened more than one time. At one point, M.S. also told A.R. not to leave her and L.I. with respondent.

59. M.S. also stated that respondent touched her at times when L.I. was seated at the classroom tables and M.S. was at a computer. Respondent stood behind her and put his hand on her upper chest and moved his hand down for three seconds slowly on her breasts. More than one time respondent seated himself between her and L.I. He placed one hand on one of them and his other hand on another person's breast. When M.S. demonstrated how respondent touched her, she consistently grasped her right breast. But when asked, she stated that he touched both of her breasts.

60. M.S. did not tell her parents that respondent had touched her, but she told some of her friends that respondent had touched her hand. She did not tell them that he had touched her breasts because she did not want the boys to make fun of her for being touched on the breast by a teacher.

61. M.S. stated that she and L.I. decided that if respondent touched them one more time, they would tell Mr. Bizzini. M.S. stated that respondent did not touch them on the day that they spoke to Mr. Bizzini, but he had touched her the day before. This assertion was inconsistent with her statement to Mr. Wirowek, that respondent had not touched her the day before they spoke to Mr. Bizzini. M.S. then demonstrated that respondent had very quickly touched her upper chest and barely her upper breast.

62. M.S. stated that no one had ever touched her breast before and it made her feel like she did not want anyone to touch her. After respondent began to touch her, she hugged her mother less because she was afraid that her mother would touch her breasts. She stated that since she was moved out of respondent's class she hugs her mother again. Ms. Romo observed that when M.S. spoke to her, she often looked up and to the left and down and to the right when she tried to recall information. Ms. Romo described M.S.'s body language as "closed" when speaking about the events involving respondent.

63. M.S. shared with Ms. Romo that when she was at Riverbank elementary school, she told the front office that a girl in her class had touched her on the leg, but really the girl had touched her in the crotch area. M.S. stayed in the same class with the student for the entire school year. After M.S. shared this information, Ms. Romo concluded the counseling session. Ms. Romo informed M.S. that she was at Cardoza on Thursdays and she could come to see her anytime. She also stated if she needed to speak with her on a different day, to let the office know.

64. Ms. Romo's interview with M.S. lasted approximately 40 minutes. Ms. Romo prepared notes concerning her observations and the statement made by M.S. in the meeting.

INTERVIEW WITH A.R.

65. At approximately 10:40 a.m., Ms. Romo met with A.R. Ms. Romo knew A.R. from past interactions. Ms. Romo had prepared written questions to ask A.R. that were different than the questions she wrote for M.S. and L.I.

66. During the meeting, A.R. asked Ms. Romo if Mr. Bizzini had told her that something had happened in respondent's class. Ms. Romo asked him what he meant. A.R. explained that M.S. told him that respondent was touching L.I. "funny", and that L.I. said "yes he was touching me funny." L.I. sounded scared when she said it. This conversation occurred in class. M.S. and L.I. told him that respondent touched L.I.'s shoulder and back. They also told him not to leave class because they were scared. A.R. told Ms. Romo that he only had speech one day since the school year had begun.

67. A.R. explained that he and respondent joked and that respondent touched him on the shoulder at times, but it was not in a "funny" way. A.R. had never seen respondent touch the girls. A.R. was not sure if L.I. was telling the truth or joking with him because he and the girls picked on each other at times.

68. The interview concluded at 11:05 a.m. Ms. Romo prepared notes concerning her observations and the statement made by A.R. in the meeting.

INTERVIEW WITH L.I.

69. At approximately 11:06 a.m., Ms. Romo met with L.I. Ms. Romo introduced herself and asked L.I. about her background. Ms. Romo then asked L.I. how she liked the sixth grade. She stated that she liked Ms. Luna's class and that she got along with everyone. She then stated that she was no longer in respondent's class because he had touched her and her friend M.S. Ms. Romo asked what she meant. L.I. explained that respondent touched M.S. seven times while M.S. was seated at the computer and that he placed his hand on M.S.'s shoulder and slowly moved it down. L.I. demonstrated and Ms. Romo counted seconds again. She noted that L.I. moved her hand down for approximately three seconds.

70. L.I. described respondent as a "nice" teacher but that when he touched them she was scared to be in class. L.I. stated that on the first day of class respondent touched M.S.'s shoulder and that it had grown from that point. Respondent would stand behind M.S. at the computer and with his left hand touch M.S.'s breast. Afterward, M.S. told her that she was scared and that she wanted to cry and call her mother, but she did not have a telephone. L.I. further stated that recently M.S. had told her that she was scared that respondent would kill her.

71. L.I. initially would not tell Ms. Romo any details concerning how respondent touched her and only said that he did not touch her breasts. She explained that respondent placed his hand over her hand one time while she was using the mouse by the computer. L.I. added that respondent sat in between her and M.S. and had his hand over L.I.'s hand and moved the mouse. She did not like when he touched her hand, but she could not say why. Respondent also touched L.I.'s shoulder with a push or jab and told her "turn around." L.I. and M.S. watched where respondent was in the classroom to see if he was getting close to them because they were scared. L.I. was scared that respondent would touch her in a "bad place." One day J.R. and A.R. were not in class and respondent touched her hand and touched M.S. L.I. did not explain where respondent touched M.S.

72. Ms. Romo asked L.I. if she told anyone that respondent had touched her and M.S. She stated that she told her father. He told her to tell the school. Ms. Romo's interview with L.I. lasted approximately 20 minutes. Ms. Romo prepared notes concerning her observations and the statement made by L.I. in the meeting.

73. After Ms. Romo met with the students, her intern told her that while she was in the waiting room with L.I. and A.R., one of the children flicked her hair. The intern asked the children who had done it. L.I. blamed it on A.R. when in fact it was L.I. who had flicked her hair and then lied about it. Ms. Romo documented her conversation with the intern in her handwritten notes. Ms. Romo also wrote in her notes that it was possible M.S. could have been influenced by L.I. At hearing, Ms. Romo opined that M.S. may have been cognitively too low to mastermind a lie about respondent's conduct, but that M.S. could be susceptible to influence.

74. After Ms. Romo met with M.S. and L.I. on September 4, 2013, she had no further counseling sessions with them concerning their allegations. At times, Ms. Romo checked with Ms. Luna to find out how the girls were doing in class. If Ms. Romo saw the girls at Cardoza she would say hello and asked them how they were doing. Ms. Romo felt that after the girls were moved from respondent's class into physical education, they adjusted well.

Investigation Conducted by the Stanislaus County Sheriff's Department

75. At approximately 5:00 p.m. on August 30, 2013, Deputy Knittel met with Mr. Wirowek. He informed Deputy Knittel that two students had told the principal at Cardoza that their teacher had touched them and that they did not like it. He further stated that the girls explained that their teacher would touch them on their shoulder, and Mr. Wirowek opined that it may have been to get their attention. Mr. Wirowek further stated that one of the girls stated that the teacher had placed his hand on her shoulder and then grazed his hand down across her breast. Mr. Wirowek told Deputy Knittel that he placed his hand on his own chest and asked the girl where on her chest she was touched. She inched his hand towards his breast. Mr. Wirowek provided Deputy Knittel contact information for M.S. and L.I. He also provided Deputy Knittel copies of the statements they had written.

76. On September 5, 2013, Deputy Knittel requested that Jesse Tovar, a detective with the Stanislaus County Sheriff's Department, investigate the allegations. In cases that involved alleged sexual assault or child abuse, the Sheriff's Department made arrangements to have the children interviewed by someone who was trained to interview minors. Law enforcement officers are trained to ask leading questions, but special knowledge is required to interview victims of sexual abuse and minors.

77. On September 9, 2013, Detective Tovar contacted the M.S.'s mother and arranged for M.S. to be interviewed on September 16, 2013. The same day, Detective Tovar contacted L.I.'s mother and left a message. On September 11, 2013, he spoke to L.I.'s mother and arranged for L.I. to be interviewed on September 19, 2013. The interviews of M.S. and L.I. were conducted by Kelley Dominguez who worked for the Family Justice

Center. She had specialized training in interviewing children. The interviews were video recorded and Detective Tovar included a synopsis of the interviews in his investigation report.

INTERVIEW OF M.S.

78. At approximately 11:00 a.m. on September 9, 2013, Ms. Dominguez met with M.S. Ms. Dominguez introduced herself and told M.S. the importance of telling the truth. M.S. indicated that she understood that she was there to talk about what happened with her teacher. M.S. then explained that she and her friend, referring to L.I., had class with respondent, and that were also two boys in the class.

79. M.S. explained that first time she was in class with respondent, on the first day of school, he touched her. M.S. then pointed to her shoulder area. M.S. stated that she thought it was normal but then respondent started to put his hand where he was not supposed to. M.S. then moved her hand to her chest area. M.S. stated that she did not tell anyone about this. This statement was inconsistent with her statement to Ms. Romo that she had told her friend at school that respondent had touched her hand. Respondent then touched them one more time and they went to the office and told the principal.

80. M.S. also stated that when respondent first touched her shoulder she did not feel uncomfortable. She told L.I. that respondent had touched her and L.I. stated respondent touched her too. They decided that they did not feel comfortable with the touching, but they did not think about talking to anyone about it. M.S. placed her hand on her right breast and explained that she and L.I. decided if respondent touched them one more time they would talk to someone about it. Ms. Dominguez placed her hand on her chest and asked M.S. if she knew how long ago respondent had touched her there. M.S. did not. Ms. Dominguez asked M.S. how many times respondent had touched her in the chest area. M.S. again placed her hand on her chest and stated that he "touched us" for a "few minutes" then took it off and that respondent had only touched them for "like a week."

81. Ms. Dominguez asked M.S. what occurred when respondent touched them. M.S. explained that she, L.I. and the two boys were at the computers. Respondent would sit in the middle and "start grabbing our shoulders and putting his hands right here." M.S. placed her hand on her chest area. She and L.I. started to feel uncomfortable. M.S. and L.I. talked in Spanish about it in front of respondent, but they were afraid to talk about it in English.

82. Ms. Dominguez gave M.S. a doll and asked her to demonstrate on the doll how respondent would touch her. M.S. stated that respondent would sit in the middle between her and L.I. and start "grabbing us." She then placed her hand on the chest area of the doll to show where respondent touched. Ms. Dominguez asked M.S. how long respondent would keep his hand in that area. M.S. responded "for an hour or a little bit." When respondent touched them he did not say anything. Ms. Dominguez asked how many times respondent had touched her chest area. M.S. replied "five or four." M.S. also explained that one time L.I. was turned around in her seat looking at the boys in the class and

"goofing around." Respondent told L.I. to turn around. He then placed his hand on L.I.'s chest. This occurred while the boys were sitting at the table in the back of the classroom and M.S. and L.I. were sitting at the front table. M.S. never saw respondent put his hands on the boys.

83. M.S. and L.I. decided to tell someone about respondent because they thought it was going to be worse and they were scared. M.S. explained that they did not say anything to their families about it, but they told the woman in the District office and a school friend, A.V., who told other friends. Ms. Dominguez asked M.S. if respondent had ever told her not to tell anyone about the touching. M.S. stated that he did not.

INTERVIEW OF L.I.

84. On September 19, 2013, at approximately 10:30 a.m., Ms. Dominguez met with L.I. Ms. Dominguez introduced herself and asked L.I. if she knew why they were meeting. L.I. stated that her mother had brought her to the meeting but did not tell her anything about the meeting, other than she should not lie. Ms. Dominguez asked L.I. what she thought the meeting was about, and L.I. stated that she believed it was about her teacher, respondent. Ms. Dominguez asked L.I. to tell her about respondent. L.I. stated and demonstrated that when respondent wanted her to turn around and pay attention, he placed his hand on her shoulder and it hurt. Ms. Dominguez asked if respondent had placed his hand anywhere else. L.I. stated her hand. Then she used Ms. Dominguez's hand. She placed her hand over the top of Ms. Dominguez's hand. The only thing that respondent had ever done that made her uncomfortable was to touch her shoulder and hand.

85. Ms. Dominguez then asked L.I. if she had seen respondent do anything to other children that made her feel uncomfortable. L.I. stated that one day M.S. was laughing at the computer. Respondent approached M.S. and told her what to do and what not to do. L.I. then stated and demonstrated that respondent put his hand over M.S.'s shoulder and breast area. She stated that the boys were in speech class when this occurred. L.I. did not know how long respondents' hand was on M.S.'s chest. She saw respondent put his hand on M.S.'s chest seven times. Respondent told M.S. how to do math when this occurred.

86. L.I. told Ms. Dominguez that she spoke to her father about respondent, and he told her to tell the office. M.S. did not want to tell because she would get in trouble with her mother.

INTERVIEWS CONDUCTED BY DETECTIVE TOVAR

87. Detective Tovar was present when M.S. and L.I. were interviewed by Ms. Dominguez. At hearing, Detective Tovar testified that during the interviews of M.S. and L.I. they were asked questions such as whether respondent had told them not to tell anyone. Detective Tovar explained that it is important to determine if any threats were made to the children. In this case, respondent did not threaten the children. M.S. and L.I. were also asked if respondent made any comments when he touched them. This question was important because it may show what respondent was thinking at the time and whether he

touched the girls for sexual gratification. There was no evidence that respondent made any sexual comments to M.S. or L.I.

88. Detective Tovar also conducted interviews with Ms. Luna, the mother of M.S., students J.R., A.R., and A.V., a female student at Cardoza who was friends with M.S. and L.I. Detective Tovar summarized the interviews in his investigation report and relevant portions of some of the interviews are set forth below.

INTERVIEW WITH J.R.

89. On September 18, 2013, at approximately 4:18 p.m. Detective Tovar interviewed J.R. Detective Tovar asked J.R. about the time he spent in respondent's class. J.R. confirmed that there were four people in respondent's seventh period class, including M.S. and L.I.

90. J.R. stated that M.S. and L.I. never told him that respondent had touched them. There were times when the students, including J.R., would get a problem correct and respondent would tap them on the shoulder. At some point M.S. and L.I. told J.R. that they were scared that something was going to happen with respondent. J.R. never witnessed respondent touch M.S. or L.I. inappropriately.

INTERVIEW WITH A.R.

91. On September 19, 2013, at approximately 2:49 p.m., Detective Tovar interviewed A.R. He confirmed that he was in respondent's math class with M.S. and L.I. A.R. stated that M.S. and L.I. would "always get in trouble" because they talked a lot. Detective Tovar asked A.R. if respondent ever made comments to him about homework or a project. A.R. stated that respondent would say "good job." Detective Tovar then asked if respondent would touch him on any place on his body when he said "good job." A.R. stated that respondent would give him a tap on the back. Detective Tovar asked A.R. to demonstrate. A.R. then placed his hand on his shoulder area. A.R. did not see respondent do this to M.S. or L.I.

92. At some point M.S. told A.R. "in a dramatic way" that she was afraid of respondent, because he was touching L.I. on the back area. Later L.I. told A.R. that she felt "creeped out" that he was touching them. They also told A.R. that respondent rubbed their arms. A.R. never witnessed respondent touch M.S. or L.I.

93. A.R. informed Detective Tovar that he does not get along with M.S. and L.I. and that sometimes they lied. For example, they would tell him that his shoe was untied, but it was not.

INTERVIEW WITH A.V.

94. On October 2, 2013, at approximately 4:15 p.m., Detective Tovar interviewed A.V. a female student at Cardoza. A.V. was friends with M.S. and L.I. She told Detective Tovar that approximately three weeks before, during lunch time, both M.S. and L.I. had told her that respondent touched their legs and chest area. When M.S. and L.I. told her about respondent, there were others girls present.

95. After Detective Tovar completed his investigation report, he sent the report to the District Attorney to determine if criminal charges should be filed against respondent. Respondent was never arrested or detained. No criminal charges were filed against respondent and the time has since lapsed to file criminal charges against him.

Testimony of M.S. and L.I.

96. At hearing, M.S. and L.I. testified concerning the time that they spent in respondent's classroom and the manner in which respondent touched them during the approximate three weeks that they were in his class.

TESTIMONY OF M.S.

97. M.S. learned from Ms. Luna that she would attend respondent's class. She had never met respondent, but was nervous to be in his class. When she first attended respondent's class he helped her with math and she liked respondent. She was able to play math games on the computer. At some point, respondent would no longer allow the students to play math games on the computer. He wanted the students to be more challenged. M.S. testified that he then began to "scold" and touch her in class. For example, he would tell M.S. and L.I. that he did not want them to play "jumping chicks," a math game that M.S. enjoyed. M.S. felt that respondent was mean because he did not allow her to play the math game that she wanted to play. M.S. also felt that she did not need to be in respondent's class.

98. M.S. could not recall when respondent first began to touch her, but she believed it was in the middle of the school year. M.S. described that when respondent touched her, he would place his hand on her shoulder and then moved it to her breast. She estimated that he did this "three, five or four times." Sometimes he put his hand on her breast and took it off, other times he would leave his hand there for "a little while." Respondent touched M.S. when she was seated at computer or at a table. At times, J.R. and A.R. were in the classroom and seated at the computers with her when this occurred. There were also times when respondent would stand behind M.S. at the computers in between her and L.I. and instruct her and L.I.

99. M.S. also saw respondent put his hand on L.I.'s shoulder and slide it downwards towards her breast. M.S. testified that respondent touched L.I. just like he touched her. She could not recall how many times she saw respondent touch L.I., but she was "100 percent sure" she saw respondent touch L.I.'s breast.

100. After respondent began to touch M.S, she stayed in her bedroom and was angry. She did not want her father to touch her because she was scared. M.S. made no mention of feeling this way towards her mother.

TESTIMONY OF L.I.

101. L.I. testified that she did not like respondent because he touched her and M.S. Respondent touched L.I. on the shoulder and hand when she used the mouse. Respondent told her and M.S. to look at the whiteboard. She then demonstrated that respondent touched the front of her shoulder to move her in the direction of the whiteboard. Respondent touched her like this just "once or twice." It made her feel "weird" because he was her teacher. Respondent touched her shoulder "more than twice" and that also made her feel "weird" because it hurt.

102. Respondent also touched L.I.'s hand to take control of her computer mouse because she was on the wrong application on the computer. Respondent put L.I. on the right application. L.I. understood that is why respondent touched her hand. Prior to taking control of L.I.'s computer mouse, he would tell her that she was not on the correct game.

103. Respondent never touched L.I. anywhere other than the hand and shoulder. M.S. was in the classroom when respondent touched her, but J.R. and A.R. were not. Respondent did not touch L.I. when she was seated at the classroom tables.

104. L.I. also testified that respondent touched M.S. "by the breast" with an open palm. His hand stayed on her breast for two or three seconds. This occurred when respondent stood directly behind M.S. while she was seated at the computer. Respondent reached over M.S.'s shoulder to touch either the mouse or keyboard when his hand touched M.S.'s breast. Respondent opened math games on the computer for the girls to play. At times, L.I. played different games than she was allowed to play and respondent told her to go back to the math games. L.I. was scared that respondent would touch her as well.

105. The only time L.I. saw respondent touch M.S.'s breast was while M.S. was seated at the computer. The boys were not in the classroom. L.I. never saw respondent touch M.S. while she was seated at a table. L.I. contended that if M.S. claimed that respondent touched her while she was seated at a table, she would be lying. M.S. would also be lying if she claimed that respondent touched her when J.R. and A.R. were in the classroom.

Education Assessments of M.S. and L.I

106. During the 2013-2014 school year, M.S. and L.I. had psychoeducational assessments conducted. These assessments are typically conducted every three years to assess whether a student is still eligible for special education services. Ms. Romo was involved in conducting portions of the assessments for M.S. and L.I.

M.S. ASSESSMENT

107. M.S. tested low range for the Differential Ability Scale (DAS-II), particularly in the areas of verbal similarities. Ms. Romo opined that a child that scored in the low range for verbal similarities may have a difficult time communicating distinctions about units of time. For example, when M.S. mixed up minutes with seconds when describing how long respondent touched her breast. Ms. Romo also opined that M.S. may confuse the words for desk and table.

108. M.S. was also administered the Wide Range Assessment of Memory and Learning, which tested verbal and visual memory as well as attention and concentration. This test was administered only in English. M.S. scored in the very poor range. She was also given the Test of Auditory Processing Skills in English and Spanish. M.S. scored below average memory in English, but scored average in Spanish. Her overall score for the nine core subtests which, in part, tested number, word and sentence memory, was below average in English, but average in Spanish. M.S. had strengths in her ability to recall visual and auditory patterns, sustained attention and visual memory.

109. M.S. was also administered Woodcock-Johnson Normative Update Tests of Achievement. She displayed strength in ability to recall parts of stories and her fluid reasoning which tested her ability to think in the moment and form connections, was average.

110. Ms. Luna also provided information for M.S.'s assessment. Ms. Luna reported that M.S. had substantial difficulties in math. For example, during one observation, M.S. was asked to solve a math equation. She had to be prompted several times to complete it. M.S. stated that she did not want to complete the problem because it was too hard. Ms. Luna then walked through the steps of the problem with her, but when she walked away, M.S. stopped working on the problem and stated that she still did not know how to complete the problem. M.S. also followed the lead of other students that were seated next to her, rather than generate her own responses. She often looked at what others were doing and appeared to want to please others.

L.I. ASSESSMENT

111. L.I. also scored in the very poor range for the Wide Range Assessment of Memory and Learning. She scored in the poor range for visual and verbal memory indexes and very poor range for overall memory ability. Her scores indicated that it could be difficult for her to sustain attention. She was also "very distractible." It was noted in the report that L.I. had a history of being tired and lethargic

112. Ms. Luna also reported that L.I. had severe difficulties in math. Ms. Luna provided the following information:

She lacks confidence, behaves aggressively, has difficulty being redirected and lack [sic] motivation. [L.I.] is rarely cooperative

with others, inconsistently displays situation appropriate behavior, and inconsistently gets along well with peers.

[¶] ...[¶]

[L.I.] typically does not present as a student with behavioral difficulties. However, she sometimes is a bully and uses foul language. She is sometimes defiant outside of the classroom and the yard duty teacher has difficulties with [L.I.] not following directions. At the beginning of the school year, [L.I.] was able to unlock her locker and now she states that she is unable to. Staff feels like she is pretending to not be able to unlock her locker so that she can share a locker with a friend.

113. Ms. Romo opined that M.S. and L.I. have specific learning disabilities. There was a gap between how the girls were expected to perform on the assessments and their actual performance. However, the specific learning disabilities for which they suffer do not affect their ability to know right from wrong.

45-Day Notice to Improve Conduct

114. On November 15, 2010, respondent was in class with several students. Respondent was seated at a table instructing students. There was a student sitting next to respondent to his left. Respondent and the student were both seated in chairs that had triangular legs. The student proceeded to use the table to rock himself back in his chair. The student's right hand was on respondent's left shoulder to stop him from falling backwards. Respondent asked the student multiple times to stop. The student did not stop. As the student rocked his chair he put his hand on respondent's shoulder again. Respondent then performed a wrestling maneuver called a "reverse wrist lock," where he took the student's hand off of his shoulder and turned the student's palm up so he could not grasp respondent's shoulder again. The student then fell backward in his chair to the floor.

115. As soon as the class period was over, respondent spoke with Alice Solis, principal of Cardoza from approximately 2006 until 2012. Respondent explained what occurred, that he performed a reverse wrist lock, and that the student fell backward out of his chair and hit his head. He stated that the student's conduct made him upset. Respondent told Ms. Solis that he acted inappropriately by putting the student on the ground. Respondent knew his conduct was wrong.

116. Ms. Solis interviewed the student that was involved in the incident. The student explained that he fell and did not take the incident seriously. The student was not injured. There was no evidence that respondent hit the student.

117. On November 24, 2010, respondent was issued a notice to improve his unprofessional behavior (Notice). The Notice was issued by Ms. Solis. The Notice directed respondent to:

Exercise self-control and restrain [himself] when addressing and disciplining any student in a manner that is contrary to the safety and welfare of students and contrary to the rules and regulations of the [District] in regards to how we treat students.

After respondent was issued the Notice, he did not violate the directive.

118. At hearing, respondent was questioned about why he did not send the student to the office when the student refused to take his hand off respondent's shoulder. Respondent explained that that the student had been sent to his class because he had gotten into trouble in another class. If respondent had sent the student to the office he would have been suspended for the day and he was at risk of expulsion from Cardoza if he received another suspension. Respondent did not make an excuse for the manner in which he handled the situation, which he acknowledged was wrong. Rather, he provided context for the situation with this student.

District Policies

119. The District alleged that respondent's conduct constituted persistent violations of several Board policies, administrative regulations and Education Code sections. Specifically, the District contended that respondent violated prohibitions against sexual harassment set forth in Education Code sections 212.5 and District Administrative Regulation (AR) sections 4119.11, 4219.11, 4319.11, and 5145.7, which set forth the District's regulations prohibiting sexual harassment. The language in Education Code sections 212.5, essentially mirrors the language set forth in the District's regulation, which provides, in pertinent part, that:

Prohibited Sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted request for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or education setting when...

120. The District also contended that respondent's conduct violated District Board Policy (BP) sections 4119.21, 4219.21 and 4319.21, which set forth the policy on professional standards for District employees. The BP provides, in pertinent part, that:

The Board expects all employees to exercise good judgment and maintain professional standards and boundaries when interacting with students both on and off school property.

Inappropriate employee conduct shall include, but not be limited to, engaging in harassing or discriminatory behavior; engaging in inappropriate socialization or fraternization with a student; soliciting, encouraging, or establishing an inappropriate written, verbal, or physical relationship with a student; engaging in child abuse.

121. The District contended that respondent's conduct violated BP section 5137 which sets forth the policy concerning the school environment. The policy, in part, requires employees to enforce and abide by the Board's rules and regulations prohibiting harassment.

122. The District contended that in November 2010, respondent engaged in corporal punishment of a student, in violation of BP section 5144, and Education code sections 49000 and 49001, which prohibits the use of corporal punishment as a disciplinary measure. Education Code section 49001, defines corporal punishment, in pertinent part, as:

...the willful infliction of, or willfully causing the infliction of, physical pain on a pupil. An amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, is not and shall not be construed to be corporal punishment within the meaning and intent of this section.

Discussion

123. Respondent had been employed with the District for 25 years. He has no history of sexual misconduct towards students. In the instant case, the District failed to establish by a preponderance of the evidence that respondent inappropriately touched M.S. or L.I., that he touched M.S.'s breast, or that he stroked her hair. The District also failed to establish that in November 2010, respondent's conduct constituted corporal punishment, or that he violated the 45-day Notice to correct his behavior.

124. M.S. and L.I. made numerous statements concerning the events that occurred in respondent's classroom between August 7 and August 29, 2013. The statements and their version of events have changed and evolved significantly since August 30, 2013, when they first reported to Mr. Bizzini that respondent touched them. Specifically, their statements concerning when respondent touched them, how he touched them, how often he touched them, where they were touched, and who was present when he touched them, were inconsistent and often in contradiction with each other. The significant inconsistencies and contradictions in their versions of events affect their credibility to the extent that their statements that respondent inappropriately touched them are unreliable.

125. Both girls had reasons why they did not want to be in respondent's class. M.S. and L.I. were new to Cardoza. Both girls were assessed and determined to have severe difficulties learning math. M.S. was nervous about being in respondent's class prior to meeting him. Shortly after attending respondent's class, M.S. decided that she did not like respondent because he would not allow the students to play the math games that she preferred. At times M.S. and L.I. had to be redirected by respondent because they talked to each other. M.S. felt that respondent had "scolded" her and L.I. When M.S. and L.I. arrived late to class, respondent made them write sentences. M.S. also believed that she did not need to be in respondent's class.

126. Initially when respondent touched M.S. on the shoulder, she was not uncomfortable. It was not until L.I. informed her that respondent had also touched her shoulder that they decided that they were uncomfortable. Within a three week period of attending respondent's class, M.S. and L.I. reported that respondent had inappropriately touched them. M.S. reported to Mr. Bizzini that respondent touched her on the shoulder or neck. She demonstrated that respondent then let his hand fall across her chest, which Mr. Bizzini described as a "graze." She did not demonstrate any type of grab of her breast. L.I. told Mr. Bizzini that she saw respondent's hand "fall across" M.S.'s chest about seven times.

127. Mr. Wirowek was the second person to interview the girls. He had never worked for a school district or with children. Nor did he have any specialized training to interview children. Mr. Wirowek asked M.S. a series of suggestive and leading questions. M.S. adopted many of his suggestions. For example, Mr. Wirowek asked M.S. several times when was the last time that respondent had touched her. Initially, she stated that she could not remember. When he continued to ask, she then stated multiple times that respondent had not touched her the day before, which was Thursday. Mr. Wirowek then suggested that maybe respondent had touched her on the Tuesday of that week and she agreed. He then suggested to M.S. how respondent may have touched her on the chest. For example, before M.S. had provided any explanation as to how respondent touched her chest, Mr. Wirowek asked her if respondent would touch her shoulder and "go down across the chest?" M.S. then stated that respondent "went down." He then asked if respondent "paused" referring to his hand. She replied that he "left it there for a few seconds." When Mr. Wirowek asked M.S. how many times respondent had touched her on the chest, she replied that she did not know. Mr. Wirowek then began to suggest that it had occurred five or six times. M.S. agreed that it was "maybe" five times.

128. When M.S. met with Ms. Romo, for the first time she claimed that respondent placed his hand on her breast in what she demonstrated was a "semi-folded like cup" of his hand. M.S. again stated that she could not remember how many times respondent touched her breast, but that it was more than one time. She initially claimed that respondent touched her breast for two to three minutes. Ms. Romo had to clarify that she meant two to three seconds. When M.S. was interviewed by Ms. Dominguez, she stated that respondent left his hand on her breast for "an hour or a little bit." She claimed this occurred "five or four" times.

129. M.S. and L.I. did not attend respondent's class until the second week of school. Yet they claimed that respondent began to touch them on the first day of school. M.S. and L.I. told some people that respondent touched them every day. M.S. told Ms. Dominguez that respondent touched her for "like a week." M.S. claimed that respondent touched her when the boys were present, but L.I. claimed that respondent did not touch them when A.R. and J.R. were in the classroom. J.R. and A.R. were pulled out for speech services on Thursdays, and A.R. had only been pulled out for speech services one time in the three weeks M.S. and L.I. were in respondent's class.

130. M.S. repeatedly stated that respondent touched her on the breast when she was seated at the computer and tables. She also contended that the boys were present when this occurred. One incident M.S. described was that all of the students were seated at the computers. Respondent was seated in between her and L.I. when he started to grab their shoulders and put his hands on her breast. Based on the tight configuration of the computer stations, it is not plausible that the boys would not see this occur. M.S.'s statements that the boys were present when respondent touched them is also in contradiction to L.I.'s statements and testimony that the boys were not present when respondent touched them. L.I. also stated that respondent only touched them when they were seated at the computers, and if M.S. said otherwise she would be lying. L.I. described that respondent touched M.S.'s breast when he reached over M.S. while she was seated at the computer to touch either the mouse or the keyboard.

131. M.S. often spoke about incidents with respondent in terms of "us" referring to both her and L.I. M.S. also consistently reported that respondent touched L.I. on the breast. M.S. testified that she is "100 percent sure" that she saw respondent touch L.I. on her breast and that respondent touched L.I. just like he touched her. Yet, L.I. repeatedly denied that respondent touched her on the chest or breast.

132. M.S.'s reasons for why she did not tell anyone that respondent had touched her, were also inconsistent. M.S. told some people that she did not tell her mother because she was afraid that her mother would be mad. She told other people that she was afraid that respondent would threaten or kill her if she told. M.S. also denied that she told her friends that respondent had touched her on the chest. She claimed that she had only told her friends that respondent had touched her hand because she did not want the boys to know that respondent had touched her chest. However, A.V. who was a friend of M.S. and L.I., reported that both M.S. and L.I. told her that respondent had touched their legs and chest area. Furthermore, A.R. reported that M.S. and L.I. told him that respondent had touched L.I. "weird." They did not tell him that respondent had touched M.S.

133. M.S. and L.I. also had different versions for why they decided to speak to the principal about respondent. M.S. stated that she and L.I. decided if respondent touched them again, they would report it to the principal. However, respondent had not touched them on the day that they spoke to Mr. Bizzini. M.S. denied that she or L.I. had spoken to their parents about the incidents. In contrast, L.I. decided to talk to the principal after her father encouraged her to do so.

134. The District contended that the inconsistencies in M.S. and L.I. statements concerning the events are due to their learning challenges. While their learning challenges may explain inconsistencies such as confusion with seconds versus minutes, it does not explain the progressive changes in their story. The learning challenges do not explain the inconsistencies concerning when the alleged touching started, how many times it occurred, where it occurred, who was present when it occurred, the manner in which it occurred, and exactly where respondent touched M.S. Nor does it explain the inconsistencies between M.S. assertion that she is "100 percent sure" that she saw respondent touch L.I. on the breast, and L.I.'s repeated assertions that respondent did not touch her on the breast.

135. In contrast, respondent credibly denied that he inappropriately touched M.S. or L.I. Respondent did not seek to portray M.S. or L.I. in a negative light, nor did he appear to harbor any animosity towards the girls. Respondent testified that while M.S. and L.I. were in his class, they were not off task any more than any other sixth grade student. Respondent's version of the events that occurred between August 7 and 29, 2013, was consistent and plausible. He did not deny that he touched M.S. and L.I. on the shoulder. He did so to redirect their attention and he used this technique with his other students as well. Typically, he did not touch their shoulders until he first gave them verbal direction, but this was not always the case. Respondent admitted that once he pushed L.I. on the shoulder to turn her around to face the computer, without first giving her verbal direction to do so. Unbeknownst to respondent, L.I. had a bruise on her shoulder. When respondent pushed her shoulder to turn her around, it caused her pain. L.I. did not inform respondent that he caused her pain.

136. Respondent also credibly testified that he touched M.S. and L.I. on the hands on a few occasions in an effort to move a mouse that was difficult to use. Neither M.S. nor L.I. ever told respondent that they did not want to be touched. The evidence established that it was not inappropriate nor was it a violation of the District's policies for respondent to touch M.S. and L.I. on their shoulders or hands to redirect their attention or assist them with instructional matters.

137. Respondent's testimony was also corroborated in many respects by A.R. and J.R. Neither of the boys ever witnessed respondent touch M.S. or L.I. in an inappropriate manner. Both A.R. and J.R. reported that they had seen respondent pat other students on the back or shoulders and that it usually occurred when he was praising a student for doing a good job. Neither boy saw respondent touch the girls in any different way from the way that he touched them.

138. Furthermore, there is no evidence that respondent engaged in any type of behavior that would be consistent with sexual misconduct. He did not threaten the girls. He also did not make any sexual comments or remarks. Respondent was instructing the girls on math and where they should be on the computer.

139. The evidence also failed to establish that respondent "stroked" M.S.'s hair, as alleged by the District. The only time it was noted that M.S. reported that respondent "stroked" her hair, was in the notes prepared by Mr. Bizzini. There is no mention by M.S. in the subsequent interviews or at hearing that respondent "stroked" or touched her hair. The

evidence established that respondent flicked M.S.'s hair as he walked passed her on the way to the computers. Notably, L.I. was not afraid to respond to the gesture by stating "Ew." Respondent immediately acknowledged how L.I. felt about his actions when he put up his hands and stated "okay." Although respondent flicked M.S.'s hair in jest, in hindsight he understood that this was not appropriate as could have been construed by M.S. as unwelcome.

140. Finally, the evidence failed to establish that in November 2010, respondent engaged in corporal punishment of a student. Respondent did not willfully inflict or cause pain to a student. Respondent removed a student's hand from his shoulder and lifted the student's palm up to prevent the student from grabbing his shoulder. As a result, the student fell back in his chair. Respondent did not hit the student. The student was not injured. Respondent immediately reported the incident and acknowledged that he handled the incident incorrectly. Furthermore, after respondent received a 45-day Notice to correct his behavior, he did not violate the Notice.

141. As set forth above, when all of the evidence is considered, the District failed to establish by a preponderance of the evidence that respondent inappropriately touched M.S. and L.I. The District also failed to establish that respondent engaged in corporal punishment or violated the 45-day Notice to correct his behavior. The District failed to establish that respondent engaged in immoral conduct, is unfit to teach or persistently and willfully violated the school laws or regulations governing his employment. As a result, the Accusation filed against respondent by the District must be dismissed.

LEGAL CONCLUSIONS

1. A school district which seeks to dismiss a permanent certificated employee from its employment bears the burden of proof and the standard of proof is by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035; *Bevli v. Brisco* (1989) 211 Cal.App.3d 986.)

2. A permanent certificated teacher may be dismissed for any of the following causes: "immoral conduct," "evident unfitness for service," or "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." (Ed. Code, § 44932, subdivisions (a)(1), (5), and (7).)

3. For the purpose of dismissal of a teacher, immoral conduct is defined as conduct that:

is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful [sic], flagrant, or shameless conduct showing moral

indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.

(*Palo Verde Unified Sch. Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 972, citing *Board of Ed. of San Francisco Unified School District v. Weiland* (1960) 179 CalApp.2d 808, 811.)

4. As set for the in Factual Findings 8 through 22, 31 through 33, 45 and 46, 65 through 68, 87 through 95, and 114 through 141, the District failed to establish by a preponderance of the evidence that respondent engaged in immoral conduct. The evidence did not establish that respondent inappropriately touched M.S. or L.I. Respondent touched M.S. and L.I. on their shoulders. He did so to redirect their attention. Respondent also did not intentionally touch M.S. on the breast. Nor did he stroke her hair. Consequently, the District failed to established cause to dismiss respondent under Education Code section 44932, subdivision (a)(1).

5. Pursuant to Education Code section 44932, subdivision (a)(5), a school district may discipline a permanent certificated employee for "evident unfitness for service." In *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*), the Third District Court of Appeal defined the term "evident unfitness for service," as used in Education Code section 44932, subdivision (a)(5), to mean "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." The court found that the term "connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*) The court held that the *Morrison* factors "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service." (*Id.* p. 1445.) As the court in *Woodland* explained, "[i]f 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." (*Ibid.*)

6. As set forth in Factual Findings 8 through 22, 31 through 33, 45 and 46, 65 through 68, 87 through 95, and 114 through 141, the District failed to establish by a preponderance of the evidence, that respondent is unfit for service. The District failed to establish that respondent inappropriately touched M.S. and L.I. on their shoulders, touched M.S. on her breast or stroked her hair. Since the District failed to prove that respondent engaged in the alleged inappropriate conduct cited in the Accusation, an analysis of the *Morrison* factors is not required. Consequently, the District failed to establish cause to dismiss respondent under Education Code section 44932, subdivision (a)(5).

7. Pursuant to Education Code section 44932, subdivision (a)(7), a school district may discipline a permanent certificated employee for persistent violation of or refusal to obey reasonable regulations prescribed by a school district's governing board. A charge of persistent violation of or refusal to obey school rules requires a showing of insubordination. (*Midway School Dist. of Kern County v. Griffeath* (1946) 29 Cal.2d 13, 18-19.) Persistence requires a showing of "continuing or constant" behavior. (*Governing Board of the Oakdale*

Union School District v. Seaman (1972) 28 Cal.App.3d 77, 82.) The District contended that respondent violated several District policies and Education Code regulations related to sexual harassment and corporal punishment.

8. As set forth in Findings 8 through 22, 31 through 33, 45 and 46, 65 through 68, 87 through 95, and 114 through 141, the District failed to establish by a preponderance of the evidence, that respondent persistently violated or refused to obey reasonable regulations prescribed by the District's Governing Board or the State Board of Education. The District failed to establish that respondent violated the District policies or the Board of Education regulations prohibiting sexual harassment. The evidence established that he did not inappropriately touch M.S. or L.I. Furthermore, the District failed to establish that respondent violated the prohibition against corporal punishment. Consequently, the District failed to establish cause to dismiss respondent under Education Code section 44932, subdivision (a)(7).

Conclusion

9. The District did not sustain its burden of proving, by a preponderance of the evidence that respondent engaged in immoral conduct, is unfit for service, or that he persistently violated or refused to obey reasonable regulations. As a result, respondent shall not be dismissed as a resource specialist program teacher from the Riverbank Unified School District.

ORDER

The Accusation filed by the District against Jerry Pief is DISMISSED.

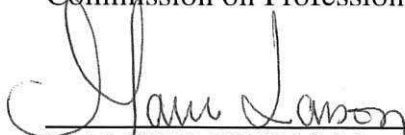
DATED: February 23, 2015



KATHY CRONIN, Member
Commission on Professional Competence



LARA ROBINSON, Member
Commission on Professional Competence



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Commission on Professional Competence