

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
VAL VERDE UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of

MARCIA MALINE,

A Permanent Certificated Employee,

Respondent.

OAH No. 2010070173

**DECISION OF THE  
COMMISSION ON PROFESSIONAL COMPETENCE**

On February 28 and March 1, 2, and 3, 2011, a Commission on Professional Competence heard this matter in San Diego, California. The Commission consisted of Donald P. Cole, Administrative Law Judge, Garrett Corduan, and Joyce Abrams.

Henry R. Karft and Georgina G. Dunne, Attorneys at Law, represented complainant Patricia Ralphs, Administrator, Human Resources, Val Verde Unified School District.

Fern M. Steiner, Attorney at Law, represented respondent Marcia Maline, a permanent certificated employee of the Val Verde Unified School District, who was present throughout the administrative hearing.

On March 3, 2011, the matter was submitted. On March 3 and 11, 2011, the Commission on Professional Competence deliberated and reached a decision.

**ISSUES**

1. Did respondent Marcia Maline, a permanent certificated employee with the Val Verde Unified School District, provide unsatisfactory performance in connection with her duties as a teacher with Val Verde Unified School District?

2. If so, should Marcia Maline be terminated from her employment with the Val Verde Unified School District?

## SUMMARY OF DECISION

Over a several-year period, respondent demonstrated a serious inability to promote substantial student engagement and interaction in her classroom. She strongly resisted the directives of two successive principals to utilize teaching methods, particularly small group activities, which would have helped improve her teaching. Especially during her last year in the classroom, respondent also demonstrated an inability to control her classroom and to foster a positive learning environment. Respondent's failings existed despite substantial assistance and encouragement that the district provided to her. After giving respondent a reasonable period of time within which to remedy her shortcomings, and as her performance was in fact deteriorating during the course of her final year in the classroom, the district properly concluded that respondent's performance had been unsatisfactory and cause existed under Government Code section 44932, subdivision (a)(4) to dismiss respondent from her teaching position with the Val Verde Unified School District.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On March 3, 2010, the district issued to respondent a notice of unsatisfactory performance. On the same date, the notice was served on respondent. On May 11, 2010, Wraymond Sawyerr, President, Board of Education, signed a statement of written charges against respondent and a notice of intent to dismiss. These documents were served on respondent. On July 6, 2010, Patricia Ralphs, Administrator, Human Resources, signed the dismissal accusation. The dismissal accusation and other required jurisdictional documents were served on respondent, who filed a notice of defense.

2. The district nominated Garrett Corduan to serve on the Commission. Respondent nominated Joyce Singer Abrams to serve on the Commission. Neither nominee was related to respondent, neither was employed by the district, each held a valid credential, and each had served at least five of the preceding ten years as an elementary school teacher under a multiple subject credential.

3. All jurisdictional requirements have been met.

4. On February 28, 2011, the record was opened and opening statements were given. On February 28 and March 1 and 2, 2011, sworn testimony and documentary evidence were received. On March 3, 2011, closing arguments were presented, the record was closed, and the matter was submitted. On March 3 and 11, 2011, the Commission met in closed session to determine the matter. On March 11, 2011, the Commission reached a non-unanimous decision.

5. The draft of the decision was circulated among Commission members. Administrative Law Judge Donald P. Cole and Garrett Corduan signed the decision as the majority members of the Commission. Joyce Abrams signed the dissent as the minority member of the Commission.

### *Background*

6. Respondent has a multiple subject credential with supplemental authorizations for social studies, health sciences, and computer applications. She also has a community college teaching credential. She has about 25 years of teaching experience, including substitute and part-time teaching. She has been employed with the district full time since 1997. She taught fifth grade at Rainbow Ridge elementary school from 2002 or 2003 through the 2009-2010 school year. For two or three years prior to her service at Rainbow Ridge, respondent taught fourth and fifth grades at the district's Manual Real elementary school. Her principal at Manual Real was Greg Blanco. When Blanco was transferred to Rainbow Ridge, respondent requested and received a transfer as well, since she wished to follow him.

### *The 2005 to 2006 School Year*

7. The district teachers are normally evaluated bi-annually. The 2005-2006 school year was respondent's scheduled evaluation year. At the time of respondent's second interim evaluation for the year (which occurred in December 2005), Blanco remained the Rainbow Ridge principal. In early 2006, Blanco left Rainbow Ridge and was replaced by Thelma Almuena, who served the remainder of the school year as Interim Principal.<sup>1</sup> Almuena gave respondent her final evaluation of the 2005-2006 school year.

8. Blanco observed respondent in the classroom on three occasions in the fall of 2005, before his departure from Rainbow Ridge. On all three occasions, he gave respondent a "Meets/Exceeds District Standards" rating in all evaluation areas. On all three occasions, he noted that students were engaged (twice he noted that they were "very" engaged).

9. In respondent's December 2005 interim evaluation, Blanco stated:

Mrs. Maline IS HAVING A MORE SUCCESSFUL YEAR WITH PARENT COMMUNICATION.

This is [sic] been an area of [sic] have been concerned about. Continue to build better relationships and communication strategies so your parents

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<sup>1</sup> Almuena was appointed Rainbow Ridge principal at the beginning of the 2006-2007 school year.

become your ally. Test scores for this year have shown a remarkable growth since the pre-test results.

10. Almuena observed respondent in the classroom on four occasions during the school year, between February 9 and May 4, 2006. On all four occasions, she gave respondent a “Meets/Exceeds District Standards” rating in all areas, except that on March 20 and May 4, 2006, she gave respondent a mixed “Meets/Exceeds Standards and “Needs Improvement” rating in the area of “Student Engagement.” On March 20, Almuena made the following suggestion: “How can you get all students engaged & actively participate in lesson? Group activity? Use of GLAD strategies?”<sup>2</sup> On May 4, Almuena commented, “Need more student interaction/discussion.” On April 21, 2006, despite a “Meets/Exceeds District Standards” rating in student engagement, Almuena made the following comment, “How can you plan instruction that will promote student interaction? I appreciate your review of place value – systematic. I need to see lessons that promote student interactions.”

11. In respondent’s final evaluation for the year, Almuena, stated:

Marcia Maline elicits higher level thinking through the use of metacognitive strategies, asking probing questions, and asking students to justify and support their responses. Mrs. Maline reviews math procedures to facilitate student understanding of concepts and skills. Mrs. Maline taught after school program. She serves as TUPE, safety, and Physical Fitness facilitator. Suggestion: Promote student interactions through think-pair-share<sup>3</sup> and collaborative small group activities. Foster positive relationships with students and parents through discipline with dignity.

12. From the outset of her tenure at Rainbow Ridge, Almuena was concerned about the lack of student interaction and engagement in respondent’s classroom. Though respondent preferred to teach in a lecture (“direct teaching”) format, she felt that Almuena’s suggestions were good ones. Respondent believed that she was implementing what Almuena suggested, but perceived that Almuena wanted her to do more. It was respondent’s sense that Almuena was somewhat of a micromanager.

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<sup>2</sup> GLAD refers to “Guided Language Acquisition Design.” GLAD strategies include the use of graphic organizers in class.

<sup>3</sup> “Think-Pair-Share” is a strategy in which the teacher provides a limited quantum of content, and students then talk to each other, with the result that student engagement is fostered more than if the teacher simply lectured and occasionally asked questions of individual students. Almuena was concerned that respondent relied too heavily on the lecture format, and did not sufficiently foster student-to-student interaction and engagement.

13. Respondent's overall evaluation for the 2005-2006 school year was "Meets/Exceeds District Standards." She received that evaluation for all six teaching standards in both her interim and her final evaluation for the year.

14. In part because of respondent's concerns about Almuena's administrative style, respondent requested a transfer at the end of the school year. When she received her assignment for the 2006-2007 school year, she learned that her request had been denied.

#### *The 2006 to 2007 School Year*

15. Almuena was elevated to the position of Rainbow Ridge principal in July 2006. She had previously served as Vice Principal at another district elementary school. As an administrator at the two schools, Almuena conducted over 35 formal teacher evaluations. Almuena remained at Rainbow Ridge through the 2008-2009 school year. Before the 2009-2010 school year, she was transferred to another district school.

16. During Almuena's three-year tenure at Rainbow Ridge, there were three fifth-grade teachers at the school, including respondent.

17. Respondent was not scheduled for a formal evaluation during the 2006-2007 school year. However, Almuena observed respondent in her classroom on a number of occasions. In connection with those observations, Almuena instructed respondent to use small groups.<sup>4</sup> Respondent attempted to do so, but perceived that her students did not focus well on her instruction when in that setting, so she reverted to her previous style of lecturing from the front of the classroom, with all of her students facing her. Though respondent explained to Almuena that in her opinion small group instruction was not working, Almuena directed respondent to continue using small groups.

18. On May 7, 2007, respondent left handwritten instructions for a substitute teacher. The instructions appeared to have been written in some haste, and did not constitute a formal lesson plan for the day. The instructions did, however, provide some specific guidance as to what matters to cover in class. At one point, in large writing, respondent wrote, "Please Follow my plans as they are written."

Apparently, the substitute teacher was offended by respondent's instructions, and Almuena spoke to respondent about this. Respondent explained that she had had a substitute in the past who had failed to follow her plans, and this concerned her.

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<sup>4</sup> While observing respondent in the classroom, Almuena (and later her successor Tim Tanner) took notes on a district classroom observation form, and routinely gave a copy of those notes to respondent within a day after the observation.

Respondent never again wrote up a lesson plan of the kind in question on this occasion.

19. On May 10, 2007, at Almuena's request, respondent visited the district's Columbia Crest Elementary School, in order to observe how a particular teacher, Kristina Harvin, conducted small group instruction and managed her classroom. During the visit, respondent made phone calls on Harvin's classroom phone, logged onto Harvin's computer and connected to the Internet, and took a "dog tag" incentive necklace from an autistic child, who suffered chest pains as a result and had to be picked up and taken home by a parent. Respondent also left Columbia Crest prior to dismissal at 1:15 p.m.

In a May 17, 2007, letter to Principal Almuena, respondent explained that she took the necklace from the student "because I was working with him and he seemed distracted by it. If the teacher thought that was the wrong thing to do she could have told me, or just given it back to him."<sup>5</sup> Respondent confirmed that she used the phone and the computer. She explained that she "used the phone to call my classroom and find out how things were going and I wanted to know about the attendance so I could report it on" the school's attendance program. She added that Harvin had given her permission to log on to her computer so that she could report the attendance, and that Harvin had also given her permission to use the phone. Finally, respondent wrote that Harvin left school at lunch, telling respondent that there would be a substitute in her place. Respondent, who understood that the purpose of the visit was for her to observe Harvin in particular, nonetheless stayed at Columbia after lunch and observed a third grade Academy class for a period of time before she left (because she taught an Academy class at Rainbow Ridge), and then respondent returned to Rainbow Ridge for the remainder of the school day.

20. At the end of the school year, respondent again requested a transfer to another school. Again, her transfer request was denied.

#### *The 2007 to 2008 School Year*

21 The 2007-2008 school year was respondent's bi-annual evaluation year. Almuena observed respondent on three occasions between the beginning of the year and December 10, 2007. Areas of concern to Almuena during this period included a perceived lack of student engagement and a need for greater differentiation in

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<sup>5</sup> At the hearing, respondent testified that Harvin had given her permission to work with the small group which included the child in question. She testified further that she felt Harvin had given her permission, through eye contact, to take the dog tag from the student. Respondent did not make these statements in her letter, when the matter was fresh in her mind, and the explanation is discounted. In other respects, respondent's testimony was consistent with the May 17 letter.

instruction to meet the needs of each student. Almuena gave respondent a number of “Needs Improvement” and “Unsatisfactory” ratings during her three observations.

22. On December 10, 2007, as a result of Almuena’s concerns, Almuena placed respondent on the first of a series of teacher improvement plans. The plan covered 22 bulleted areas,<sup>6</sup> including:

- Engage student learning through interesting and meaningful instructional strategies
- Utilize strategies such as small groups, think pair share, ELD, QAR, GLAD that will actively involve all students
- Lessons need to promote student interaction as well as provide students to [sic] in meaningful and thoughtful discussions
- Promote small group activities and student group responsibility
- Use more positive reinforcement during lessons
- Foster positive learning climate that promotes fairness and respect
- Teaching using cooperative groups with assigned roles; implement literature circles
- Less teacher talk – more student interaction; allow students to explain/justify responses
- Facilitate discussions that will elicit and promote critical thinking skills
- Develop and implement a variety of instructional strategies that meet individual student’s needs as well as increase student interaction and motivation
- Support student learning through teacher facilitated small group instruction

23. After respondent was placed on the improvement plan, Almuena observed her in class on a more frequent basis – eight more times during the 2007-2008 school year. Through the remainder of the year, as reflected in observation notes Almuena prepared at the time of each classroom visit, the series of three improvement plans prepared during the course of the year, and the narrative statement attached to respondent’s final evaluation for the year,<sup>7</sup> Almuena was concerned about and continued to stress the need for respondent to improve in such areas as engaging students through interesting and meaningful instructional strategies, promoting small

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<sup>6</sup> In subsequent plans, the number of bullet points varied somewhat (i.e., between about 20 and 25) during Almuena’s tenure as Rainbow Ridge principal. As noted below, after Tim Tanner became principal, he reduced the number of bullet points to 12.

<sup>7</sup> While on improvement plans, respondent was evaluated on an annual, instead of a biannual, basis.

group activities, as well as other strategies (e.g., ELD, QAR, GLAD) that would actively involve all students, using positive reinforcement during lessons, fostering a positive learning climate that promoted fairness and respect, decreasing teacher lecturing and increasing student interaction, and following lesson plans consistently. With regard to small groups, entries in observation notes on at least two occasions (both in May 2008) directed respondent to arrange students' desks in small groups, not in rows.<sup>8</sup> More generally, Almuena was concerned by what she perceived as a lack of progress on respondent's part in implementing the improvement plans.

24. Almuena did not perceive any student discipline problems for the 2007-2008 school year. She did get the impression, however, that students were a little scared of respondent – she based this on disciplinary referrals from respondent that she (Almuena) considered minor in nature, such as a student bending down to tie his shoelaces or going to the trash can to expectorate phlegm.

25. Respondent received “Needs Improvement” ratings for all three improvement plans implemented during the 2007-2008 school year.

26. In respondent's final evaluation for the 2007-2008 school year, dated May 8, 2008, Almuena made the following comments:

Marcia Maline is a 5<sup>th</sup> grade EMC teacher. She is currently working on her improvement plan. Recently, Mrs. Maline has been observed to implement small group instruction using SRA Kit as well as think pair share instructional strategy to promote student interaction. It has been noted that Mrs. Maline has been doing her best with maintaining her Math Focus wall.

*Main Concerns:*

Marcia Maline needs to promote learning through student interaction. She needs to engage students' interests through meaningful instructional strategies, stimulating discussions with active student participation, and connecting students' life experiences and prior knowledge to the lesson. She also needs to

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<sup>8</sup> Almuena did not hesitate to praise respondent when she felt respondent had done a good job, and to seek to encourage her by pointing out strong points in her teaching, even in the context of noting areas where improvement was needed. For example, on September 25, 2007, Almuena identified a number of “[g]ood strategies I observed today.” On January 18, 2008, Almuena's observation notes concluded, “Great job today! I appreciate your having students explain how they solved math problem. Also, great job with your math focus wall!” Respondent received “Meets/Exceeds District Standards” across the board on that date. On February 21, 2008, Almuena wrote, “I appreciate your working with 2 students to focus on their needs. I'm concerned about the amount of pages assigned to rest of class for IG and also that it doesn't focus on Lang. Arts.”



implement small group instruction and think pair share consistently. Mrs. Maline needs to use results of data analysis to differentiate instruction to meet the needs of individual students. She needs to continue to foster positive learning climate as well as positive and collaborative relationships with staff, students, and parents. Mrs. Maline needs to review the concerns and suggestions outlined throughout this evaluation and her performance in each of those areas.

Respondent's overall evaluation was "Needs Improvement." On both her interim and final evaluations, respondent received a "Needs Improvement" rating in three of six standards ("Creating and Maintaining Effective Environments for Student Learning," "Understanding and Organizing Subject Matter for Student Learning," and "Planning Instruction and Designing Learning Experiences for All Students"), an "Unsatisfactory" rating in one standard ("Engaging and Supporting All Students in Learning"), and a "Meets/Exceeds District Standards" in two standards ("Assessing Student Learning" and "Developing as a Professional Educator.") Comments stressed the need to foster greater student interaction and engagement, through use of small groups (especially) and other strategies. The importance of a positive learning environment was also stressed.

27. When Almuena discussed with respondent the need to implement small group and other strategies, respondent said she understood but told Almuena that she (respondent) did not believe these strategies would work with her students. Almuena described it as a "battle" to get respondent to implement the strategies. Almuena's perception during the course of the year was that respondent was able to implement her directives when she wanted to, but that she was very inconsistent in this regard – she would implement them for a period of time, and then return to her earlier practice. Almuena felt that respondent always had excuses as to why the strategies would not work, and it appeared to Almuena that respondent's efforts to implement them were half-hearted.

#### *The 2008 to 2009 School Year*

28. During the course of the 2008-2009 school year, because respondent remained on an improvement plan, Principal Almuena observed her in class on about 16 occasions. As reflected in Almuena's observation notes, in the five improvement plans prepared during the course of the year, and in the narrative statement attached to respondent's final evaluation for the year, Almuena was concerned about and continued to stress the need for respondent to improve in such areas as engaging students through interesting and meaningful instructional strategies, promoting small group activities, as well as other strategies (e.g., ELD, QAR, GLAD) that would actively involve all students, using positive reinforcement during lessons, fostering a positive learning climate that promoted fairness and respect, decreasing teacher lecturing and increasing student interaction, and following lesson plans consistently. With regard to small groups, observation note entries on at least two occasions

directed respondent to arrange students' desks in small groups, not in rows. Emphasis was also placed on the need for respondent to implement (and how to implement) universal Access time.<sup>9</sup> Almuena was also concerned about respondent's occasional tardiness.<sup>10</sup> On one occasion, Almuena noticed a student sleeping, and respondent did not make any attempt to wake the student.

29. On October 9, 2008, at Principal Almuena's direction, respondent visited the district's Bethune Elementary School for the purpose of "Teacher to Teacher Best Practices Observation" of Donna Walker's class. Respondent was very impressed with the environment Walker created for her students. In Walker's classroom, the student desks were arranged in rows, not in small groups. However, Walker used small groups extensively, having the children leave their desks and move to other areas of the classroom for small group activities. Respondent "learned some wonderful new ways to incorporate small group instruction" into her own teaching methods.

Respondent told Principal Almuena that she wished to set up her classroom like Walker had set up hers. Principal Almuena denied respondent's request, instructing her instead to have the students' desks arranged in small group fashion.

30. At some point during the 2008-2009 school year, respondent was placed in the district's Peer Assistance and Review (PAR) program. The purpose of the PAR program is to assist tenured teachers who need help with teaching strategies or other issues so that they can become more successful in the classroom. A teacher can request PAR assistance voluntarily, or, as in respondent's case, the district can direct that the teacher participate in the program. When a teacher enters the program, the district's PAR panel assigns a PAR consultant (another district teacher) to assist

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<sup>9</sup> Universal Access time provides an opportunity for the teacher to differentiate instruction through small groups according to the varying abilities of students and to help struggling students raise their skill levels so that they can be successful. Higher challenges are provided for more advanced students, and extra support is provided for students who are below basic.

<sup>10</sup> Again, Almuena attempted to encourage respondent even while pointing out areas for improvement. On January 8, 2009, Almuena wrote, "I appreciate your questioning [illegible] You need to praise students for responses, increase student discussion/interaction, use GLAD strategies, follow your lesson plan." On January 16, 2009, Almuena wrote, "I appreciate your implementing think pair share 1x. You need to do it more often." On January 26, 2009, Almuena wrote, "Good use of map to show location" and "Good job today." On April 16, 2009, Almuena wrote, "Good higher level thinking questions. I appreciate the way you ask students to justify answers."

the individual in question. The district had contracted about eight to 12 PAR consultants during the 2008-2009 school year.<sup>11</sup>

31. On one occasion while Almuena was still Rainbow Ridge principal (the precise year was unclear from the record), respondent observed a child about age 12 or 13 holding a gun of some kind. The student was shooting an arrow-like object at passing cars. Respondent approached the student and took away the gun, which turned out to be a “nerf” (toy) gun. She told the child that guns were not allowed on campus and that she was going to turn the gun in to her principal. The student was not a Rainbow Ridge student, but was apparently on campus in connection with an after-school sports event. The child’s mother arrived and tried to explain that the child was autistic, but respondent would not relent. The student’s mother became very upset.

32. Almuena did not perceive any improvement during her classroom observations of respondent during the course of the school year. She thus gave respondent “Unsatisfactory” ratings for all five improvement plans implemented during the 2008-2009 school year.

Respondent testified that she understood the changes Almuena wanted her to make as set forth in the improvement plans and that she did everything Almuena asked. She perceived, however, that Almuena was not satisfied with her efforts. Respondent added that when she felt uncomfortable with the implementation of Almuena’s directives, she “pulled back.” Respondent did not recall Almuena going through each point in her improvement plan and identifying the specific matters that she felt respondent had failed to implement. Instead, respondent recalled Almuena saying things like, “I saw a little bit of this, I need to see more.”

33. In respondent’s final evaluation for the 2008-2009 school year, dated May 12, 2009, Almuena made the following comments:

Marcia Maline is a 5<sup>th</sup> grade EMC teacher. She is currently working on her improvement plan. She has been observed to try implementing small group instruction as well as think-pair-share a few times. She informs students of their progress through graphs. She has improved on maintaining her ELA and Math focus walls include essential elements – theme/chapter, standards, and vocabulary current. She also displays student written work.

*Main Concerns:*

Marcia Maline needs to increase students’ level of engagement through their active participation in discussions and meaningful activities. She needs to check for understanding by having students explain solutions/answers, repeat

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<sup>11</sup> Respondent’s participation in the PAR program is described below.

her instructions/directions/discussions, and by asking open-ended questions. In order to differential instruction, Mrs. Maline needs to develop and implement a variety of instructional strategies such as flexible grouping, small groups, ELD, and GLAD that meet individual student's needs as well as increase student interaction and motivation. She also needs to foster a classroom management system that will reinforce students' positive responses and behavior. Mrs. Maline needs [sic] improve her relationship with colleagues as well as improve on fostering positive relationships with students and their parents by respecting students and treating them with dignity. She also needs to be on time to supervise her students by 7:45 a.m. each day during morning assembly. Mrs. Maline needs to continue to analyze students' assessment data and use results to differentiate instruction to meet the needs of individual students.

Respondent's overall evaluation was "Unsatisfactory." On both her interim and final evaluations, she received a "Needs Improvement" rating in two of six standards ("Creating and Maintaining Effective Environments for Student Learning" and "Understanding and Organizing Subject Matter for Student Learning"), an "Unsatisfactory" rating in three standards ("Engaging and Supporting All Students in Learning," "Planning Instruction and Designing Learning Experiences for All Students," and "Developing as a Professional Educator"), and a "Meets/Exceeds District Standards" rating in one standard ("Assessing Student Learning.") Comments stressed the need to foster greater student interaction and engagement, through use of small groups (especially) and other strategies. The importance of a positive learning environment was also stressed.

Almuena gave respondent an overall "Unsatisfactory," rather than a "Needs Improvement," rating because she felt that respondent had been given ample opportunity to succeed, but was still not implementing the strategies that would have promoted a positive learning climate and student achievement. During conferences with Almuena, respondent told her that the kinds of students she had in her classroom made it difficult to implement the strategies (e.g., small groups) that Almuena had directed her to employ.

34. In May 2009, respondent requested a transfer to another school. She withdrew that request in June, based on her "understanding that there will be a different Principal at Rainbow Ridge for the 2009-2010 school year."

#### *The 2009 to 2010 School Year*

35. Prior to the commencement of the 2009 to 2010 school year, Almuena was reassigned to another district elementary school. In August 2009, Timothy Tanner took her place at Rainbow Ridge. Tanner has been an educator since 1988, and has served the last 14 years as a school principal. During that period, he has evaluated about 30 teachers per year.

36. On August 24, 2009, Tanner initiated a new improvement plan for respondent. Tanner took respondent's improvement plan instituted by Almuena as his starting point, but he reduced the number of items (bullet points) to 12. His purpose was to simplify the assistance plan, to emphasize the areas where he really wanted respondent to concentrate, and thus to give her "every opportunity to improve" her teaching practice. The items in the new plan included the following:

- Engage students learning through interesting and meaningful instructional strategies and discussions
- Utilize a variety of instructional strategies such as small groups, think pair share, ELD, QAR, GLAD, Bloom's Taxonomy etc. that will respond to students' diverse learning levels
- Use instructional time effectively to promote small group activities which engage all students
- Foster positive learning climate that promotes fairness and respect for all students
- Check for student understanding; have students elaborate, discuss, explain, justify answers; less teacher talk, more student discussion and interaction
- Increase student interaction and motivation by valuing students' developmental learning needs
- Analyze data to plan differentiated instructions through small groups, flexible grouping, and Universal Access
- Foster positive relationships with your students, students' parents, and colleagues

37. During the course of the 2009-2010 school year, Tanner observed respondent in class on about eight occasions, for 30 to 60 minutes each. In his classroom observation notes, Tanner referenced such matters as a lack of student engagement and participation, excessive lecturing by respondent, inconsistency between learning activities and respondent's lesson plans, a non-motivational learning environment, and a failure to implement Universal Access time. The last item, Universal Access time, was the one area in which Tanner most wanted to see respondent improve.

On at least one occasion, respondent explained to Tanner why her classroom activities had deviated from her lesson plan.

On one occasion, Tanner noticed a student was asleep for about 30 minutes, and respondent made no attempt to wake him. On that same date, Tanner noticed a student sitting at his desk and doing nothing. Tanner asked the student why he wasn't working; the student stated that he did not have a pencil and that respondent would not give him one.

On only one of the eight occasions when Tanner observed respondent's classroom was respondent working in small groups. On several occasions, respondent explained to Tanner her reluctance to utilize small groups by stating that she felt such a structure would limit her ability to control her classroom.

Tanner's greatest concern was that respondent consistently and appropriately provide Universal Access time. He instructed respondent to use this teaching tool on a daily basis. On one occasion when Tanner visited respondent's classroom to observe her conducting a scheduled Universal Access time, respondent was giving a spelling test instead. When Tanner later asked respondent about this, respondent said that Tanner must be "out to get her" if he was writing her up for giving a spelling test. On only one occasion during all of his classroom visits did Tanner observe respondent attempt to provide Universal Access time in the manner in which it was intended. Tanner once invited respondent to let him know when she was going to use Universal Access time and was confident in her lesson plan, so that he could observe her. She never took him up on this offer.

Respondent had an "open invitation" to discuss Tanner's classroom observation notes with him, but she never did so. Respondent explained at the hearing that she never went to see Tanner about the matters contained in his classroom observation notes because she understood what he wanted her to do, so that there was no need to meet. She tried to implement what he had asked her to do. She tried to implement small groups. She felt she was implementing all the matters reflected in the improvement plan. She perceived, however, that Tanner was not satisfied with her efforts.

38. On November 4, 2009, respondent's performance on the new improvement plan was evaluated. Tanner recognized respondent's strengths (e.g., her efforts to set-up groups and differentiate instruction during Universal Access time, her wealth of knowledge, her consistency in turning in her lesson plans). However, he also noted several areas of concern. The two key areas he focused on were student engagement/involvement and the provision of a safe, productive educational environment.<sup>12</sup> Respondent's overall evaluation for the improvement plan period was "Needs to Improve." A second improvement plan (identical to the first) was instituted.

39. On January 20, 2010, Tanner issued to respondent a letter of reprimand. The letter was based on a number of matters, including: (i) that at the request of parents Tanner had removed five students from respondent's class during the current school year, and that six more students were still on a waiting list for removal and

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<sup>12</sup> With regard to student engagement, Tanner noted respondent's tendency to do most of the talking herself and the need to implement strategies to involve her students. With regard to the educational environment, Tanner was concerned among other things with respondent's handling of discipline.

transfer to another class; (ii) that respondent had written 13 discipline referrals on nine different students during the preceding week; and (iii) that numerous complaints about respondent's conduct toward students had been made. The letter was also based on Tanner's concern about respondent's lecture style of teaching and her failure to foster interaction and engagement with students.

40. On February 23, 2010, respondent's performance on the second improvement plan was evaluated. Tanner noted respondent's continued consistency in turning in lesson plans each week. However, he also referenced respondent's failure to establish a positive learning climate, and the need for greater student engagement and motivation, for less talking by respondent during class, and for a consistent and effective Universal Access time. Strong concerns about respondent's disciplinary methods were articulated as well, along with concerns about the removal of several students from respondent's class and parental complaints about respondent's treatment of students. Respondent's overall evaluation for the improvement plan period was "Unsatisfactory." A third improvement plan (similar but not identical to the first two) was instituted. The new improvement plan marked the first time that respondent was explicitly instructed to be at school at 7:15 a.m., the contractual starting time of the school day.<sup>13</sup>

As far as Tanner could recall at the hearing, respondent did not challenge any of the above matters during the evaluation meeting.

41. On March 3, 2010, the district issued to respondent a notice of unsatisfactory performance. The notice in particular emphasized:

The following are specific instances of unsatisfactory performance that have occurred this school year. During classroom observations, it was noted that most of your teaching is lecture. You are doing most of the talking, you were given directives to interact more with your students and to use cooperative learning teaching strategies. There has been no improvement in these areas.

The notice also referenced respondent's first two improvement plans, and emphasized concerns in the two "key areas of student engagement and providing a safe productive educational environment for your students."

42. In a March 30, 2010, email to respondent, Tanner advised her that he had been informed that on several occasions during the preceding week, respondent had locked her classroom door and denied entrance to students, even after they knocked. Tanner instructed respondent not to lock her students out of her room. In

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<sup>13</sup> Previously, respondent had been explicitly instructed to report by 7:45 a.m., when class began.

an email she sent later the same day, respondent stated that she had never locked a student out of her classroom, but admitted that she did not open her door to tardy students “as quickly as they think I should,” so as not to empower them to disrupt the classroom. In an email on March 31, 2010, Tanner reiterated, “If someone knocks on your door, you or one of your assigned students is to answer it promptly.”

On at least one occasion after this email exchange,<sup>14</sup> respondent again locked a student out of the classroom. When Tanner brought this up with respondent, she told him that she felt she should be allowed to determine when to lock the door and that it interrupted her teaching to go and open the door for a student.<sup>15</sup>

43. On April 26, 2010, respondent’s performance on the third improvement plan was evaluated. Tanner noted respondent’s continued consistency in turning in lesson plans each week. However, he also referenced respondent’s failure to establish a positive learning climate, and expressed the need for greater student engagement and motivation, and for a consistent and effective Universal Access time. Strong concerns about respondent’s disciplinary methods were articulated as well, along with concerns about the removal of several students from respondent’s class and parental complaints about respondent’s treatment of students. Respondent’s overall evaluation for the improvement plan period was “Unsatisfactory.” A fourth improvement plan was instituted.<sup>16</sup>

As far as Tanner could recall at the hearing, respondent did not challenge any of the above matters during the evaluation meeting.

44. On several occasions during the school year, Tanner observed respondent arrive to school late, i.e., after 7:15 a.m. At the hearing, respondent did not deny that she arrived late, but explained that as the year wore on, as she was having trouble with her class, and as she felt that the whole school environment was hostile to her, her motivation really slipped. No evidence was presented that respondent ever arrived at school after 7:45 a.m., when class was scheduled to begin.

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<sup>14</sup> Tanner testified that he received more “complaints” (plural) after he spoke to respondent about this issue.

<sup>15</sup> Testimony was offered that the district superintendent had issued a directive that classroom doors be locked. The details of this directive were not provided, and to what extent it was enforced was not clear. The directive is not, however, significant to the decision in this case, because respondent did not mention the directive as a reason for her locking out of students, and Tanner explicitly told respondent not to do so.

<sup>16</sup> The fourth improvement plan was never completed, because respondent was removed from her teaching assignment before the completion date.



45. Respondent admitted to Tanner that at times she yelled at students in class to get them to pay attention and to follow her rules. She also told Tanner that at times she kept the entire class in the classroom during recess as punishment, even though not every student had done something wrong. Tanner explained to her that she had to identify the children who had behaved wrongly. Respondent told him that she would work on it.

46. Respondent received both an interim and a final evaluation for the 2009-2010 school year. On her interim evaluation, she received a “Needs Improvement” rating on all standards except for “Engaging and Supporting All Students in Learning” (“Unsatisfactory”) and “Developing as a Professional Educator” (“Meets/Exceeds District Standards.”) Comments stressed the fostering of greater student interaction and engagement, creating a positive learning environment, and the use of small groups. Disciplinary concerns were also noted.

Respondent’s overall final evaluation was “Unsatisfactory.” She received an “Unsatisfactory” rating on all standards except for “Assessing Student Learning” (“Needs Improvement.”) Comments similar to those contained in the interim evaluation were made. Student and parental complaints were also noted, as were disciplinary concerns and tardiness. Finally, Tanner expressed great concern about respondent’s “disregard,” “non-compliance,” and “defiance” of his directives to arrive at school on time, to implement Universal Access time, and not to lock students out of her classroom.

#### *Respondent’s Participation in the PAR Program*

47. Respondent’s PAR consultant (or “coach”), for both the 2008-09 and 2009-2010 school years, was Todd Lamph, a teacher in the district’s Val Verde High School “Student Success Academy.” Lamph has 22 years of district teaching experience. He has special education, supplemental administrative, and a multiple subject credential. Lamph received training to be a PAR consultant, and he has worked with about 12 to 15 teachers over the years. In Lamph’s view, two years is a sufficient time period for a teacher to correct and improve any areas of concern.

48. Lamph got together with respondent about once every six weeks. When respondent met with Almuena (or, later, Tanner) to discuss her improvement plans, Lamph attended. At those meetings, the administrators shared things they had observed in class, both positive and negative. Lamph made sure that he understood the administration’s expectations of respondent. The meetings were typically cordial; Lamph did not detect any animosity between respondent and the administrators.

49. Lamph believed that the directives of Almuena and Tanner were reasonable. He did not sense any improper agenda on the part of either administrator. He advised respondent that whether or not she liked their directives, as a teacher she had to do what her employer told her to do, and that, as she did so, she would receive

more “Meets/Exceeds District Standards” and less “Needs Improvement” and “Unsatisfactory” ratings. Lamph perceived that respondent was “comfortable delivering curriculum in a certain way, and it was difficult for her to deviate from that.” When Lamph told respondent she needed to comply with administrative directives, he initially felt that she understood. However, he discovered as time went on that she would start to implement administrative directives, but then back away. Lamph spoke to respondent about this, and she told him that she didn’t think she could be successful with the children in her class, unless she were “out in front,” i.e., lecturing to them as a large group. Respondent felt, in other words, that she would lose control of her students if she conducted class in the manner that Almuena and Tanner directed. Lamph’s repeated encouragement to respondent was to do what administration told her to do.<sup>17</sup>

50. In light of the fact that respondent chose not to implement the teaching strategies that Rainbow Ridge administration wanted her to use, Lamph understood the “Unsatisfactory” rating respondent received in the area of Universal Access time/small groups.

51. Based on a review of numerous emails between respondent and Lamph, it appears that respondent was generally appreciative of the sincere efforts Lamph made on her behalf.

52. Lamph testified in a neutral, objective fashion; he did not display any hostility toward respondent and did not seem to have an axe to grind with her.

#### *Other Matters*

53. Evidence was offered about the success (or lack of success) of respondent’s students on departmental and standardized tests. The Commission did not believe that the evidence offered established any unsatisfactory performance on respondent’s part. For example, the scores of respondent’s students on grade-level SMART tests improved less than those of the other two fifth-grade teachers in language arts, but they improved more in math.<sup>18</sup> The scores on standardized tests in

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<sup>17</sup> Lamph himself taught in a manner similar to respondent. He nonetheless strongly advised her to comply with the school’s directives.

<sup>18</sup> Evidence was adduced on a number of other matters that the Commission did not consider significant, either because they were one-time occurrences, were relatively remote in time, or for other reasons. On one occasion, for example, Almuena noticed respondent had posted student disciplinary referrals on her wall (she took them down at Almuena’s direction and this never occurred again). On another occasion, respondent had in her class a special education student whose Individualized Educational Plan was “expired” (i.e., apparently needed to be updated), and respondent did not take affirmative action to address this issue. Tanner

which numbers of respondent's students were below basic did not reflect how far below basic her scores were. Finally, Tanner readily disclosed that the decision to terminate respondent was made before he looked into the performance of her students on these tests.

54. When Almuena was the Rainbow Ridge principal, the school tried to make the three fifth grade classes as similar as possible in terms of student composition. Each class did, however, have a different "cluster." One class had a GATE cluster, another had an English immersion cluster, and the third, respondent's, had an RSP special education cluster. The record was not clear as to whether this arrangement continued during respondent's final year, when Tanner was principal. The record was also not clear with regard to what percentage of each class consisted of the designated cluster group.

55. On two occasions, Almuena raised with respondent the possibility of retirement. One of these occasions was in the context of a "golden handshake" that the district was offering as a retirement incentive. Respondent had never expressed any interest in retirement, and she told Almuena that she could not afford to retire.

56. Several Rainbow Ridge teachers testified at the hearing.

a. Shannon Todd, a fourth and fifth grade teacher with about 15 years district experience, all at Rainbow Ridge, testified that during the 2009-2010 school year, respondent's classroom was right across the hall from her own. On about five occasions that year, she saw or heard respondent yell at her students, in a loud, angry voice, reprimanding the students, e.g., lecturing the entire class on how to behave. About ten to 15 times during the year, she observed students knocking on respondent's classroom door, asking to be let in. On several occasions, Todd invited respondent's students who could not gain access into respondent's classroom to sit in Todd's own classroom.

Though Todd stated that she "got along" with respondent, her demeanor during her testimony suggested a degree of hostility against her. Such an attitude was also reflected in an email she sent to Tanner in February 2010, in which she reported respondent's refusal "to answer her door when her kids knock, so they stand outside the door calling her names and yelling at kids that are in the hall." Todd prefaced her email with the comment that it "may be whining on my part or *more ammo* for you." (emphasis added) Todd did not come across as objective in her evaluation of respondent, and her testimony must accordingly be discounted to a certain extent.

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testified that though this responsibility was with the classroom teacher, he considered himself also partly responsible that in essence this matter slipped through the cracks. In addition, this was, again, a one-time occurrence.

b. Theresa Barbeau, a second grade teacher with about nine years district experience, all at Rainbow Ridge, testified that she was respondent's union site representative from 2008 to 2010. Barbeau attended several meetings that Almuena held with respondent. On these occasions, Almuena gave respondent directives, which Barbeau tried to encourage respondent to follow. Respondent's basic response was essentially negative, i.e., that she was not interested.

During her testimony, Barbeau exhibited a degree of hostility toward respondent and was, for example, evasive in response to questions posed by respondent's counsel. Barbeau's hostility was also reflected in a November 2009 email to the Val Verde Teachers Association president, in which she spoke of respondent in highly critical terms, and which, astonishingly, she copied to Tanner. Barbeau's testimony must accordingly be discounted to a certain extent.

c. Kristin Sandoval, a second, third, and fourth grade teacher with about five years district experience, all at Rainbow Ridge, testified that she served as respondent's site representative for the 2009-2010 school year. During that same year, respondent's classroom was several doors down from her own, on the other side of the hall. On one occasion at the end of the school day, she observed respondent's students "going crazy" and "out of control" (yelling, screaming, throwing things) as they were preparing to leave. On another occasion, she observed that respondent had locked a student out of her classroom. Sandoval was bringing her own students up the stairs, and noticed one of respondent's students tying his shoes by respondent's door, which was closed. Sandoval knocked on respondent's door and, peering through the glass opening in the door, Sandoval could see respondent and her students looking at Sandoval. Respondent did not, however, open the door. Later, respondent told Sandoval that she had not seen her there.

Sandoval testified that respondent blamed Tanner for student behavioral problems that existed at Rainbow Ridge, that "it comes from above," that Tanner "just sends kids back to her without any consequences," and that Tanner failed to support respondent with regard to student disciplinary issues. Sandoval's own view, in contrast, was that Tanner addresses issues appropriately. Sandoval advised respondent that Tanner was trying to work with her (respondent) and that respondent should try to use small groups as Tanner asked her to do. Respondent told Sandoval that it was too difficult to work small groups with her particular students.

Sandoval testified in an objective, professional manner; she did not appear to have any bias against respondent.

d. Mario Perez, a fifth grade teacher with five years district experience, all at Rainbow Ridge, testified that respondent's classroom was two doors down from his own.

Perez testified that he observed respondent's classroom on one occasion during the 2006-2007 school year; she was able to maintain discipline on that occasion.

Perez testified that all fifth grade teachers were given directives by both Almuena and Tanner to use small groups whenever possible. Respondent complained to Perez at times about the directives of both principals, explaining that her class misbehaved and could not handle small groups. Perez advised respondent to do whatever the fifth grade staff was told to do, as teachers had to follow the directives of administrators. She responded that she was a "child of the 60's," that she had free will, and that she did not like being told what to do.

Perez testified that on more than one occasion, students of respondent entered his classroom, stating that they had been locked out. Perez also heard respondent yelling at her students on more than one occasion; he felt her conduct was not always appropriate.

Perez testified that Rainbow Ridge teachers were taught strategies for dealing with disruptive students. He himself "seldomly" referred students to the principal's office. He called the parents of disruptive students, and that generally was sufficient to resolve the issue.

Perez testified that every year respondent complained that she had poor students. During the 2008-2009 and 2009-2010 school years, a total of about eight to ten students were transferred from respondent's classroom to his own. Some of these students initially acted out in Perez's class, but he was able to solve the problem by following his usual procedures. Perez was of the opinion that respondent had an excessive amount of student disciplinary issues each year. He believed that if she had used the strategies that the teachers were taught, she would have had fewer problems.

Perez testified in a thoughtful, careful, professional manner. He refrained from answering questions to which he did not know the answer. He did not appear to have any bias against respondent. He was not defensive on cross examination by respondent's counsel, and appeared to answer each question directly, and as he saw it.

f. Monica Valcarcel, a former fifth grade and now instructional coach with six years district experience, all at Rainbow Ridge, testified that from 2004 to 2008, she taught fifth grade at Rainbow Ridge and that respondent's classroom was next door to her own.

Valcarcel testified that respondent used to complain at grade level meetings about the things that Almuena asked the teachers to do.

Valcarcel testified that two of respondent's students were transferred to her class during the 2007-2008 school year. One was academically low; the other was proficient. Valcarcel did not have discipline problems with either student.

Valcarcel testified that she heard respondent yelling at her students more than once when students were unruly. In Valcarcel's opinion, the yelling was not appropriate. Valcarcel stated that she had been taught strategies for dealing with unruly students.

Valcarcel testified that on one occasion, she noticed about 12 of respondent's students walking by her classroom on the way to the office. They told her that respondent would not let them in the classroom, because they had arrived late for class.

Valcarcel testified that on about five days during the 2009-2010 school year, she covered for respondent's class, during STAR testing. Valcarcel was able to maintain discipline in the class during those five days. However, because testing was taking place, small groups were not used.

Valcarcel testified that all fifth grade classes had some RSP students.

Valcarcel testified, in response to a question about her relationship with respondent, that respondent was not always pleasant during staff meetings. Valcarcel seemed hesitant to speak negatively about respondent, however. She came across as fair and neutral during her testimony.

g. Elizabeth Robison testified that she has been a district teacher for about 15 years. She taught at Rainbow Ridge, primarily in special education, until the end of the 2007-2008 school year. She knows respondent professionally. Robison was a union site representative at Rainbow Ridge. Robison recalled attending a meeting with respondent and Almuena, where respondent expressed a concern about the selection of a particular Christian hymn for the school's Christmas program. At one point during the meeting, Almuena asked respondent, "Do you believe in God, and if you don't, why do you say the pledge every day?" Robison thought this was an inappropriate question.<sup>19</sup> Robison, who observed respondent teach on more than two occasions, believed that respondent was a good teacher. She added that respondent is a "direct instructor," i.e., she prefers to stand in front of the class and teach the class as an entire group.

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<sup>19</sup> Almuena testified that she may have asked respondent if she believed in God, and added that such a question would have been inappropriate.

57. Respondent testified that she had not had discipline problems before the 2009-2010 school year. That year, she had a difficult class. "All of a sudden, with this group of students," it became very difficult for her to implement her standard disciplinary plan. Students were defiant, threw things, and used inappropriate language, among other matters. Further, respondent did not believe she was receiving support from Tanner on disciplinary issues. For example, when she referred students to Tanner's office, he did not send back to her the form used to indicate the result of the referral. Respondent inferred that no discipline had occurred in those cases, and this concerned her greatly. As another example, her students sometimes left her classroom without a hall pass, i.e., without her permission. These students told her they were going to see Principal Tanner. Respondent immediately called the office to verify where the students were, and learned that they had in fact gone to see him. Respondent felt this was inappropriate.

58. In February 2010, respondent intercepted a note passed between students. The note stated, "Joey told on Mrs. Maline and Mr. Tanner said he was going to get rid of her on Friday !!!!!!!!!!! Yes" The note is hearsay and no students testified at the hearing.

Tanner testified that he never told any student that he was going to "get rid of" respondent. He did tell several students that he would monitor and observe respondent's classroom, when students discussed their concerns with him. Tanner was aware that at times students came to see him about matters that occurred in respondent's classroom without first securing a hall pass. On those occasions, he did not immediately send the students back to class, if he had time to talk to them right then. He thought it was important for students to know that they had someone to listen to their concerns. He also felt it would be more disruptive to send the students back to the classroom without a pass rather than to address their concerns right then. He did instruct students not to return to see him without a pass in the future.

The evidence did not establish that Tanner ever told a student that he was going to terminate respondent.

59. Respondent was the first teacher Tanner ever recommended for dismissal.

60. Both Almuena and Tanner testified in a professional and objective manner. Neither appeared hostile toward respondent or to have an agenda against her.

61. Sometime during the 2009-2010 school year, the district superintendent issued a directive that teachers were to have their doors locked. The evidence was unclear with regard to how regularly or under what circumstances this directive was followed or enforced or how it was implemented at district schools.

62. Respondent testified that she tried to do everything Almuena and Tanner told her to do. She felt capable of doing everything they asked, except that she had some difficulty implementing small group instruction.

## LEGAL CONCLUSIONS

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

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

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

2. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) This standard requires a party (here, the district) to convince the trier of fact that the existence of a fact is more probable than its nonexistence. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

3. A permanent employee may be dismissed based, *inter alia*, on unsatisfactory performance. (Ed. Code, § 44932, subd. (a)(4).)

4. Before 1995 Education Code section 44932, subdivision (a)(4) authorized the termination of a tenured teacher for "incompetency." A 1995 legislative amendment to that subdivision substituted the phrase "unsatisfactory performance" for "incompetency."

The 1995 Summary Digest, Chapter 392, states "under existing law, a permanent employee shall not be dismissed except for one or more certain enumerated causes including incompetency. This bill would eliminate incompetency as one of the enumerated causes for dismissal of a permanent employee and would instead provide that a permanent employee may be terminated for unsatisfactory performance."



The 1995 legislative amendment was subject to the following comment in 27 Pacific Law Journal (Winter, 1996), at pages 668-669:

Chapter 392 was enacted in order to enable school district governing boards to dismiss teachers based on a determination of unsatisfactory performance. As noted by the author of Chapter 392, the incompetence standard has been problematic for school districts, their employees, and the courts. The enactment of Chapter 392 simply changes the law to what it was meant to be originally. Although evaluating a teacher's performance involves the issue of competency, performance is intended to be a broader term and whether a teacher is competent or not is to be considered a small subsection of satisfactory performance.

5. By reason of Findings 1 through 63 and Conclusions 1 through 4, a preponderance of the evidence established that:

a. Respondent Marcia Maline's performance was unsatisfactory in connection with her duties as a teacher with the Val Verde Unified School District.

b. Cause to terminate respondent Marcia Maline from her employment with the Val Verde Unified School District exists under Education Code section 44932, subdivision (a)(4).

Based on the extensive classroom observations of two different principals over a period of several years, respondent demonstrated that she was unable or unwilling consistently to utilize teaching methods, particularly small group activities, which would foster interaction and engagement among her students. Respondent similarly demonstrated her inability or unwillingness to implement Universal Access time, a differentiation process which would promote learning among students of all educational levels and abilities. This was the case, despite the repeated directives from the two principals in a long series of improvement plans that respondent implement these particular teaching strategies. Respondent's unwillingness to comply with the reasonable directives of her principals reflected a decided resistance to change that in fact amounted to affirmative defiance on her part. Her resistance was the more egregious in that her PAR consultant, fellow teachers, and union representatives all encouraged her to comply.

Both principals testified in a professional, unbiased manner; neither appeared to have a conscious agenda against respondent. To the contrary, both attempted to help and encourage respondent to improve her teaching, e.g., by documenting not only areas where improvement was needed, but also areas in which she had done well. The observation notes upon which they relied in reaching their conclusions about respondent were detailed and contemporaneous. Respondent's PAR consultant confirmed that, in his view, the two principals acted reasonably and fairly toward respondent, and that respondent was resistant to their directives. Other teaching staff

also confirmed respondent's resistance. Tanner, who made the ultimate decision to recommend respondent's termination, had never in his long administrative career taken that step with any other teacher.

Especially during her last year as a Rainbow Ridge teacher, respondent also demonstrated her inability to control her classroom and to foster a positive learning environment. This failure was reflected in a high number of parental complaints against her, the transfer of at least five students out of her classroom during that year, the absence of significant disciplinary issues with the transferred children in their new classes, the excessive number of referrals to the principal's office, and respondent's own statements to her principal and to others about the severe disciplinary problems she experienced. Respondent's failure was also reflected – though to a lesser extent because the frequency of these matters was not clear from the record – in her yelling at students, locking them out of her classroom, and disciplining the entire class for the misconduct of a smaller group. Another concern was respondent's repeated – though, again, the extent was not reflected in the record – failure to arrive at school by the start time of 7:15 a.m.

Respondent's failings were despite substantial assistance the district provided to her. The district gave respondent over two and a half years to address the issues in question. Her principals provided her with detailed, clear improvement plans, and extensive class observation notes. They were available to meet with her to discuss any questions or concerns she might have as to those notes. The district provided her with a PAR consultant for two years.

It is true that the district could have done more than it did, but that will always be the case. In view of the entirety of the evidence, the fact, for example, that respondent's PAR consultant was a high school, rather than an elementary, teacher, or that respondent's principals did not offer to model for her the kinds of teaching strategies they had in mind, was not significant. Similarly, the refusal of the district to grant respondent's transfer request was not, in light of the entirety of the evidence, significant, especially since respondent herself rescinded the final request in June 2009, before any formal disciplinary steps had been taken against her, and a full year before the ultimate decision was reached to terminate her employment. Finally, it was not established that Tanner's actions regarding the students in respondent's class substantially and adversely impacted respondent's ability to exercise appropriate authority in her classroom.

For all of these reasons, and based on the evidence as a whole, it was established that respondent's performance was unsatisfactory, and that the district's decision to terminate her employment was appropriate.

## DISPOSITION

The Accusation and Statement of Charges are sustained. Respondent Marcia Maline is dismissed from her employment with the Val Verde Unified School District.

DATED \_\_\_\_\_

\_\_\_\_\_  
DONALD P. COLE  
Administrative Law Judge  
Office of Administrative Hearings

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

\_\_\_\_\_  
GARRETT CORDUAN  
Principal  
Murrieta Unified School District

## DISSENT

## FINDINGS OF FACT

1. All Findings of Fact are incorporated by reference except as set forth below.

12. From the outset of her tenure at Rainbow Ridge, Almuena was concerned about the lack of student interaction and engagement in respondent's classroom. Though respondent preferred to teach in a lecture ("direct teaching") format, she felt that Almuena's suggestions were good ones. Respondent believed that she was implementing what Almuena suggested, but perceived that Almuena wanted her to do more. It was respondent's sense that Almuena was somewhat of a micromanager. Other Rainbow Ridge teachers who testified agreed that Almuena was a micromanager.

18. Finding of Fact 18 is not incorporated by reference.

19. On May 10, 2007, at Almuena's request, respondent visited the district's Columbia Crest Elementary School, in order to observe how a particular teacher, Kristina Harvin, conducted small group instruction and managed her classroom. During the visit, respondent made phone calls on Harvin's classroom phone, logged onto Harvin's computer and connected to the Internet, and took a "dog tag" incentive necklace from an autistic child, who suffered chest pains as a result and had to be picked up and taken home by a parent. Respondent also left Columbia Crest prior to dismissal at 1:15 p.m.

Ms. Harvin, the exemplary teacher being observed, gave respondent permission to use the class phone and computer, as well as sit in on the small group discussion. With regard to respondent taking the dog tag away from the distracted student, most teachers would have done the same thing. Further, Harvin did not identify the student as having special needs or accommodations. It would have been impossible for respondent to know, and may not have changed her action.

In a May 17, 2007, letter to Principal Almuena, respondent explained that she took the necklace from the student "because I was working with him and he seemed distracted by it. If the teacher thought that was the wrong thing to do she could have told me, or just given it back to him."<sup>20</sup> Respondent confirmed that she used the phone and the computer. She explained that she "used the phone to call my classroom and find out how things were going and I wanted to know about the attendance so I could report it on" the school's attendance program. She added that Harvin had given her permission to log on to her computer so that she could report the attendance, and that Harvin had also given her permission to use the phone. Finally, respondent wrote that Harvin left school at lunch, telling respondent that there would be a substitute in her place. Respondent, who understood that the purpose of the visit was for her to observe Harvin in particular, nonetheless stayed at Columbia after lunch and observed a third grade Academy class for a period of time before she left (because she taught an Academy class at Rainbow Ridge), and then respondent returned to Rainbow Ridge for the remainder of the school day.

28. During the course of the 2008-2009 school year, because respondent remained on an improvement plan, Principal Almuena observed her in class on about 16 occasions. As reflected in Almuena's observation notes, in the five improvement

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<sup>20</sup> At the hearing, respondent testified that Harvin had given her permission to work with the small group which included the child in question. She testified further that she felt Harvin had given her permission, through eye contact, to take the dog tag from the student. Respondent did not make these statements in her letter, when the matter was fresh in her mind, and the explanation is discounted. In other respects, respondent's testimony was consistent with the May 17 letter.

plans prepared during the course of the year, and in the narrative statement attached to respondent's final evaluation for the year, Almuena was concerned about and continued to stress the need for respondent to improve in such areas as engaging students through interesting and meaningful instructional strategies, promoting small group activities, as well as other strategies (e.g., ELD, QAR, GLAD) that would actively involve all students, using positive reinforcement during lessons, fostering a positive learning climate that promoted fairness and respect, decreasing teacher lecturing and increasing student interaction, and following lesson plans consistently. With regard to small groups, observation note entries on at least two occasions directed respondent to arrange students' desks in small groups, not in rows. Emphasis was also placed on the need for respondent to implement (and how to implement) universal Access time.<sup>21</sup> Almuena was also concerned about respondent's occasional tardiness.<sup>22</sup> On one occasion, Almuena noticed a student sleeping, and respondent did not make any attempt to wake the student. Oddly, Almuena did not attempt to wake the student or find out why he was sleeping.

29. On October 9, 2008, at Principal Almuena's direction, respondent visited the district's Bethune Elementary School for the purpose of "Teacher to Teacher Best Practices Observation" of Donna Walker's class. Respondent was very impressed with the environment Walker created for her students. In Walker's classroom, the student desks were arranged in rows, not in small groups. However, Walker used small groups extensively, having the children leave their desks and move to other areas of the classroom for small group activities. Respondent "learned some wonderful new ways to incorporate small group instruction" into her own teaching methods.

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<sup>21</sup> Universal Access time provides an opportunity for the teacher to differentiate instruction through small groups according to the varying abilities of students and to help struggling students raise their skill levels so that they can be successful. Higher challenges are provided for more advanced students, and extra support is provided for students who are below basic. This was done through a prescribed program in the Houghton Mifflin Language Arts series.

<sup>22</sup> Again, Almuena attempted to encourage respondent even while pointing out areas for improvement. On January 8, 2009, Almuena wrote, "I appreciate your questioning [illegible] You need to praise students for responses, increase student discussion/interaction, use GLAD strategies, follow your lesson plan." On January 16, 2009, Almuena wrote, "I appreciate your implementing think pair share 1x. You need to do it more often." On January 26, 2009, Almuena wrote, "Good use of map to show location" and "Good job today." On April 16, 2009, Almuena wrote, "Good higher level thinking questions. I appreciate the way you ask students to justify answers."

Respondent told Principal Almuena that she wished to set up her classroom like Walker had set up hers. Principal Almuena denied respondent's request, instructing her instead to have the students' desks arranged in small group fashion, going against the concept behind using a visit to a "best practices" observation, that Almuena herself had directed.

31. On one occasion while Almuena was still Rainbow Ridge principal (the precise year was unclear from the record), respondent observed a child about age 12 or 13 holding a gun of some kind, long after school was dismissed, at approximately 4:30 p.m. The student was shooting an arrow-like object at passing cars. Respondent approached the student and took away the gun, which turned out to be a "nerf" (toy) gun. She told the child that guns were not allowed on campus and that she was going to turn the gun in to her principal. The student was not a Rainbow Ridge student, but was apparently on campus in connection with an after-school sports event. The child's mother arrived and tried to explain that the child was autistic, but respondent would not relent. The student's mother became very upset. A zero tolerance policy sign against guns was clearly posted. Respondent should be commended for following posted district policy.

35. Prior to the commencement of the 2009 to 2010 school year, Almuena was reassigned to another district elementary school. In August 2009, Timothy Tanner took her place at Rainbow Ridge. Tanner has been an educator since 1988, and has served the last 14 years as a school principal. This was Tanner's first year working for the Val Verde Unified School District, and his fifth or sixth district in his 14 years as an administrator. During that period, he has evaluated about 30 teachers per year.

36. Before meeting respondent or observing her teach, on August 24, 2009, Tanner initiated a new improvement plan for respondent. Tanner took respondent's improvement plan instituted by Almuena as his starting point, but he reduced the number of items (bullet points) to 12. His purpose was to simplify the assistance plan, to emphasize the areas where he really wanted respondent to concentrate, and thus to give her "every opportunity to improve" her teaching practice. The items in the new plan included the following:

- Engage students learning through interesting and meaningful instructional strategies and discussions
- Utilize a variety of instructional strategies such as small groups, think pair share, ELD, QAR, GLAD, Bloom's Taxonomy etc. that will respond to students' diverse learning levels
- Use instructional time effectively to promote small group activities which engage all students
- Foster positive learning climate that promotes fairness and respect for all students

- Check for student understanding; have students elaborate, discuss, explain, justify answers; less teacher talk, more student discussion and interaction
- Increase student interaction and motivation by valuing students' developmental learning needs
- Analyze data to plan differentiated instructions through small groups, flexible grouping, and Universal Access
- Foster positive relationships with your students, students' parents, and colleagues

37. During the course of the 2009-2010 school year, Tanner observed respondent in class on about eight occasions, for 30 to 60 minutes each. In his classroom observation notes, Tanner referenced such matters as a lack of student engagement and participation, excessive lecturing by respondent, inconsistency between learning activities and respondent's lesson plans, a non-motivational learning environment, and a failure to implement Universal Access time. The last item, Universal Access time, was the one area in which Tanner most wanted to see respondent improve.

On at least one occasion, respondent explained to Tanner why her classroom activities had deviated from her lesson plan.

On one occasion, Tanner noticed a student was asleep for about 30 minutes, and respondent made no attempt to wake him, nor did Tanner. On that same date, Tanner noticed a student sitting at his desk and doing nothing. Tanner asked the student why he wasn't working; the student stated that he did not have a pencil and that respondent would not give him one.

On only one of the eight occasions when Tanner observed respondent's classroom was respondent working in small groups. On several occasions, respondent explained to Tanner her reluctance to utilize small groups by stating that she felt such a structure would limit her ability to control her classroom.

Tanner's greatest concern was that respondent consistently and appropriately provide Universal Access time. He instructed respondent to use this teaching tool on a daily basis. On one occasion when Tanner visited respondent's classroom to observe her conducting a scheduled Universal Access time, respondent was giving a spelling test instead. When Tanner later asked respondent about this, respondent said that Tanner must be "out to get her" if he was writing her up for giving a spelling test. On only one occasion during all of his classroom visits did Tanner observe respondent attempt to provide Universal Access time in the manner in which it was intended. Tanner once invited respondent to let him know when she was going to use Universal Access time and was confident in her lesson plan, so that he could observe her. She never took him up on this offer.

Respondent had an “open invitation” to discuss Tanner’s classroom observation notes with him, but she never did so. Respondent explained at the hearing that she never went to see Tanner about the matters contained in his classroom observation notes because she understood what he wanted her to do, so that there was no need to meet. She tried to implement what he had asked her to do. She tried to implement small groups. She felt she was implementing all the matters reflected in the improvement plan. She perceived, however, that Tanner was not satisfied with her efforts.

40. On February 23, 2010, respondent’s performance on the second improvement plan was evaluated. Tanner noted respondent’s continued consistency in turning in lesson plans each week. However, he also referenced respondent’s failure to establish a positive learning climate, and the need for greater student engagement and motivation, for less talking by respondent during class, and for a consistent and effective Universal Access time. Strong concerns about respondent’s disciplinary methods were articulated as well, along with concerns about the removal of several students from respondent’s class and parental complaints about respondent’s treatment of students. Respondent’s overall evaluation for the improvement plan period was “Unsatisfactory.” A third improvement plan (similar but not identical to the first two) was instituted. The new improvement plan marked the first time that respondent was explicitly instructed to be at school at 7:15 a.m., the contractual starting time of the school day.<sup>23</sup> The record did not reflect by what steps, if any, Tanner offered to assist respondent to move her from unsatisfactory to satisfactory.

As far as Tanner could recall at the hearing, respondent did not challenge any of the above matters during the evaluation meeting.

42. Dr. Alan Jensen, district superintendent, issued a directive for all teachers to lock their doors. Respondent’s claim in this regard was supported by other teachers who testified.

In a March 30, 2010, email to respondent, Tanner advised her that he had been informed that on several occasions during the preceding week, respondent had locked her classroom door and denied entrance to students, even after they knocked. Tanner instructed respondent not to lock her students out of her room. In an email she sent later the same day, respondent stated that she had never locked a student out of her classroom, but admitted that she did not open her door to tardy students “as quickly as they think I should,” so as not to empower them to disrupt the classroom. In an email on March 31, 2010, Tanner reiterated, “If someone knocks on your door, you or one of your assigned students is to answer it promptly.”

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<sup>23</sup> Previously, respondent had been explicitly instructed to report by 7:45 a.m., when class began.



On at least one occasion after this email exchange,<sup>24</sup> respondent again locked a student out of the classroom. When Tanner brought this up with respondent, she told him that she felt she should be allowed to determine when to lock the door and that it interrupted her teaching to go and open the door for a student.

44. On several occasions during the school year, Tanner observed respondent arrive to school late, i.e., after 7:15 a.m. This was anecdotal information, with no dates attached to the evidence. At the hearing, respondent did not deny that she arrived late, but explained that as the year wore on, as she was having trouble with her class, and as she felt that the whole school environment was hostile to her, her motivation really slipped. No evidence was presented that respondent ever arrived at school after 7:45 a.m., when class was scheduled to begin, or even after 7:30 a.m., when students were permitted on campus.

45. Respondent admitted to Tanner that at times she yelled at students in class to get them to pay attention and to follow her rules. She also told Tanner that at times she kept the entire class in the classroom during recess as punishment, even though not every student had done something wrong. Tanner explained to her that she had to identify the children who had behaved wrongly. Respondent told him that she would work on it.

However, most teachers have yelled at students and punished the entire class at some time in their career. The foregoing evidence was presented in anecdotal form, with no dates or positive number of times in a specific number of dates or months or years.

48. Lamph got together with respondent about once every six weeks.<sup>25</sup> When respondent met with Almuena (or, later, Tanner) to discuss her improvement plans, Lamph attended. At those meetings, the administrators shared things they had observed in class, both positive and negative. Lamph made sure that he understood the administration's expectations of respondent. The meetings were typically cordial; Lamph did not detect any animosity between respondent and the administrators.

53. Evidence was offered about the success (or lack of success) of respondent's students on departmental and standardized tests. The Commission did not believe that the evidence offered established any unsatisfactory performance on respondent's part. For example, the scores of respondent's students on grade-level SMART tests improved less than those of the other two fifth-grade teachers in

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<sup>24</sup> Tanner testified that he received more "complaints" (plural) after he spoke to respondent about this issue.

<sup>25</sup> If, however, respondent was in such dire circumstances, one may ask why Lamph, her PAR consultant, did not see her more often, at least during or after each of the administrative observations.

language arts, but they improved more in math.<sup>26</sup> The scores on standardized tests in which numbers of respondent's students were below basic did not reflect how far below basic her scores were. Real numbers would be required, if a judgment were to be made. Finally, Tanner readily disclosed that the decision to terminate respondent was made before he looked into the performance of her students on these tests.

54. Each Rainbow Ridge fifth grade class had a different "cluster" of students. One class had a GATE cluster, another had an English immersion cluster, and the third, respondent's, had an RSP special education cluster. The record was not clear as to whether this arrangement continued during respondent's final year, when Tanner was principal. The record was also not clear with regard to what percentage of each class consisted of the designated cluster group.

55. On two occasions, Almuena raised with respondent the possibility of retirement. One of these occasions was in the context of a "golden handshake" that the district was offering as a retirement incentive. Respondent had never expressed any interest in retirement, and she told Almuena that she could not afford to retire. Asking an employee if she plans to retire is illegal – it is age discrimination. The other teacher on Almuena's improvement plan did retire, raising the question whether she was pushed into doing so.

56. All of Finding of Fact 56 is incorporated by reference, except that the second sentence of Finding 56(d) is modified as follows:

Perez testified that he observed respondent's classroom on one occasion during the 2006-2007 school year; she was able to maintain discipline on that occasion and respondent used small group instruction.

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<sup>26</sup> Evidence was adduced on a number of other matters that the Commission did not consider significant, either because they were one-time occurrences, were relatively remote in time, or for other reasons. On one occasion, for example, Almuena noticed respondent had posted student disciplinary referrals on her wall (she took them down at Almuena's direction and this never occurred again). On another occasion, respondent had in her class a special education student whose Individualized Educational Plan was "expired" (i.e., apparently needed to be updated), and respondent did not take affirmative action to address this issue. Tanner testified that though this responsibility was with the classroom teacher, he considered himself also partly responsible that in essence this matter slipped through the cracks. In addition, this was, again, a one-time occurrence. If a student enters the school with an active IEP, it is an administrative responsibility to provide the IEP to the teacher and to call a meeting with all of the required parties.

## CONCLUSIONS OF LAW

1. Conclusion of Law 1 is incorporated by reference.
2. Conclusion of Law 2 is incorporated by reference.
3. Conclusion of Law 3 is incorporated by reference.
4. Conclusion of Law 4 is incorporated by reference.

5. By reason of Findings 1 through 63 and Conclusions 1 through 4, a preponderance of the evidence did not establish that Respondent Marcia Maline's performance was unsatisfactory in connection with her duties as a teacher with the Val Verde Unified School District. Accordingly, cause to terminate respondent Marcia Maline from her employment with the Val Verde Unified School District does not exist under Education Code section 44932, subdivision (a)(4).

The district should have done much more in providing systemic proactive professional development and opportunity than it did to help respondent succeed as a teacher. While the two principals told respondent what she needed to do, almost to the degree of harassment, they did not provide meaningful assistance to enable her to succeed. They did not, for example, offer to model for respondent the kind of small group and Universal Access strategies that they told her to implement. In addition, respondent's PAR consultant was a high school teacher, whereas an elementary school teacher, like respondent herself, would have been much more helpful. Further, the consultant had a similar teaching style to respondent's – much more helpful would have been a consultant who himself or herself utilized small groups extensively. In addition, there was no valid reason why the district could have not granted one of respondent's several requests for a transfer to another school, or at least to another grade level at Rainbow Ridge. With regard to respondent's disciplinary problems, not only did the district not provide meaningful assistance to her, but to the contrary, Tanner exacerbated the problem by entertaining student complaints when those students went to his office without first going through proper protocol for students complaining to a principal. He should instead have immediately sent them back to their classroom. His actions in this regard had the effect of undermining respondent's authority in the classroom.

As another example of the district's failings toward respondent, Almuena sent respondent to observe a teacher (Ms. Walker) who did not arrange her classroom in the manner Almuena had instructed respondent to do. When respondent enthusiastically asked Almuena if she could arrange her own classroom in the same manner as Walker did hers, Almuena turned her down, thus sending a mixed, and confusing, message to respondent. In fact, the insistence of Almuena and Tanner that respondent arrange her classroom in small groups, rather than in rows, was unnecessary to achieve effective teaching, and in that sense constituted an artificial

requirement. Indeed, while neither Almuena nor Tanner exhibited any overt hostility against respondent, the evidence suggested that they placed too much emphasis on the arrangement of respondent's classroom, and as respondent dug in her heels in resistance to their directive, they dug in their heels in their insistence that she comply. Also troublesome, inappropriate and illegal was Almuena's suggestion that respondent retire. At the hearing, Almuena said, "It might have been easier for her [respondent] to retire." Further, Almuena's question as to respondent's religious beliefs before the holiday program was also invasive and discriminatory.

With regard to the claims that respondent was tardy, that she yelled at students, that she locked them out of class, and that she disciplined the entire class for the misconduct of a portion thereof, the evidence was insufficient to establish the extent and precise context, and therefore the significance, of these matters. With regard to respondent's locking out of students, there is the additional issue that the district superintendent issued a directive requiring that classroom doors be locked.

The Val Verde Unified School District took an effective teacher, according to her 2006 evaluation by Principal Blanco, and systematically worked to destroy her week after week, year after year, of administrative observations and scribbled notes and offered little or no effort to try different strategies to elicit change. She was programmed to fail.

Ultimately, respondent wanted to provide education to and cared about her students and had a desire to teach using the California State standards as her guidelines. Based on all the evidence presented, it was not established that her performance was unsatisfactory, or that her termination is appropriate.

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

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JOYCE SINGER ABRAMS  
(Retired) Teacher  
Chula Vista Elementary School District