

**BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SAN JOSE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

MICHAEL JACOBS, Respondent.

OAH No. 2022080655

DECISION

A Commission on Professional Competence (Commission) heard this matter by videoconference on December 5 through 9, 2022, and March 20, 2023. The Commission's members were Amy Irwin, Torrance Unified School District; Nico Sandoval, Tracy Unified School District; and Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, who presided.

Attorney Ingrid A. Meyers represented the San Jose Unified School District.

Attorney Joseph A. Cisneros represented respondent Michael Jacobs, who was present.

The matter was submitted on March 20, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. The San Jose Unified School District (District) is a large school district in Santa Clara County.
2. At all relevant times, respondent was a permanent certificated employee of the District.
3. On March 8, 2022, the District served a six-page Notice of Unsatisfactory Performance upon respondent, summarizing numerous “Does Not Meet Standard” evaluations of his teaching performance in the 2020–21 and 2021–22 school years, directing him to improve his teaching performance in numerous specific ways, and warning him that continued unsatisfactory performance would subject him to further disciplinary action, up to and including dismissal.
4. On June 16, 2022, the District’s Board of Trustees (Board) received a statement of charges against respondent from District Assistant Superintendent J. Dominic Bejarano and voted to seek respondent’s dismissal from employment.
5. On June 16, 2022, the District attempted to personally serve respondent with notice of its intention to dismiss him and a copy of the statement of charges. On June 28, 2022, respondent’s counsel accepted service of these documents on respondent’s behalf. It is undisputed that June 28, 2022, was after the instructional year of the school site where respondent is physically employed.
6. In the statement of charges, the District alleges that over the past few years, respondent performed unsatisfactorily as a teacher, specifically that he

consistently failed to perform his duties as a teacher in a satisfactory manner; failed to meet the fundamental expectations of the District; interfered with students' ability to learn and succeed; failed to meet state standards for the profession; and undermined the goals of the District. The District further alleges that respondent has demonstrated an evident unfitness for service; has repeatedly violated Board policies and regulations, state laws, and other rules governing his employment; and that all these alleged facts constitute cause for his dismissal.

7. Respondent timely requested a hearing and this proceeding followed.

Relevant District Policies

8. District Board Policy No. 100, "Philosophy, Goals, Objectives and Comprehensive Plans," sets forth the District's fundamental principles and philosophy and specifically provides that:

It is the philosophy of the district that:

1. All students can learn and succeed.
2. Every student in the district, regardless of gender, special needs, or social, ethnic, language or economic background has a right to a high-quality education that challenges the student to achieve to his/her fullest potential.
3. The future of our nation and community depends on students possessing the skills and personal goals necessary for lifelong learning, productive employment, competition in the global economy, and contributions as members of society. . . .

9. District Board Policy No. 4119.21, "Code of Ethics," sets forth the District's expectation that all certificated employees "maintain the highest ethical standards, to follow district policies and regulations, and to abide by the state and national laws. Employee conduct should enhance the integrity of the district and the goals of the educational program."

10. District Board Policy No. 4119.3, "Duties of Personnel," provides that, "All employees shall fulfill the duties and responsibilities set forth in their job descriptions and shall comply with Board policies, administrative regulations, applicable employee agreements, and local, state and federal laws."

11. Pursuant to District Board Policy No. 4100, "Certificated Personnel," "Each certificated staff member shall be held accountable for duties assigned to him/her and shall undergo regular performance evaluations in accordance with law and negotiated agreements."

12. Article 16000, "Evaluation," of the collective bargaining agreement (CBA) between the District and the San Jose Teachers Association, along with the Education Code, sets forth the evaluation system for certificated employees at the District.

13. After the second year of permanent status, each certificated employee (also referred to as a "teacher") of the District is evaluated by an administrator once every three years.

14. The evaluating administrator gathers evidence from observing partial lessons and at least two full lessons (defined as an observation of at least 45 minutes). The evaluator provides feedback to the teacher after each observation. The evaluator then presents a written evaluation (known as a winter evaluation) to the teacher no later than the last workday in January.

15. If the teacher receives an overall rating of "Meets Standard" in the winter evaluation, the evaluation cycle is concluded.

16. If the teacher receives an overall rating of "Does Not Meet Standard" in the winter evaluation, (1) the teacher and evaluating administrator jointly develop a support plan, (2) the teacher may request a Consulting Teacher (CT) (a teacher released full-time to gather evidence to inform and validate evaluations) with similar grade and curricular experience if possible, and (3) the evaluating administrator and CT (if requested) independently gather further data and independently issue new evaluations based upon the new data (spring evaluation).

17. If the teacher receives an overall rating of "Meets Standard" from all evaluators in the spring evaluation, the evaluation cycle is concluded.

18. If the teacher receives an overall rating of "Does Not Meet Standard" from all evaluators in the spring evaluation, the teacher is moved into the Teacher Assistance Program (TAP).

19. TAP provides coaching and support to these teachers in the following year. In TAP, the teacher is assigned a TAP mentor, a new evaluating administrator, and a new CT, and is evaluated in three new periods. If the teacher continues to receive overall ratings of "Does Not Meet Standard" in the TAP year, the teacher is typically dismissed from employment.

20. The District issued a Teacher Evaluation System Handbook (Evaluation Handbook), which contains guidance and sample reports to assist evaluators.

21. Pursuant to the Evaluation Handbook, teacher evaluations in the District are based on the following five (5) performance standards:

Standard I. Teachers create and maintain effective environments for student learning.

Standard II. Teachers know the subjects they teach and how to organize that subject matter for student learning.

Standard III. Teachers design high-quality learning experiences and present them effectively.

Standard IV. Teachers continually assess student progress, analyze the results, and adapt instruction to promote student achievement.

Standard V. Teachers continually improve and develop as professional educators.

These standards were developed by members of the Teacher Quality Panel (TQP), which is made up of administrators and representatives of the San Jose Teachers Association (Union). Generally, evaluators make several claims related to each standard, cite observations supporting the claims, and then conclude with a statement of the impact the claimed behavior had (or would be expected to have) on the teacher's students.

22. In response to the transition to distance learning associated with the COVID-19 pandemic, the District and the Union executed a Memorandum of Understanding ("MOU"), in which they agreed that teachers would not be evaluated under Standards II, III, and V during the 2020–21 and 2021–22 school years. Therefore, new evaluations during this period (including respondent's) were based upon performance in Standards I and IV only.

23. Respondent's classes were taught via remote learning (also known as distance learning) for almost all of the 2020–21 school year—students stayed home and attended classes virtually. Class periods were lengthened to 97 minutes. A small percentage of his students returned to campus on a hybrid basis for the last six weeks of school. Respondent's classes were taught in person throughout the 2021–22 school year.

24. Remote learning in the District, including respondent's classes, was conducted using an online platform called Canvas, which contains a syllabus; work assignments; and tools for students to submit work and communicate with the teacher. Teachers (including respondent) taught classes in real time using WebX (a videoconferencing platform similar to Zoom). The teacher of each class could control students' access to a chat platform, and students' ability to virtually raise their hands or unmute themselves. Teachers could share their computer screen with the students and the students could simultaneously work on the Canvas platform.

Respondent's Background

25. Respondent holds a clear single subject teaching credential authorizing him to teach English and social sciences. Respondent began teaching in the District in August 2006. He taught social studies and language arts at the District's John Muir Middle School (John Muir), except for teaching summer school at different locations.

26. Respondent was evaluated at least twice in his first two years with the District and thereafter once every three years. Prior to the 2020–21 school year, respondent received a rating of "Meets Standard" in each of these evaluations.

27. In the 2020–21 and 2021–22 school years, respondent was assigned to teach eighth grade social studies and sixth grade language arts classes.

Respondent's 2020–21 Performance Evaluations

28. Anessa Amer is currently the assistant principal of instruction at Willow Glen Middle School. For the previous three years she was the assistant principal of discipline at John Muir. She holds credentials in administrative services and multiple subject teaching. She taught second and third grade classes from 2012 through 2016.

29. Amer's training in evaluating teachers includes a course in her credential program, as well as training specific to the District. The District-specific training lasted seven days, was provided by the creators of the District's evaluation system, and included practice observations and review of the Teacher Evaluation Handbook. The 2019–20 school year was the first year she evaluated teachers.

30. In the 2020–21 school year, Amer evaluated five teachers, including respondent, all assigned to her by Jeanette Harding, John Muir's principal. Amer reports that she had no conversations with Harding about previous evaluations of respondent, nor regarding how to evaluate respondent. Amer reports that prior to her evaluation of respondent she had little interaction with respondent and she felt no animosity towards him.

31. Amer opines that an evaluator does not need to have taught the same grade level or subject matter as the teacher being evaluated because the evaluation system is based on universal teaching standards.

32. Amer's observations of respondent were all virtual, through the WebX and Canvas platforms. She was able to see him teaching, see the students' screens, and sometimes was able to see the chat platform.

33. In the winter evaluation period, Amer conducted three “full” observations of 45 minutes or longer (on October 19, and November 3 and 6, 2020) and five “drop-in” observations of 10 to 30 minutes each (on September 17, October 16, November 24, December 17, 2020, and January 5, 2021).

34. Amer reports that she observed limited opportunities for students to participate in respondent’s classes; limited ways that he collected or reflected on data in order to reteach; and limited opportunities for students to build community in respondent’s classes. Overall, she opined that his classes were not positive learning environments.

35. Amer reports that when she offered respondent support and coaching, he became defensive and frustrated. When she told respondent that she had concerns about whether he would “pass” the evaluation, their professional relationship quickly deteriorated. In a November 12, 2020, email respondent primarily blamed distance learning for issues identified by Amer and accused Amer of bias against him. Shortly thereafter, in a videoconference with Amer to discuss an observation, respondent refused to turn on his audio or video and insisted on communicating with Amer only through the WebX chat feature. He explained that this was to show Amer the difficulties of teaching remotely. Eventually Amer ended the meeting. In a subsequent email, respondent demanded an apology from Amer for ending the meeting.

36. Amer reports that respondent told her that the Canvas and WebX platforms were a struggle for him, but he did not attend office hours or coaching that she offered to him to address those struggles.

37. On or about January 14, 2021, Amer completed respondent’s Winter Evaluation Report based on the three full-lesson observations and five drop-in

observations and their debriefing conversations. Despite many attempts to schedule an evaluation conference, respondent refused to meet with Amer.

38. Respondent also refused to sign the Winter Evaluation Report, despite the fact that it states that such a signature only indicates that “the teacher has read and reviewed the final evaluation report, not necessarily that the teacher concurs with the contents” and that the teacher may attach comments or submit a separate response to the TQP.

2020–21 WINTER EVALUATION REPORT

39. In the 2020–21 Winter Evaluation Report, Amer assigned respondent an overall rating of “Does Not Meet Standard” and the same rating for Standards I and IV (the only two used that school year). In summary, Amer reported that respondent:

has not satisfied the requirements to meet standard for this evaluation period. He makes excuses for student performance, is unwilling to look critically at his own instructional decisions, and has not built classroom culture to support students. He uses limited assessment formats, cannot show evidence of data analysis and/or the impact of data-driven decisions on lessons or units.

40. Under Standard I (Teachers create and maintain effective environments for student learning), Amer reported several claims to support the Does Not Meet Standard rating.

41. Amer reported that respondent “does not take responsibility for academic growth and achievement of all students.” She cited numerous instances in

which respondent only called on volunteers to answer questions. She cited examples of respondent blaming the gender distribution of classes; stating of “unresponsive” students “If that is the path they’ve chosen, I don’t keep pushing it . . . I don’t have an answer for the unresponsive ones, but I can try with the others”; blaming a student’s inability to speak English well; describing poor-performing students as “seat warmers”; and blaming the remote learning paradigm. Amer opined that as “a result some students believe it is acceptable or even inevitable that they will not succeed.”

42. Amer reported that respondent “does not use opportunities to build interpersonal relationships with students.” She cited several examples in which respondent began class with little or no personal interaction with students. She also reported that respondent did not have “set” office hours, but instead required students to schedule a time for such interaction. Amer reported that as “a result, not all students feel comfortable taking risks in class.”

43. Amer reported that respondent provides “limited support to students that are identified as needing additional support.” Among the examples cited were: very few of respondent’s comments on student work consisted of more than “not complete,” “more,” “what?” or the like; respondent rejected the suggestion that he use technological tools to help English Learner students as too time-consuming to learn, and also rejected the idea of allowing a student with a disability to retake assessments as an accommodation, stating that he did not allow others to do so, “so I don’t think giving it to one student would make sense.” At hearing, Amer explained that this practice is a common accommodation for special education students and legally required if included in a student’s individualized education plan (IEP). Amer reported that as a result of respondent’s limited support, “students that need additional support

are more likely to struggle or fall behind than students that do not need additional supports.”

44. Under Standard IV (continually assess student progress, analyze the results, and adapt instruction to promote student achievement), Amer reported several claims to support the Does Not Meet Standard rating.

45. Amer reported that respondent “uses a limited variety of formal and informal assessment formats and/or techniques.” She cited respondent’s heavy reliance on formal assessments such as true/false, multiple choice, and fill-in-the blank questions, his failure to have students interact with each other during class discussions, and his heavy reliance on volunteers to answer questions in class. Amer opined that this makes it likely that only some students can show mastery of the curriculum.

46. Amer reported that respondent “does not analyze and use data to adapt instruction or lesson plans after assessments.” She cited respondent’s failure to mention the results of formal assessments in the subsequent classes on two occasions, and respondent’s own admissions that he does not use any objective measures to determine when his instruction was insufficiently effective. He explained “I looked at the data in the class you brought up [on 10/22/2020] and I didn’t see the problem in the other 2 classes, and again I look at the demographic of that group I have and again I don’t mean to be dismissive of them, but I don’t see the cause for alarm. I don’t think there is a need to redo a lesson since it wasn’t an issue in all the classes.” Amer reported that, as “a result, students that do not master the content are moved forward in the curriculum without the skills they need to be successful.”

SUPPORT PLAN

47. Because respondent received an overall rating of Does Not Meet Standard, he was placed on a support plan.

48. The support plan addressed the areas in which he received a Does Not Meet Standard rating and included specific examples of actions to improve in these areas. For example, to better “use opportunities to build interpersonal relationships with students,” respondent was advised to incorporate at least one such opportunity to learn more about his students in each class, such as making a connection between material and student context, including interests, current events and student experiences. To provide additional support to students that need it, respondent was advised to complete two trainings, identify one or two students to use as a case study, and add support structures to his lesson plans, including sentence frames, chunking, and questions aimed at different levels of knowledge.

49. Amer reports that it was “incredibly difficult” to get respondent to participate in the preparation of the support plan. Respondent again declined an offer of coaching. Respondent also refused to sign or participate in the finalization of the support plan. Amer also reports that she checked the electronic history of support materials provided to respondent on March 22, 2021, and again at the time of reevaluation, and respondent had not accessed them.

2020–21 SPRING EVALUATION REPORT BY AMER

50. In the 2020–21 spring evaluation period, Amer conducted two full observations (on April 1 and 5, 2021) and three drop-in observations (on March 29, and April 9 and 19, 2021).

51. On the Spring Evaluation Report, Respondent again received an overall rating of Does Not Meet Standard and the same rating for Standards I and IV.

52. Under Standard I, Amer again reported that respondent did not take responsibility for academic growth and achievement of all students and that, as “a result, some students believe it is acceptable or even inevitable that they will not succeed.” Amer cited examples of respondent relying primarily on two volunteers to answer most oral questions in a class, respondent failing to provide a rubric (blueprint for success on assignment) or providing a rubric that was incomplete or insufficiently specific.

53. Amer again reported that respondent “does not use opportunities to build interpersonal relationships with all students,” resulting in not all students “feeling comfortable taking risks in class,” citing examples of such missed opportunities such as starting class without a welcome routine and respondent not having set office hours, but instead requiring students to make an appointment to speak with him.

54. Amer again reported that respondent “provides limited support to students that are identified as needing additional support,” citing examples such as respondent leaving less comments on the work of English-learner students, failing to encourage such students to finish a final project, and refusing to allow students to retake assessments or daily assignments.

55. Under Standard IV, Amer again reported that respondent “uses a limited variety of formal and informal assessment formats and/or techniques.” She cited respondent’s heavy reliance on formal assessments such as true/false, multiple choice, and fill-in-the blank questions, his infrequent use of informal methods to check for

understanding, and his heavy reliance on volunteers to answer questions in class. Amer reports that as a result, “students are unable to show mastery in a variety of ways.”

56. Amer again reported that respondent “does not analyze and use data to adapt instruction or lesson plans after formal or informal assessments,” citing examples of respondent’s inability to articulate how he was assessing student learning to shape his lesson planning, an example where he only mentioned the previous assessment once in 36 minutes, and an example where, after a student answered a question incorrectly, respondent stated “oh ok. [Student’s name] what did you put for when this chapter is happening? Yes—great 4th grade” and failed to return to this student that answered incorrectly. Amer reports that, as “a result, students that do not master the content are moved forward in the curriculum without the skills they need to be successful.”

57. Amer summarized her 2020–21 Spring evaluation:

[Respondent] still has not satisfied the requirements to meet standard for this evaluation period. He continues to make excuses for student performance, is unwilling to look critically at his own instructional decisions, and has not built classroom culture to support all students. He uses limited assessment formats, cannot show evidence of data analysis and/or the impact of data-driven decisions on lessons or units.

2020–21 SPRING EVALUATION REPORT BY CT JAHRMAN

58. After receiving Amer's Winter Evaluation Report, respondent requested a CT evaluator, and the TQP assigned Ryan Jahrman to evaluate him in that role in spring 2021. Jahrman testified at hearing.

59. Jahrman is currently the assistant principal of curriculum instruction at San Jose High School. Prior to the current school year, he served as a CT for six years at multiple sites in the District. Prior to that he taught English to grades 9 through 12 at San Jose High School. Jahrman holds a single subject teaching credential in English and an administrative services credential. He holds a master's degree in urban education.

60. Jahrman reports that he never saw Amer's evaluations of respondent or spoke with her during the process of his evaluation of respondent. Nor did he ever speak about respondent with the other individuals who evaluated respondent the following year. He views his role as a CT evaluator as acting like a "second set of eyes" to agree or disagree with the administrator evaluator. In addition to an initial seven-day training, Jahrman received yearly evaluation training. Jahrman reports that he was trained to include teacher statements from reflecting conferences in his evaluation reports, as well as direct observations of teaching and student work. Jahrman believes that he evaluated respondent in the same manner as any other teacher.

61. Like Amer, Jahrman opines that an evaluator does not need to have the same teaching experience as the teacher being evaluated. He reports that he has evaluated Spanish and physical education teachers, and that the expectations are the same regardless of subject matter or grade level.

62. Jahrman's evaluation report of respondent is dated April 28, 2021. He conducted one full observation (on April 1, 2021) and six drop-in observations (on March 23 and 29, and April 5, 7, 20, and 23, 2021). Jahrman reported an overall rating of Does Not Meet Standard. He summarized his evaluation as follows:

[Respondent] does not take responsibility for the academic growth and achievement of all students. This is apparent both in the lack of support for students who might be struggling, and in remarks by [respondent] in which he explicitly places blame on his students. [Respondent] does not provide opportunities for students to collaborate or interact with one another. Instead, the overwhelming majority of class time is dedicated to students working independently in silence, and/or students (usually volunteers) sharing answers with the class. [Respondent] also does not sufficiently assess student progress before, during and after instruction; he does not assess students' readiness for activities before releasing students to work, he does not meaningfully assess students as they are working, and his assessment after instruction consists primarily of calling on volunteers.

On the other hand, [respondent] does positively affirm students' responses. He has also attempted to implement some of the feedback given during this round. For example, he called on some volunteers, attempted using a Webex poll question, and gave students an outline that they could

use for a project. Nevertheless, these strategies were not used consistently or effectively, and the overall pattern of this evaluation round is that [respondent] does not take responsibility for all students, does not provide opportunities for peer collaboration or interaction, and does not sufficiently assess students.

63. Under Standard I, Jahrman reported several claims to support the Does Not Meet Standard rating. Jahrman reported that respondent “does not take responsibility for the academic growth and achievement of all students. Instead, he takes the approach: ‘If they didn’t learn it, it’s their fault.’” Jahrman cited multiple examples of respondent failing to provide scaffolding for reading or textbook work and failing to check for understanding; and examples of respondent blaming his students for failing to participate or complete assignments. Jahrman noted that on one occasion respondent provided sentence frames to his students, but concluded: “[n]evertheless, the overall pattern in this round is that [respondent] does not take responsibility for the academic growth and achievement of all students, but instead places blame on students. As a result, students who need additional support may not be successful in his class.”

64. Jahrman reported that respondent “does not give students opportunities to positively interact with one another,” citing numerous examples. Jahrman concluded that, “[i]n this way, students may not have the opportunity to develop as collaborative 21st century learners.”

65. Jahrman also noted that respondent “does positively affirm students’ efforts” and cited several examples. He observed that “In this way, students might feel safe to take academic risks. However, these positive affirmations are undermined by

the lack of supports for students who are struggling . . . and the lack of formative assessment.”

66. Under Standard IV, Jahrman also reported several claims to support the Does Not Meet Standard rating. Jahrman reported that respondent “does not sufficiently assess student progress before, during and after instruction,” citing examples in which respondent called only on volunteers to answer questions, released students to work independently without first checking for understanding, or otherwise did not assess whether most of his students understood the course material. Jahrman reported that, in this way, respondent “may not know if students are ready for an activity, and he may not know which students need extra support.”

67. At hearing, Jahrman reported that his overall observation of respondent was that he failed to take responsibility for his students, struggled in many ways, blamed students, did little to support them, failed to provide students the opportunity to collaborate, and failed to adequately assess students during class. Jahrman observed respondent make some attempts to improve, but opines that respondent’s failure to significantly improve demonstrates that he is not able to do so.

2021–22 School Year Performance Evaluations

68. Throughout the 2021–22 school year, classes were in person and reverted to 56 minutes in length. A mask mandate was in effect through March 2022, and many students continued to wear masks through the end of the school year.

ASSIGNMENT TO TEACHER ASSISTANCE PROGRAM, SUPPORT PLAN, AND THE “TEN ARENAS”

69. Because respondent had received ratings of Does Not Meet Standard on both of his 2020–21 spring evaluations, he was assigned to TAP (see Factual Findings 18 & 19). Sheila Billings was assigned as his TAP Mentor for the 2021–22 school year. Michelle Reghitto was assigned as his administrative evaluator. Kara Hafner was assigned as his CT evaluator.

70. Respondent was also provided a support plan addressing the areas marked “Does Not Meet Standard,” with strategies and support structures to help him improve in these areas. This plan contain several specific goals for respondent, such as welcoming students as they enter the classroom; making connections between the course materials and students’ experiences; providing clear feedback, sentence frames, and questions of an increasing depth of knowledge; performing one “check for understanding” every 10 minutes, using informal and formal assessments with a variety of formats; providing assessment feedback to students within two school days; and using formal and informal data to plan instruction, including reteaching content for which students did not demonstrate 80 percent mastery. Because respondent’s 2020–21 evaluations and 2021–22 support plan were based only on Standards I and IV, his 2021–22 evaluations were likewise based only on those two standards.

71. The support plan and the evaluations that followed frequently reference the “10 Arenas” (10 Arenas), which were alternatively referenced as the “Ten Arenas for Communicating High Expectations” and the “10 Arenas of everyday verbal interactions with students.” The 10 Arenas are:

1. Calling on students: Aspects include: calling students by name, demands, persistence, frequency of interaction, and feedback.
2. Responding to students' answers: Aspects include acknowledging/affirming, sticking with a student, wait time, asking a student to elaborate, giving praise.
3. Giving Help: Whether or not a student requests help.
4. Changing Attitude Toward Errors: (persevere and return)—Does the teacher view it as lack of ability/weakness or opportunity for learning/growth. The teacher may say "You can do this!"
5. Giving and Negotiating Tasks and Assignments: Explain why students are doing assignments (the purpose and objective).
6. Giving feedback according to criteria of success: Giving verbal or written feedback.
7. Positive framing or reteaching: Possibly differentiating, frequent follow ups.
8. Tenacity: The teacher conveys an "I won't give up on you" message.
9. Grades, Retakes, and Redos: Grading practices.
10. Grouping: Students are grouped to provide additional support. This may include flex grouping.

72. The 10 Arenas come from a training textbook called *The Skillful Teacher*, which was the primary reference book used in the seven-day evaluation training the District provides to evaluators. Hafner reports that evaluators in the District have been using the 10 Arenas in teacher evaluations for at least 10 years, but the 10 Arenas are not mentioned in the *Teacher's Evaluation Handbook* because the handbook does not delve into all the details of ways teachers can communicate with students. Reghitto also reports that she learned about the 10 Arenas in the District's evaluation training.

2021–22 EVALUATIONS BY REGHITTO

73. Reghitto is the manager of student services for the District. She works with at-risk students, supports principals, and manages school-wide systems related to student behavior and families that need additional services at home. Reghitto has worked for the District for approximately 20 years, in various administration positions, primarily as principal or assistant principal of several middle schools. Reghitto holds a California administration services credential, and previously held a California preliminary multisubject credential. Prior to joining the District, she taught middle school math, science, and social studies in California, Utah, Idaho, and Maryland. She evaluates teachers in the District yearly as an administrator. Pursuant to the TAP program, Reghitto evaluated respondent three times in the 2021–22 school year. She reports that she never discussed her evaluations of respondent with Hafner or any District administrator during the process.

November 29, 2021, Evaluation Report by Reghitto

74. During the first round of TAP, Reghitto conducted six full-lesson observations (October 11, 13, 21, and 26 and November 4 and 10, 2021) and two

drop-in observations (on September 15 and 22, 2021) of respondent, and regularly met and communicated with him following each observation.

75. Reghitto issued an evaluation report of respondent dated November 29, 2021. She reported an overall rating of Does Not Meet Standard. She rated respondent as Does Not Meet Standard on both Standard I and IV. Under Standard I, Reghitto claimed that respondent (1) does not take responsibility for academic growth and achievement of all students, (2) does not use opportunities to build interpersonal relationships with students, and (3) provided limited intervention to students that are identified as needing additional support. Under Standard IV, Reghitto claimed that respondent (1) uses a limited variety of formal and informal assessments formats and/or techniques, and (2) does not analyze and use data to adapt instruction or lesson plans after assessments. Using the 10 Arenas as a framework, Reghitto provided numerous examples to support these claims, also noting instances in which respondent showed improvement.

76. She summarized her evaluation as follows:

While [respondent] has shown progress in Standard 1 and Standard 4, he does not meet expectation.

In Standard 1 - Problem 1 [does not take responsibility for academic growth and achievement of all students] - [respondent] does not use the 10 arenas of daily verbal interactions with students. While he does ask a lot of questions to check for understanding and he does extend student answers and/ or ask more questions to provide clarity, he typically does not call the students by name and

does not acknowledge, give feedback, or praise.

[Respondent] provides feedback via Canvas, but does not provide students with clear feedback verbally or in writing.

While he provides students rubrics, sentence frames and exemplars, he does not reference them, or consistently model use of tools during direct instruction, thus the students do not utilize the tools as a part of their practice.

On 10/26, I saw a shift in his use of the 10 arenas. While there was an increase in name usage, a slight increase in giving help, and an increase in grouping, [respondent] still needs to be specific with feedback provided, adjust his rubric, frame the reteaching, and address errors.

[Respondent] stated, "I understand you[r] point on a couple. Some of it disagree with. I use students' names all of the time. You make it seem as if I do not know my students' names. I learned their names faster this year." He continued, "We talked about this before. You have your perception of things I have mine."

While I have seen an increase in the use of the 10 arenas starting on 10/26, my recommendation is that [respondent] post a visual of ELA and Social Studies rubrics for students to reference. [Respondent] has posters around the room that are teacher centered. He should review and post what an exemplar prompt looks like and display it during class or on the wall. I also suggest he change his rubric to be more

closely linked to the San Jose Unified rubric. For example to get a 10 on a Social Studies prompt, [respondent's] rubric states, "Responds well in relevant manner with examples to topic." What does "well" mean? How many examples? San Jose Unified sample rubrics provide a more clear definition of what "well" means and definition the number of examples that would be considered exemplar. I also recommend, [respondent] plan time to incorporate the 10 [arenas] until it becomes "organic" for him.

[Respondent] stated, "I'm not doing full blown essays. It's for history." This statement was regarding the rubric.

In Standard 1 - Problem 2 [does not use opportunities to build interpersonal relationships with students] - [respondent] does not use opportunities to build interpersonal relationships with students. While [respondent] consistently begins each class welcoming his students at the door. After this interaction [respondent] does not consciously incorporate opportunities to learn more about his students.

There is also no connection between the material, student context, and current events. During all lessons [respondent] spent approximately 45 minutes covering material.

[Respondent] stated, "I am going to start incorporating warm ups, which was something I did with my students

prior to COVID to build interpersonal relationships with students.”

I agreed and recommended he use the warm up as a way to integrate content with [students’] current life experience.

In Standard 1 - Problem 3 [provided limited intervention to students that are identified as needing additional support] - [respondent] does not provide intervention to students that are identified as needing additional support. [Respondent] tends to teach lessons [to the] whole class. For 33% of the lessons observed, students were given the opportunity to collaborate while working on in class assignments.

[Respondent] stated, “Students are heterogeneously grouped. This helps those students that need additional support.” I feel [respondent] could take this a step further.

My recommendation is that [respondent] take advantage of opportunities, when students are in collaborative groups, to work with students that are in need of more help and provide more one on one support or accommodations. For example, invite specific students to utilize the sentence frames as needed. I also recommend he provide more rigor by giving students the opportunity to find their own passages during ELA lessons.

[Respondent] agreed and stated, “I agree with you. When I have a substitute the students usually find their own

passages. As a class, we also tend to find the same passages.”

In Standard 4 - Problem 1 [uses a limited variety of formal and informal assessments formats and/or techniques] - While still not effective, [respondent] has made the most progress in this area as he has made attempts to incorporate sentence frames in his lessons and model usage. [Respondent] also asks a lot of questions during his lesson to check for understanding. [Respondent] has also started incorporating opportunities for collaboration. But does not provide small group opportunities for intervention. While he has started incorporating these strategies he does not provide students with consistent feedback, acknowledgement, or praise.

[Respondent] stated, “I don't know what you want. Have you looked at all on Canvas?”

My recommendation is that [respondent] will provide all students with verbal or written detailed feedback that support each student mastering the learning objective.

In Standard 4 - Problem 2 [does not analyze and use data to adapt instruction or lesson plans after [a]ssessments] - [respondent] plans his lessons based on the scope and sequence. He does not reteach information based on student formal or informal assessments. For example. On

November 10th, [respondent] gave a Chapter 7 quiz the average score on the quiz was 61%. While he does offer regrades, he does not reteach content. He moved on to the next topic.

[Respondent] stated, "I think you made an assumption here as you are not here to see the next lesson or two. This is clearly an assumption and not fact."

My recommendation is that [respondent] use the data from his assessments to determine which objective he will reteach. [Respondent] also has an objective posted for multiple days thus giving me the impression that he is posting a standard versus an objective. Thus possibly making it difficult for him to determine the skills or content he will reteach. Therefore I also suggesting he post daily objectives with student outcomes versus the unit standard. Thus he can utilize the results of his informal/formal assessments to determine what he will teach the following day.

[Respondent], "I don't necessarily have the same objective. In History today it was what it is and tomorrow it will be something different. In Language Arts it may be [the] same. The outcome I do not feel it will be explicitly expressed on the board."

77. At hearing, Reghitto reported that respondent did not seem receptive to her feedback, mostly getting defensive or “upset.”

78. On December 16, 2021, Reghitto, Hafner, and Billings attended a support plan meeting with respondent and issued a revised Support Plan Meeting Outcome document. Respondent refused to sign this document.

February 18, 2022, Evaluation Report by Reghitto

79. During the second round of TAP, Reghitto conducted six full-lesson observations (January 12 [two classes], 19, and 27 and February 10 [two classes], 2022) of respondent, despite the fact that he was absent nine school days in January and February of 2022. Reghitto met with respondent via teleconference at the end of most weeks to provide feedback and discuss his teaching.

80. Reghitto issued an evaluation report of respondent dated February 18, 2022. She reported an overall rating of Does Not Meet Standard. She rated respondent as Does Not Meet Standard on both Standard I and IV. Under Standards I and IV, Reghitto made the same claims as in her previous evaluation report, except that for the second claim, she acknowledged that respondent had improved by using “daily warmups to provide opportunities to build interpersonal relationships with students,” but also reported that “he does not provide consistent opportunities for the rest of class.” She again recommended that he plan one time during each lesson to “build interpersonal relationships until it becomes ‘organic’ for him.”

81. In her evaluation and testimony at hearing Reghitto reported that respondent also showed improvement in calling on students and acknowledging and clarifying answers, but opined that he “still needs to focus on giving help, changing attitude toward errors, feedback according to criteria, and tenacity when students do

not meet expectation." She and respondent "had a discussion around improving in these areas on January 26, 2022," but reports that "due to his absences and lack of evidence, I was unable to see growth" in this area.

82. Reghitto reported that respondent still provided limited intervention to students identified as needing additional support. Specifically, she reports that when students were given the opportunity to collaborate, respondent never provided individualized support or attention. She reports that from February 8 through 11, 2022, respondent identified 16 students to whom he was providing additional support, but of 22 students receiving failing grades, only 6 received additional support from respondent.

83. Reghitto also reported that respondent's performance under the first claim under Standard IV (uses a limited variety of formal and informal assessments formats and/or techniques) further regressed, in that he stopped incorporating sentence frames into his lessons and "model usage." She credited him with starting to "acknowledge and praise student answers."

84. Under the second claim under Standard IV (does not analyze and use data to adapt instruction or lesson plans after assessments), Reghitto reported that respondent regularly posted a goal for three to five classes, but that this goal was more of a standard than an objective because it was not updated or changed and therefore he was not incorporating data in determining what skills or content he should reteach to students.

85. Respondent refused to meet with Reghitto to discuss her February 18, 2022, evaluation report, or to submit comments on or sign the report.

April 29, 2022, Evaluation Report by Reghitto

86. During the third round of TAP, Reghitto conducted five full-lesson observations on March 15, 22, and 28 and April 22 (two classes), 2022. Respondent was absent 11 school days during this evaluation period.

87. Reghitto met with respondent via teleconference at the end of most weeks to provide feedback and discuss his teaching.

88. Reghitto issued an evaluation report of respondent dated April 29, 2022. She again reported an overall rating of Does Not Meet Standard and ratings of respondent as Does Not Meet Standard on both Standard I and IV. Under Standards I and IV, Reghitto made the same claims as in her previous evaluation report.

89. Reghitto reported that respondent's performance regarding taking responsibility for academic growth and achievement of all students declined in this evaluation period, in particular a decline in his use of the 10 Arenas, specifically grouping (temporarily putting students together in small groups for the purpose of learning a specific skill or achieving a specific learning goal). Reghitto reported that she did not observe respondent use grouping during any of the observation period, and that respondent was resistant to using this arena. She also reported a decline in respondent's giving help, and changing attitudes towards errors.

90. Regarding building interpersonal relationships with students, Reghitto again credited respondent in this area for his daily warmups, but again reported that respondent did nothing more to build interpersonal relationships during the rest of each class. At hearing, Reghitto reported that respondent never told her that students' wearing of face masks was an obstacle to building interpersonal relationships with them.

91. Reghitto reported that respondent did not provide intervention to students that are identified as needing additional support in any of the classes she observed.

92. Under Standard IV, regarding respondent's use of a limited variety of formal and informal assessments formats and/or techniques, Reghitto credited him for incorporating sentence frames and modeling usage in one lesson and acknowledging and praising student answers, she nonetheless found him deficient in this area for failing to provide clear feedback to students.

93. Under the second claim under Standard IV (does not analyze and use data to adapt instruction or lesson plans after assessments), Reghitto again reported that respondent regularly posted a goal for three to five classes, but that this goal was more of a standard than an objective because it was not updated or changed and therefore he was not incorporating data in determining what skills or content he should reteach to students. Reghitto also cited an instance where respondent simply played a video and did not show his students how to do an assignment. She reports that 59 percent of respondent's class received an F on the assignment.

94. Reghitto expressly cited respondent's numerous absences as a factor in multiple categories of this evaluation. Essentially, she reported that his absences made it difficult for him to show progress, or in some cases resulted in a regression, in his teaching performance.

2021–22 EVALUATIONS BY HAFNER

95. Hafner evaluated respondent in her role as a CT during the 2021–22 school year. She did not consult with Reghitto during this process except to schedule one joint observation in each round of evaluation.

96. Hafner is the assistant principal of Franklin High School in Seattle, Washington. For the eight years prior to July 2022, she worked for the District as a CT and as an in-district trainer on the District's evaluation system. Prior to that Hafner taught middle school English and history for the District. For the three years prior to that she was a teacher in Phoenix, Arizona. Hafner holds a California K-8 multiple subject teaching credential, with a certification in elementary education and an art and reading specialist supplement. In addition to her job as assistant principal in Seattle, she currently leads online training for the District on a short-term contract.

97. Hafner's understanding is that respondent asked for the CT with the most similar experience and she believes that is why she was assigned to evaluate him because of her experience teaching middle school English and history for the District.

November 28, 2021, Evaluation Report by Haffner

98. During the first round of TAP, Hafner conducted four full-lesson observations (October 13 and November 2, 15, and 23, 2021) and one drop-in observation (on October 25, 2021) of respondent, and regularly met and communicated with him following each observation. She also attempted to observe respondent's teaching on four other dates, but he was absent.

99. Hafner issued an evaluation report dated November 28, 2021. Hafner reported an overall rating of Does Not Meet Standard. She rated respondent as Does Not Meet Standard on both Standard I and IV.

100. Under Standard I, Hafner reported that respondent failed to consistently: (1) take responsibility for academic growth and achievement of all students; (2) plan for and provide "differentiation and scaffolding for students that are identified through IEP/504/SST/EL process and/or class data as needing additional support"; and

(3) build interpersonal relationships with students each class period. Under Standard IV, Hafner reported that: (1) respondent "inconsistently uses a variety of informal and formal assessment formats and/or techniques at varying depth of knowledge levels and in a variety of learning styles to assess students' mastery of daily objectives tied to unit assessments" and (2) respondent analyzes data from informal and formal assessments, however, she did not observe him using that data to determine and plan for instruction.

101. Under Standard I, Hafner observed that respondent primarily called on volunteers, except in one class. She reported that when a student answered incorrectly, respondent typically moved on to other volunteers until he received the right answer instead of working to ensure that each student understood the material. Hafner reported that she did not observe respondent attempt to change student attitudes towards errors or show tenacity towards student learning.

102. Under Standard IV, Hafner observed respondent failing to regularly check for student understanding, then improve on this measure for one class period, then regress again. She did not observe respondent use a variety of formal assessments or "techniques that span and multiple [depth of knowledge] levels and learning styles." Respondent did not provide her with any collected data and she observed multiple times that the identified objective for the lesson had not changed since the previous class and thus there was not a new learning objective for each class.

103. In her report, Hafner stated that on October 13, 2021, she observed only five checks for understanding. Under this statement she wrote four bullet points, each with sub-bullets. Each bullet point addresses a topic reviewed by respondent, with sub-bullets listing specific questions on the topic, some of which were asked to more than one student. On cross examination, Hafner was asked why she claimed to have

observed only five checks for understanding when Reghitto reported more than 17 questions from the same period observed. Hafner was unable to explain. Moreover, the text of her report states that more than five questions were asked. It was not clear from the evidence whether a “check for understanding” is limited to one question.

104. At hearing, Hafner reported that respondent, at times seemed receptive to her suggestions for improvement, but often expressed that he did not feel he was being evaluated fairly, and as the evaluations progressed, he expressed the opinion that he did not need to change any aspect of his teaching. She does not recall respondent ever explaining to her why he thought he was being treated unfairly.

105. Respondent refused to sign this evaluation or the second support meeting outcome document. Respondent declined training on the 10 Arenas, stating that he did not need it.

February 14, 2022, Evaluation Report by Haffner

106. During the second round of TAP, Hafner conducted four full-lesson observations (January 18 and 19, and February 9 and 11, 2022) and one drop-in observation (on January 24, 2023) of respondent, and regularly met and communicated with him following each observation. She also attempted to observe respondent’s teaching on four other dates, but he was absent.

107. Hafner issued an evaluation report of respondent dated February 14, 2022. Hafner again reported an overall rating of Does Not Meet Standard, again rating respondent as Does Not Meet Standard on both Standard I and IV. Hafner identified the same claims that she identified in the previous evaluation.

108. Hafner reported that respondent initially called on more non-volunteers, but quickly regressed and did not follow her suggestion to use cards to randomize the students questioned.

109. Hafner reported that on January 18 and 19, and February 9, 2022, respondent "did not plan or incorporate at least one opportunity to learn more about his students within the structure of the day." In Reghitto's February 18, 2022, evaluation report, she noted that on January 19, 2022 (a joint observation period in which respondent was showing the class the film 12 Angry Men), respondent asked at least five students what it means to be biased. A student answered "I think it means against a religion or race." On cross examination, Hafner was asked about this and she reported that she did not remember respondent's question or the students' responses. However, it does not appear that respondent's question about bias in this context was an "opportunity to learn more about his students" and therefore this questioning did not impeach the credibility of Hafner's reports or testimony.

110. Hafner observed respondent fail to redirect a student who wrote nothing for an assignment and fail to follow up with another student who failed to write anything after one prompt to do so.

111. Hafner did not observe respondent reteaching during this round of evaluation. Hafner explained that reteaching means to teach again in a different way, not just repeating prior instruction. Nor did she observe respondent demonstrate tenacity towards each student's learning.

112. Respondent offered a "retake" of a test during lunch if a student received less than 70 percent. Only 7 of 18 students retook the test, with three others verbally

committing to do so. Hafner opined that she would expect all 18 students to retake the test.

113. Hafner reported an incident on January 18, 2022, in which she observed that one of respondent's students had been sitting by herself on the side of the room, facing a window, with her back to the rest of the class. This had been the student's assigned seat since September 2021. The student reported: "At the beginning of the year, I was being disrespectful and by December break I was being more respectful but he didn't move me back" and "he low key kind of treats me different from others and so I sit over there." Hafner spoke with respondent about ways to get this student back to the rest of the class. He stated:

The young lady you are talking about, she is demonstrating some of the worst behaviors I have ever seen - she's probably #1 or #2 in all the years I've been teaching. I think I moved her there at the end of September beginning of October. It's not ideal to still have her there but her behavior has not improved. Usually she can't go more than a day without being problematic. She causes class wide disruptions and impedes teaching from happening; profoundly disrespectful. She has cursed me out in Spanish, I've had a conference with parents, divorced home; chaotic situation with not a lot of stability. We are in a different situation at Muir now. [W]e had [an] RC [resource counselor] when she was a 6th grader. Some of our more problematic 8th graders need a place where they can have a time out. We don't have that anymore and the admin has

not provided any good alternatives and we need to deal with it in the classroom. She's been my #1 challenge this year. Again the moving to the side has been: you earn it through good behavior to come back and she doesn't do it. I've told her I need a sustained period of time, give me 10 days and she can't go 3. It's a pretty extreme situation with her. In 18 years I haven't had a worse student. I hope she's paying attention to the lessons about her rights because she will have to invoke them someday - she has a mouth on her that is going to get her in trouble. A lot of conflict in life. I feel sorry for her and would like to help her but when someone is that venomous in your efforts to help and try to reach them. We don't even have any counselors. I would have had her referred to within the first week they cut the position and she's at Lincoln HS and she used to work wonders with people like this. A special little group for individuals like this we don't offer the service.

114. At hearing, Hafner reported that respondent's use of the word "venomous" gave her "pause, as a fellow educator."

115. Hafner recommended to respondent that he speak to his mentor and email this student's other teachers to identify strategies that have been found that are working. Respondent responded, "I understand what you're saying but I'm hesitant to reward behavior; she really stirs the crap in the class. I've never seen anything quite like that."

116. Hafner also observed on February 9, 2021, a male student sitting facing the back of class, whom Hafner previously observed sitting this way in November 2021. She asked respondent what had worked or not worked with this student and he reported:

Nothing's worked. Again I'm working on doing the 6th grade new seating charts and will bring him back over but not immediately next to other people but I want to moderately get him in the right direction. I want to stick a carrot out there to see if I can light a fire that will somehow . . . he's just one of those that's dug in his heels. Within the next week. I'm caught up on my grading for the moment and should be able to do 6th grade seating charts and get that implemented hopefully by mid-week next week.

117. During a debrief on February 10, 2022, respondent reported to Hafner regarding the female student discussed in Factual Findings 113 through 115:

I emailed other teachers, almost all got back to me except PE and one other. She has all female teachers except for me and gets along better with them. [They] understood my challenges with her and were sympathetic - gave me some suggestions. I created a new seating chart for 8th grade Social Studies when I got back on Tuesday and I incorporated her back with the rest and let her know we're trying it and reminded her of the rules and she's three days in and she's compliant. Still not the most pleasant person

but giving her a shot at redemption and again I'm mindful of what my colleagues said and will take it from there.

118. In three observations, respondent did not assess students at the end of the class to identify whether 80 percent had mastered the learning objective. In five observations, respondent did not give a formal assessment with a variety of formats or techniques that spanned multiple depths of knowledge. Respondent consistently checked for understanding less often than the goal of once per every 10 minutes. Hafner did not see any evidence that respondent analyzed data to plan for instruction. Hafner reports that respondent's performance in the second round of observation was very similar to the first round of evaluation and did not meet standard.

April 26, 2022, Evaluation Report by Hafner

119. During the third round of TAP, Hafner conducted five full-lesson observations (March 17 and 28, and April 7, 18, and 21, 2022) and no drop-in observations of respondent, and regularly met and communicated with him following each observation. She also attempted to observe respondent's teaching on three other dates, but he was absent.

120. Hafner issued an evaluation report of respondent dated April 26, 2022. Hafner again reported an overall rating of Does Not Meet Standard, again rating respondent as Does Not Meet Standard on both Standard I and IV. Hafner again identified the same claims that she identified in the previous evaluations.

121. Hafner reported that respondent showed improvement in taking responsibility for academic growth and achievement of all students, by calling on more non-volunteers and coming back to and providing positive encouragement to students who answered questions incorrectly. However, she reported that even this

progress was inconsistent as he did not provide support to students in some classes, did not provide a criteria for success in four classes observed, did not demonstrate positive reframing or tenacity.

122. Hafner reported that respondent was inconsistent in planning to build interpersonal relationships in lessons and connecting material to student context. On three dates, she did not observe clear feedback or sentence frames. In four of the five classes she observed, respondent did not assess the students at the end of class to determine whether 80 percent had mastered the lesson. In four of the five classes, respondent did not use a variety of assessment formats, or questions of varied depth of knowledge. Respondent again checked for understanding less than once per 10 minutes of class time. Hafner did not observe evidence that instruction was consistently modified to meet the needs of students.

123. At hearing, Hafner reported that respondent never told her that he was incorporating analyzed data into his lesson plans.

2021–22 MENTORING BY BILLINGS

124. Sheila Billings holds a multisubject teaching credential and teaches sixth grade language arts at a District middle school. She has worked in the District for 12 years and previously also taught middle school social studies classes. Prior to her current position, she worked as an instructional coach at various middle schools in the District, including John Muir. She received training for this position each year and her duties included supporting teachers and working with new teachers. She has never been an evaluator.

125. Billings was respondent's TAP Mentor for the 2021–22 school year. She observed respondent's teaching and discussed her observations with him, as well as

those of the evaluators. Billings reports that she had a positive rapport with respondent and saw that he attempted to implement some of her suggested strategies. However, she reported that in the first round of TAP respondent was meeting only some of the goals of the program. For example, she observed that he still primarily called on volunteers to answer questions. Billings reported that by the end of round two, she did not observe significant improvement because respondent was still only willing to implement some of her coaching strategies. Billings reported that she observed consistent effort from respondent in only some of the identified areas of concern. Billings reported essentially the same observations in the third and final round of TAP. She reported that respondent always listened to her suggestions but did not always implement them. Billings reports that respondent was challenged by students who did not show effort in their learning.

Other District Evidence

126. There are no allegations or evidence that any parent or student complained about respondent's teaching. The District did not submit evidence that respondent's students performed worse than average on standardized tests, or generally received worse grades than similar students taught by other teachers. The District did not submit evidence that respondent violated the requirements of any student's IEP or 504 plan.

Respondent's Additional Evidence

127. Respondent testified at hearing.

128. Respondent reports that the first time he ever heard of the 10 Arenas was in a 2021 support plan prepared by Amer, but that the 10 Arenas really just describes teaching practices that he was familiar with throughout his career.

129. Respondent never used a remote learning platform, as a teacher or a student, prior to the COVID-19 pandemic school closures. He reports that the District did not provide a training on the Canvas system until shortly before the 2020–21 school year and he only had two and one-half days to load his entire curriculum into that system. Respondent experienced many problems with Canvas and reports that it had many software bugs and had to be updated routinely. Other history teachers at respondent's school also had difficulties with Canvas.

130. The District used WebX to host videoconference classes. However, respondent reports that neither students nor teachers were trained on WebX. Respondent also reports that many students would log into WebX for a class, but never turn on their video or audio, or use the chat feature. He reports that this problem got worse throughout the school year as students came to understand that the District would not require them to turn on their video or audio.

131. Respondent reports that Amer joined John Muir as an administrator in the 2019–20 school year and one of her first actions was to remove him from the Positive Behavioral Intervention Support team, of which he had been the lead for the previous two years. He believes that Amer wanted to replace him with another person, "her own type."

132. Respondent reports that for this reason, he was apprehensive when Amer was assigned to evaluate him for the 2020–21 school year. But he was "floored" when Amer first told him he was failing the evaluation. Respondent understood that the evaluation process was supposed to be collaborative, to help teachers improve their teaching and best serve students. He feels that he was making honest, dedicated efforts to learn the remote learning platforms and that it was unfair for Amer to hold him to the same teaching standard as if classes were being held normally in person.

133. Respondent admits that he refused to use his video or audio in a debrief videoconference meeting with Amer and would only respond to her via the chat feature. He is unapologetic for this conduct and appears to feel that this was a reasonable way for him to show Amer the challenges he was facing as a teacher at that time.

134. Respondent opines that an experienced evaluator would have provided him "specific concrete examples" and "honest discourse" regarding areas that needed improvement, but with Amer, "everything was vague" and generic. Respondent reports that instead of providing specific feedback, Amer told him to consult with the "site coach," but respondent told Amer that it was "well documented" that the site coach did not "like him."

135. Respondent feels like he was honest with Amer in the debriefing conversations, but she used that candor against him.

136. Respondent reports that he often called on a small group of volunteers because those were the only students who would participate. The other students "wouldn't work with him."

137. Regarding his statement to Amer that about unresponsive students "If that is the path they've chosen, I don't keep pushing it . . . I don't have an answer for the unresponsive ones but I can try with the others," respondent opines that pushing for students to be more responsive "borders on harassment." His view is that eighth-graders "have the responsibility to show up to class."

138. Regarding a student that spoke almost no English, at hearing respondent echoed his statements to Amer that he alerted the administration that the student was

“misplaced” in his class, but they did not transfer the student. Respondent did not report any further efforts to help this student.

139. Respondent reports that he was trying to build interpersonal relationships with his students, but it was challenging during remote learning. He defends his refusal to set regular office hours as “not contractually required” and providing greater flexibility for students. He also reports that he told students they could “linger after class ended” to speak with him and numerous students did just that.

140. Respondent reports that many of the accommodations afforded to IEP and 504 students were inapplicable in the remote learning environment, but he always tries to follow those plans and understands that he could be personally liable if he does not.

141. Regarding a lack of variety in formal assessments, respondent reports that because of bugs in the Canvas software, he was unable to use short answer or essay questions and was forced to rely on multiple choice or true/false questions throughout the 2020–21 school year. He explained that his 29 formal assessments sounds like “a lot,” but included 22 “mini quizzes” of 10 questions each.

142. Regarding Amer’s criticism that respondent only provided a model with three of ten slides for an assignment involving ranking the first seven presidents, respondent stated that he disagrees with this criticism; one can “twist data however you want” and he believes that was what Amer was doing, and “you don’t hand kids all the answers, she hasn’t taught this doesn’t know what she’s talking about.”

143. Regarding Amer’s claim that he was not able to explain, in an April 23, 2021, debrief session, how he planned purposeful differentiation and lesson planning to meet the needs of ESL, IEP and 504 students, respondent contends this was a

“complete fabrication” and that he provided sentence frames and graphic organizers, coordinated with the Special Education caseload managers, and “did everything possible to help those students be successful.”

144. Respondent suggests that Amer’s report that he utilized no or few checks for understanding was a result of her observing less than the full class period, pointing out that a “full” observation is defined as 45 minutes but classes during the 2020–21 school year were 97 minutes long.

145. Regarding his March 23, 2021, comment “Yes—great 4th grade” when a student answered a question incorrectly, respondent reports that the main character in the novel the class was reading was in the fourth grade.

146. Respondent reports that he thinks that he refused to meet with Amer to discuss his Winter Evaluation Report because she gave him short notice and he was unavailable.

147. Regarding Jahrman’s claims that respondent does not take responsibility for the academic growth and achievement of all students, instead taking the approach: “If they didn’t learn it, it’s their fault,” respondent opines that starting with such a claim is “incredibly unfair” to respondent because it “sets a mindset of negativity.” He also opines that the claim seems to have been taken from Amer’s evaluation, suggesting collusion between the evaluators. Respondent also claims that Jahrman’s reports of respondent’s statement were out of context, that Jahrman did not understand remote teaching because he had not been a regular teacher for five years and had taught high school, not middle school. Respondent multiple times opined that Jahrman tried to “twist” positives of respondent’s teaching into negatives.

148. Respondent reports that when he was placed into TAP after the first year of evaluations, he was "terrified, because nobody passes TAP."

149. Respondent reports that Hafner was dressed very inappropriately during her first observation and he initially did not think she could be a teacher. However, he described his interactions with her as respectful and reports that she was very personable and "seemed" at times very genuine.

150. Regarding Hafner's criticism that respondent did not return to students who answered questions incorrectly, respondent claims that Hafner took the information out of context and "twisted it for her purposes." He claims that he had divided the class in half and had a competition in answering questions with the winning side getting pencils as a prize. He did not explain why he did not tell Hafner this or report this in his evaluation in the space provided for comments.

151. Respondent testified that he submitted a written response to his initial evaluation in the "false hope" that the TQP "might actually review the material," but he believes the speed of their decision when he applied for a new evaluator shows that the panel was "rubber-stamping" all of the evaluations. Respondent did not produce any evidence to corroborate his claim that he submitted a document to the TQP.

152. When asked about his understanding of Hafner's report that under the seventh Arena, "Positive Framing for Reteaching," she did not observe reteaching, respondent testified that per Hafner's testimony he believes that means that he must reteach only if a certain number of students failed an assessment.

153. Regarding the claims that he did not consistently plan and use opportunities to build interpersonal relationships with students each class period, respondent reports that he is "confounded" by all four evaluators and considers these

to be "ridiculous statements." He rhetorically asks "what are they watching?" and reports that he has conversations with students "all the time," including before, during, and after class, and engages in small talk. He opines that the evaluators were "not doing their job thoroughly, because if they were, I pass."

154. Regarding the claim that he "inconsistently plans for and provides differentiation and scaffolding for students that are identified through IEP/504/SST/EL process and/or class data as needing additional support," respondent reports that Hafner never asked to see his students' IEP's or other support plans and therefore "can't use the number of people identified as such," because a "504" might be "an allergy" and an IEP can simply be that a student "needs to sit in front." Respondent did not explain why he did not tell this to Hafner and the other evaluators.

155. Regarding the lower depth of knowledge of questions respondent asked in class, he reports that students can demonstrate a deeper knowledge in response to discussion prompts or essay questions on tests, but quick checks for understanding in class need to be lower-level questions.

156. Regarding the claim that respondent was not observed to use assessment data to "determine and plan for instruction," he reports that he uses a template that he has had "for decades," but he revises and "adds things" to it. He emphasizes that the evaluators never reviewed his lesson plans and only observed a few hours of his teaching. He reports that he reflects each day about what he needs to adjust for the next class, and claims that he "looks at assessments" to see if he needs to "make a readjustment." He does not explain why, if true, he did not provide examples of this practice to the evaluators.

157. Regarding students who receive failing grades on assignments, respondent reports that the District implemented a new grading system in the 2021–22 school year, under which a student never receives less than 50 percent, even if absent. Respondent reports that students “know they need to complete” the assignment to get more points and he might remind them if they don’t make up the assignment, remind them that “life did go on when you weren’t here,” and that all the assignments are available to the students in Canvas.

158. Regarding not responding to students’ incorrect answers, respondent reports that there is a technique where a teacher wants several students to answer before revealing the correct answer, to allow the students to “engage and think in depth,” but other than that, his common practice is to respond to the student’s answer. He reports that circling back to the student “depends on context” and “if the student is paying attention,” then they heard the correct answer.

159. Regarding the female student who respondent seated on the side of the room, facing a window for several months, he reports that she was the most “poorly behaved” student he ever had, and was frequently suspended by the school for fighting outside the classroom and for possessing drug paraphernalia. He reports that he initially tried to talk to her alone and emphasize expectations, but she yelled at him “every time we had an issue” and she had “no empathy.” He reports that he attempted to communicate with her parents, but they were divorced, had poor availability, and he had to communicate with them via email. Respondent reports that, because of Hafner’s comments, he felt “compelled” to allow the student to move back into the “larger body” of students, even though she “didn’t earn” it. Respondent appeared very unhappy about this.

160. Respondent reports that he was professional and polite to Reghitto, even though she "demonstrated concerns regarding her intrinsic biases against me." He reports that Reghitto told him she noticed in a pre-evaluation observation from the first couple of days of the school year, that "things were unsettled," and he believes that she made up her mind "that's who he was and nothing could change her mind." He feels Reghitto was irritated because she made several unannounced visits from the District offices to respondent's classroom on dates that he was absent due to his back problems. Respondent reports that, during observations, Reghitto routinely "stepped out of the classroom to attend to other business" for "several minutes or longer." Reghitto denies this contention.

161. Respondent testified that he did not know that he could request another evaluator to replace Reghitto. However, he admits that the August 17, 2021, TAP Meeting Notes he received states that he could request an alternate administrator evaluator and an alternate CT evaluator.

162. Regarding Reghitto's claim that respondent in one class spoke for 45 minutes with no verbal interaction relating to the 10 Arenas, and conceded this afterwards, he reports that he conceded that he spoke too long "according to their observation criteria," but he disagreed because he had a plan to "frontload" information on the origin of English rights, and he had years of experience and "time-tested success."

163. Respondent believes that Reghitto is mistaken in her reports that he did not call on students by name on October 13, 2021. He attributes this mistake to her sitting in the back of the classroom and the use of masks, but also testified "maybe I didn't use their name" and used a physical cue instead. He reports that he does not understand the concern.

164. Respondent concedes that he is “not too methodical” about keeping track of which students answered questions and reports that he tries to “stay organic” and “keep a lively pace.”

165. Regarding the special education student who respondent simply told to write more, respondent reports this student had difficulty writing by hand and a habit of writing very little, but respondent needed him to write more to confirm he was understanding the material.

166. In response to Reghitto’s criticism that he did not “give any verbal interactions as it relates to the 10 Arenas for the rest of the period,” respondent reports that “it looks like” he was giving a test that day and he maintains a quiet environment for tests, and provides an assignment for students to complete after the test, and if students have questions, they can just raise their hands and he will come to their desk to answer without disturbing other students.

167. Regarding providing accommodations to students, respondent reports that this sometimes makes a student feel “singled out,” so he gives accommodations to all the students, and Reghitto did not understand that slide notes he provided were an accommodation. He reports that he tries to pay attention to the plan for each student with a plan, and it is common for the plan to include proximity to the teacher, and he watches and “re-guides” if a student is “drifting,” for example tapping the student’s desk to refocus.

168. Regarding not using formal or informal assessments on October 11, 2021, respondent reports that he was providing brand new information and “now’s not the time” for such assessments. He opines that the evaluation criteria are unreasonable

because students would “not learn any material” if he did that. He believes that he gives the same amount of assessments as any other teacher.

169. Regarding Reghitto’s claim that respondent did not use data to adapt his instruction, he reports that he believes that she wanted him to use a “data protocol,” but he had not been trained on that and Amer initially offered, but later refused, to provide him this training. Respondent reports that he nevertheless looked at tests to see if students “got something” and followed up when they did not.

170. Regarding Reghitto’s reports that she did not observe respondent follow up with students who did not complete the written assignment, respondent reports that he “imagines” Reghitto was calculating by the number of students who finished by the end of the class period, but she was “lazy” and did not go back to see if the students submitted the assignment later, because she was “looking for data to fit her narrative, not for accuracy.” Respondent also reports that there were excessive absences in the 2021–22 school year because the District had a different system “coming out of COVID” and there was no longer a counselor on campus to address “truants.”

171. Respondent points to Reghitto’s report that on April 22, 2022, she did not observe evidence of him providing feedback during “the” lesson, and her separate report on another page that in two class periods combined he called on no more than 10 students, and claims these reports are contradictory. He does not explain how asking students questions contradicts the claim that he did not provide feedback.

172. Respondent describes Billings as a “master teacher.” He reports that she “helped,” and he tried to implement her suggestions.

173. Respondent reports that he provides the same formal assessments as other teachers and collaborated with the history chair at John Muir for a dozen years on assessments. Respondent reports that this teacher told him that he had not changed his assessments.

174. Respondent refused to sign the evaluations because he did not agree with them.

175. In August 2021 emails to Bejarano, respondent claimed that his 2020–21 evaluations were “poisoned” by former principals of John Muir due to an adversarial relationship with him because he advocated for colleagues in his role as a union representative. He claimed that they created a hostile environment for him and had previously attempted to collude with assistant principals to negatively impact his evaluations. He claimed that “because I am conservative, these snowflakes took their displeasure out on me as a result of the national election of 2016.” He also claimed that the environment at John Muir had “become increasingly hostile against white, male, heterosexual, and conservative teachers,” and there was a systematic effort to “rid this campus” of such teachers. At hearing, respondent reported that he had worked with the union to address these claims but never filed a formal complaint.

176. Also in respondent’s August 2021 emails to Bejarano, he expressed concern about the evaluation process because the administrative members of the TQP “were held secret from me last year and I presume you won’t reveal them this year either.” At hearing, respondent admitted that the District’s Teacher Evaluation System Handbook lists all of the TQP members on the second page. The handbook is routinely distributed to all teachers each year.

177. At hearing, respondent did not acknowledge any flaws in his teaching or indicate any intention or desire to improve his teaching in any of the areas the evaluators identified as deficient.

Ultimate Findings

UNSATISFACTORY PERFORMANCE

178. The District evaluated respondent. Its evaluations included recommendations as to areas of improvement in respondent's performance. It notified respondent that he was not performing his teaching duties in a satisfactory manner according to the District's standards and described his unsatisfactory performance. Respondent was enrolled in the TAP and assigned a mentor. The District thereafter conferred with respondent and made specific recommendations as to areas of improvement in his performance. It endeavored to assist respondent in his performance.

179. Before 2020, respondent never had received a substandard evaluation. His testimony suggests that some of the specific criticisms of the evaluators were inaccurate. The evaluators did not always observe full class periods and otherwise may have lacked context for certain observations. Respondent was, especially during the 2020–21 school year, dealing with unique challenges related to the COVID-19 pandemic and adjusting to remote learning. No students or parents complained about his teaching.

180. However, four separate evaluators, each with sufficient experience and training, concluded in each of nine separate evaluations that respondent did not meet either of the standards being evaluated and overall did not meet the District's standards for teaching. All of the evaluators testified at hearing and their testimony

was credible and consistent with the documentary evidence. There is no evidence in the record to support respondent's testimony and written statements alleging a "systematic effort" to dismiss him on the basis of his race, gender, sexual orientation, or political beliefs. Moreover, two of the evaluators were consulting teachers not significantly connected to respondent's school. Billings, whom respondent described favorably, reported that respondent only attempted to implement some of her suggested strategies; was meeting only some of the goals of the program in the first round of TAP; and she did not observe significant improvement thereafter. Like all four of the evaluators, she observed that respondent was challenged by students who did not show effort in their learning. Respondent's attitude towards certain students was antithetical to the District's philosophy that every student be challenged to achieve to the student's "fullest potential." Respondent does not acknowledge any problem with his teaching and shows no inclination to improve his performance. The District established by a preponderance of the evidence that, notwithstanding the assistance and opportunities it provided to respondent to correct his faults and address the grounds for the unsatisfactory performance charges against him, respondent did not improve his performance to a satisfactory level. Respondent's teaching performance was unsatisfactory and remained unsatisfactory throughout the 2020–21 and 2021–22 school years.

EVIDENT UNFITNESS

181. Respondent's conduct towards Amer and Bejarano during his evaluations was at times unprofessional. However, no parent or student complained about respondent and no actual harm to any student or teacher was shown. Respondent's conduct was recent, but there were extenuating circumstances, including the stresses and challenges of the COVID-19 pandemic and adapting to remote learning.

Respondent exhibited a poor attitude during the evaluation process, but not towards his students and he evidenced some thoughtfulness and effort in his approach to teaching. Respondent is not remorseful about his unprofessional conduct, but that conduct was limited to the evaluation process and there is no significant evidence it would otherwise recur.

PERSISTENT VIOLATION OF RULES

182. Respondent received only “Does Not Meet Standard” evaluations in the 2020–21 and 2021–22 school years. He attempted to implement only some of the feedback and coaching he received. He was unprofessional and insubordinate in the November 2020 videoconference with Amer when he refused to turn on his video or audio. He refused to sign most or all of the evaluations because he did not agree with them, despite the fact that they expressly indicated that his signature did not constitute any such agreement, only that he read and reviewed the final evaluation report. However, respondent generally cooperated with the evaluation process.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District bears the burden to prove cause to dismiss respondent. The standard of proof is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) The Commission has considered all testimonial and documentary evidence, and weighed all witnesses’ credibility, in making the factual findings above. These findings reflect a preponderance of the evidence.

Motion to Dismiss for Lack of Jurisdiction

2. Respondent moves to dismiss this proceeding for lack of jurisdiction, based on untimely service under Education Code section 44936, subdivision (b).¹ The District opposes.

3. Section 44936 states in relevant part:

(a) The notice of dismissal or suspension in a proceeding initiated pursuant to Section 44934 or 44934.1 may be given at any time of year.

(b) Notwithstanding subdivision (a), the notice of dismissal or suspension in a proceeding involving only charges of unsatisfactory performance initiated pursuant to Section 44934 shall only be given during the instructional year of the schoolsite where the employee is physically employed. However, a notice of dismissal or suspension in a proceeding involving charges of unsatisfactory performance may be initiated pursuant to paragraph (2) of subdivision (b) of Section 44938.

4. Respondent was not served with the District's notice of its intention to dismiss him and a copy of the statement of charges until after the instructional year of the school where he is physically employed. (Factual Finding 5.) However, in addition to charges of unsatisfactory performance, the District also pled charges of evident

¹ All statutory references are to the Education Code, unless stated otherwise.

unfitness for service; and persistent refusal to follow Board policies and regulations, state laws, and other rules governing his employment. (Factual Finding 6.) Because this proceeding is not one “involving only charges of unsatisfactory performance,” section 44936, subdivision (b)’s requirement of service during the instructional year would not appear to be applicable.

5. Nevertheless, respondent argues that, based on both the allegations and the evidence at hearing, the evident unfitness and persistent refusal allegations fail as a matter of law. Respondent argues that the District pled those allegations only to evade the subdivision (b) deadline, and that this commission lacks jurisdiction to hear the unsatisfactory performance charges.

6. Respondent admits that there is no appellate opinion directly addressing this issue, but cites *Board of Education v. Commission on Professional Competence (Board of Education)* (1976) 61 Cal.App.3d 664, in support of his contention. In *Board of Education*, the court considered a notice of dismissal and statement of charges against a teacher alleging both immoral conduct and evident unfitness for service. (*Id.* at p. 666.) At that time, the Education Code provided that a notice of dismissal “shall not be given between May 15 and September 15 in any year.” (*Id.* at p. 667.) However, a notice of suspension and intention to dismiss was permitted at any time on the basis of immoral conduct. (*Id.* at p. 668.) In *Board of Education*, the commission found the teacher was not guilty of immoral conduct and decided that it did not have jurisdiction to consider the charge of evident unfitness for service because notice of that charge was not given until after the May 15 deadline. (*Id.* at p. 667.) The superior court granted a writ of mandate, holding that the commission should have considered the evident unfitness charge. (*Ibid.*) The appellate court disagreed, holding that simply adding a charge that was not untimely did not allow the school board to avoid the

general service deadline applicable to the evident unfitness charge. (*Id.* at 669.) The court explained:

Although the above issue is one of first impression, we are guided by analogous case law. In *Livermore Valley Joint Unified Sch. District v. Feinberg* (1974) 37 Cal.App.3d 920, 112 Cal.Rptr. 923, a loophole in the statutory language would have allowed the school district to avoid giving 90 days notice, as required by section 13407, to an errant teacher if the charge was brought under section 13403.5 instead of section 13403, although the charges under both section 13403.5 and section 13403 were, in fact, the same. The court stated this ‘. . . would permit astute counsel to avoid the notice requirement by labelling a single ground for dismissal under one section rather than its identical twin. Endorsement of such a triumph of mere form is unattractive.’ (At p. 922, 112 Cal.Rptr. at p. 924.)

Analogously, in the instant case, if we hold as respondent would have us, then the Board, whenever it wanted to avoid the moratorium provisions of section 13405, would merely add a section 13408 charge to the section 13403 charge, thus immediately suspending the employee and obtaining a hearing at any time of the year in contravention of section 13405. This ‘triumph of mere form’ would render section 13405 a nullity. As both sections 13405 and 13410 were enacted at the same time, the Legislature could not have intended to have the one section so easily nullified.

(*Board of Education, supra*, 61 Cal.App.3d at pp. 518-19.) Essentially, the Court held that the school board could not evade the filing deadline for one untimely charge by alleging another charge that was timely.

7. The subsequent change in the statutory scheme renders *Board of Education* inapposite. It is no longer the general rule that notices of dismissal may only be filed at certain times of year. Instead, the general rule now is that such notices may be filed at any time. (§ 44936, subd. (a).) The Legislature carved out a narrow exception to this new general rule, but that exception expressly applies only to proceedings where unsatisfactory performance is the only charge. (*Id.* at subd. (b).) This exception is unambiguous. The Legislature chose to limit the exception based upon the school board's charges, and there is no reason to think that the Legislature was unaware of the fact that school boards control the content of their own pleadings.² Respondent's argument is rejected. This commission has jurisdiction to hear and decide the District's unsatisfactory performance charges against respondent, as well as the evident unfitness and persistent refusal charges.

First Cause for Dismissal (Unsatisfactory Performance)

8. Pursuant to Education Code section 44932, subdivision (a)(5), a school district may dismiss a permanent certificated employee for unsatisfactory performance.

² Moreover, in this proceeding, although the District ultimately failed to prove that respondent should be dismissed based on the evident unfitness and persistent refusal allegations, there was sufficient support for those allegations such that they do not appear to be sham pleadings intended solely to evade the deadline of section 44936, subdivision (b).

9. Education Code sections 44660 through 44665 set forth the requirements for evaluating certificated employees. Education Code section 44662, in relevant part provides:

(b) The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to:

(1) The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.

(2) The instructional techniques and strategies used by the employee.

(3) The employee's adherence to curricular objectives.

(4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

10. Education Code section 44664, in relevant part, provides:

(b) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If an employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of

that fact and describe the unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist the employee in his or her performance. If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.

11. Before a school district may dismiss a permanent certificated employee for unsatisfactory performance, it must comply with Education Code section 44938, subdivision (b), which, in relevant part, provides:

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

12. The District evaluated respondent in accordance with Education Code sections 44660 through 44665. Its evaluations included recommendations as to areas of improvement in respondent's performance. (Factual Finding 178.) It notified

respondent that he was not performing his teaching duties in a satisfactory manner according to the District's standards and described his unsatisfactory performance. Respondent was enrolled in the TAP and assigned a mentor. (*Ibid.*) The District thereafter conferred with respondent and made specific recommendations as to areas of improvement in his performance. (*Ibid.*) It endeavored to assist respondent in his performance. (*Ibid.*)

13. At least 90 days before it served a notice of intent to dismiss, the District gave respondent written notice of his unsatisfactory performance, specifying its nature with specific instances of behavior and particularity as to furnish him with an adequate opportunity to correct his faults and overcome the grounds for the charges. (Factual Finding 3.)

14. Under the District's standards, respondent's teaching performance was unsatisfactory throughout the evaluation process, despite the District's efforts to assist respondent. (Factual Finding 180.) Cause exists to dismiss him from employment for unsatisfactory performance under section 44932, subdivision (a)(5).

Second Alleged Cause for Dismissal (Evident Unfitness for Service)

15. A school district may dismiss a permanent certificated employee for "evident unfitness for service." (§ 44932, subd. (a)(6).) Evident unfitness for service means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*)). This cause for discipline connotes a "fixed character trait, *presumably* not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.* at p. 1465, emphasis in original.)

Such evident unfitness may exist, for example, when a teacher is repeatedly and incurably insubordinate, or is incapable of maintaining cordial, cooperative relationships with colleagues. (*Id.*, at pp. 1436-1440.) "'Unprofessional conduct' is, as it were, often a lesser included form of proscribed behavior within 'evident unfitness for service.' Thus, conduct constituting 'evident unfitness for service' will often constitute 'unprofessional conduct.' But the converse is not true. 'Evident unfitness for service' requires that unfitness for service be attributable to a defect in temperament – a requirement not necessary for a finding of 'unprofessional conduct.'" (*Id.* at p. 1445.)

16. The Commission must evaluate "unfitness," in this context, with reference to several criteria, including likelihood and degree of adverse impact on students and fellow teachers, proximity or remoteness in time of the relevant conduct, extenuating or aggravating circumstances, praiseworthiness or blameworthiness of the teacher's motives, and likelihood of recurrence. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230.) In addition, the Commission must evaluate whether the conduct demonstrating unfitness "is caused by a defect in temperament." (*Woodland, supra*, 2 Cal.App.4th at p. 1445.)

17. The District did not prove evident unfitness. Respondent's conduct towards Amer and Bejarano during his evaluations was at times unprofessional. However, no parent or student complained about respondent and no actual harm to any student or teacher was shown. (Factual Finding 181.) Respondent's conduct was recent, but there were extenuating circumstances, including the stresses and challenges of the COVID-19 pandemic and adapting to remote learning. (*Ibid.*) Respondent exhibited a poor attitude during the evaluation process, but not towards his students and he evidenced some thoughtfulness and effort in his approach to teaching. (*Ibid.*) Respondent is not remorseful about his unprofessional conduct, but

that conduct was limited to the evaluation process and there is no significant evidence it would otherwise recur. (*Ibid.*) Respondent's unprofessional conduct was not severe or broad enough to constitute evident unfitness. (See *Woodland*, 2 Cal.App.4th 1429.)

18. The District argues that respondent's failure to improve his teaching performance to an acceptable level shows a permanent defect in character. However, respondent's teaching performance does not constitute the type of defect that would support an evident unfitness charge. Moreover, his many previous satisfactory evaluations suggest that his teaching performance problems are not caused by a permanent defect in his character. Cause does not exist to dismiss respondent for evident unfitness under section 44932, subdivision (a)(6).

Third Alleged Cause for Termination (Persistent Violation of or Refusal to Obey Applicable Laws or Regulations)

19. A school district may dismiss a teacher who engages in a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district. (§ 44932, subd. (a)(8).) Such violations by the teacher must be "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) The willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. (*Board of Educ. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 552, overruled on other grounds by *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575.) However, a contentious debate between a teacher and principal about teaching objectives, even where the teacher repeatedly refused a principal's request to write two objectives to be used in the evaluation process, is not cause to dismiss a teacher for persistent violation. (*Bourland v.*

Commission on Professional Competence (1985) 174 Cal.App.3d 317, 321.) Nor is a single violation of a school board's rules, by itself, cause for dismissal under this section. (*Oakdale Union School Dist. v. Seaman* (1972) 104 Cal.Rptr. 64.)

In this case, respondent received only "Does Not Meet Standard" evaluations in the 2020-21 and 2021-22 school years. (Factual Finding 182.) He attempted to implement only some of the feedback and coaching he received. (*Ibid.*) He was unprofessional and insubordinate in the November 2020 videoconference with Amer when he refused to turn on his video or audio. (*Ibid.*) He refused to sign most or all of the evaluations because he did not agree with them, despite the fact that they expressly indicated that his signature did not constitute any such agreement, only that he read and reviewed the final evaluation report. (*Ibid.*) However, respondent generally cooperated with the evaluation process and his conduct simply did not rise to the level of a persistent violation of the applicable rules of his employment. (*Ibid.*) The District failed to establish by a preponderance of the evidence that cause exists to terminate respondent's employment as a permanent employee for engaging in a persistent violation of or refusal to obey state law or the District's regulations under Education Code section 44932, subdivision (a)(8).

Disposition

20. The District established a basis to dismiss respondent for unsatisfactory performance, but did not establish a basis to dismiss him under its evident unfitness for service or persistent refusal charges. When reviewing a school district's dismissal action against a certificated employee based solely upon unsatisfactory performance under Education Code section 44932, subdivision (a)(5), there is no need to apply the standards of fitness to teach set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d

1167, 1175-1176.) Respondent's unsatisfactory performance, coupled with his refusal to acknowledge the validity of any of the evaluator's criticisms of his teaching, suggests there is little hope that, if returned to the classroom, he would improve to satisfactory performance under the District's teaching standards. The District's dismissal must be upheld.

ORDER

Respondent Michael Jacobs is dismissed from his position as a permanent certificated employee of the San Jose Unified School District.

DATE: 06/19/2023



MICHAEL C. STARKEY

Commission Member

Administrative Law Judge

Office of Administrative Hearings

DATE: 06/19/2023



Nico Sandoval (Jun 19, 2023 17:06 PDT)


NICO SANDOVAL

Commission Member

Dissent of Commission Member Amy Irwin

I concur in the factual findings and legal conclusions above, but I do not find that the problems with respondent's teaching rise to a level sufficient to justify dismissal from his position as a permanent certificated employee of the District. Accordingly, all of the charges against him should be dismissed.

DATE: 06/19/2023


Amy Irwin (Jun 19, 2023 17:56 PDT)
AMY IRWIN
Commission Member

