

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE FOR THE
TORRANCE UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

ERIKA STRONG,

A Permanent Certified Employee,

Respondent.

OAH No. 2022050076

DECISION

A Commission on Professional Competence (Commission) heard this matter by videoconference on September 19, 20, 21, 22 and 23, 2022. The Commission consists of Sydney Yarbrough-Baune, Los Angeles Unified School District, Katie Masterson, Culver City Unified School District, and Administrative Law Judge (ALJ) Eileen Cohn, Office of Administrative Hearings (OAH), State of California, who presided.

Sarita Patel, Esq., represented complainant Board of Education of the Torrance Unified School District (District).

Carlos R. Perez, Esq. and Alejandra Gonzalez-Bedoy, Esq. represented Erika Strong (Respondent) who appeared throughout the hearing.

Respondent presented a motion to compel with the parties' stipulation regarding the discovery dispute and motions in limine which the ALJ considered and ruled on at the outset of the hearing outside the presence of the panel, as reflected in the record. The ALJ granted the parties' stipulated request for a protective order and a confidential names list to protect the privacy of the minor students and the students' families.

The parties presented opening statements and submitted oral and documentary evidence and closing statements. The record was closed and the matter was submitted for decision on September 23, 2022.

The Commission considered the matter in executive session on September 29, 30, and October 10, 2022, and after due consideration of the entire record herein, the Commission makes the following Factual Findings, Legal Conclusions and Order.

SUMMARY

District alleges cause exists for Respondent's dismissal from her employment with the District on the following grounds: (1) evident unfitness for service pursuant to Education Code section 44932, subdivision (a)(6) (referred to as unfit to teach); and (2) 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 or the governing body of the school district employing her, pursuant to Education Code section 44932, subdivision (a)(8) (referred to as failure or refusal to follow school rules or regulations).

District's grounds for dismissal primarily focuses on one major incident involving S1 on February 3, 2022, and a few additional incidents which were uncovered during the investigation of the major incident involving S1.

The Commission found the District failed to meet its burden of proof on Respondent's persistent failure to follow school rules or regulations, on the major incident involving S1 on February 3, 2022. The Commission determined by a preponderance of the evidence Respondent more likely than not held for a few seconds her hands over S1's arms which were across his chest. However, the Commission determined the District failed to prove by a preponderance of the evidence Respondent stepped on S1's foot with one foot and kicked him with her other foot.

The Commission found the other events alleged against S1 or any other student either did not occur as portrayed or did not establish cause for Respondent's dismissal on the ground Respondent persistently failed to follow school rules or regulations or unfitness to teach. The other incidents, which were generally reported as recollections of staff during the investigation of the February 3, 2022 incident, did not establish a basis for cause for dismissal. Although the Respondent in hindsight may have applied better methods to control S1, the Commission determined the District did not meet its burden of proof her actions reflected a persistent violation of school rules or regulations or a pattern of inappropriate behavior.

The Commission did not find cause for dismissal on the ground Respondent was unfit to teach. The Commission reviewed the entire record, inclusive of testimony and exhibits (whether or not cited in the factual findings or legal conclusions) and applied the factors set forth in *Morrison v. State Board of Education (Morrison)* (1969) 1 Cal.3d 214.

The Statement of Charges against Respondent is dismissed.

FACTUAL FINDINGS

Jurisdictional Matters and Background

1. The Board of Education of Torrance Unified School District (Board) is the duly elected, qualified, and acting governing board of the District, organized, existing, and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a certified, permanent employee of the District and, at all times relevant, was assigned as a Transitional Kindergarten (TK) Teacher at Howard Wood Elementary School (Wood). Respondent received her Bachelor of Arts from the University of Hawaii and possesses a multiple subject teaching credential and a cross cultural language and academic development certificate (CLAD) from the State of California. Respondent also completed the required credits for early childhood education which qualifies her to teach transitional kindergarten students who enter kindergarten at or before five years of age. She is currently pursuing a Master of Arts in Curriculum and Instruction. She has worked in the District starting as a substitute teacher and has been assigned to Wood since approximately the 2015-2016 school year.

3. Respondent was timely and duly notified of the charges against her which form the basis of the Statement of Charges.

4. On March 21, 2022, the Statement of Charges against Respondent, alleging factual and legal grounds for termination of her employment with the District,

was adopted by the Board and signed on its behalf by Timothy Stowe, Ed.D., Superintendent and Secretary of the Board. The Statement of Charges attached the relevant Board policies (which were admitted as Official Notice). (Ex. 1)

5. On March 25, 2022, the Statement of Charges was served on Respondent. (Ex. 1.)

6. On May 2, 2022, (a date established by the OAH stamp and on file with OAH), District filed the Statement of Charges with OAH.

7. On a date not established by the evidence, but is not subject to dispute, Respondent timely requested a hearing.

Board Policies

8. The Statement of Charges referenced several Board policies which the District alleges were violated by Respondent.

9. Board Policy 4119.21 specifically defines inappropriate employee conduct in relevant part:

1. Engaging in any conduct which endangers students, staff, or others, including, but not limited to, physical violence. . . .
2. Engaging in harassing or discriminatory behavior towards students, parent's/guardians, staff, or community members, or failing or refusing to intervene when an act of discrimination, harassment, intimidation, or bullying against a student is observed.

3. Physically abusing, sexually abusing, neglecting, or otherwise willfully harming or injuring a child.

[¶] . . . [¶]

6. Using profane, obscene, or abusive language against students, parents/guardians, staff, or community members.

(Ex. 1, attachment 1; Statement of Charges paragraph 36.)

10. Board Policy 4119.21 provides for a general expectation District employees will respect and follow ethical standards and state and federal law: “the Board of Education expects District employees to maintain the highest ethical standards, exhibit professional behavior, follow District policies and regulations, and abide by state and federal laws and exercise good judgment when interacting with students and other members of the school community.” (Ex.1, attachment 1, Statement of Charges, paragraph 35.)

11. District avers the reference in Board Policy 4119.21 to state and federal law justifies terminating Respondent for committing the crime of battery as defined by Penal Code section 242: “A battery is any willful and unlawful use of force or violence upon the person of another.” (Ex. 1, attachment 2, Statement of Charges, paragraphs 39 and 41-43.)

12. District avers the reference in Board policy 4119.21 to state and federal law justifies terminating Respondent for committing the crime of “willful harming or injuring a child” pursuant to Penal Code section 11165.3 which is defined as: “a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody

of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.” (Ex. 1, attachment 3, Statement of Charges paragraphs 48-51.)

13. As further set forth below, no criminal charges were filed by the District Attorney, after an investigation, and Respondent was never convicted of any crime, including battery under Penal Code section 242, or willful harming or injuring a child under Penal Code section 11165.3.

14. As such, District’s attempt to apply a criminal evidentiary standard in this administrative action is not supported by the language “abide by state and federal laws” because there is no evidence Respondent was unlawful by failing to abide by state law. As further set forth below, the Commission found insufficient evidence Respondent willfully harmed or injured Student One (S1 or Student 1).

Incidents Alleged with S1

FEBRUARY 3, 2022

15. The principle and most egregious allegation against Respondent was brought to the District’s attention by one witness, Wood instructional assistant Shilpa Totlani. Ms. Totlani presented as a credible and straightforward witness who had no personal bias against Respondent and was unflinching in her testimony and recollection. Ms. Totlani was a well-regarded and experienced instructional assistant. Nevertheless, the Commission did not find the entirety of her observations reliable based upon the configuration of the room and the relative positions of Respondent and S1 to her as she entered the classroom and approached them.

16. In her role as paraeducator, Ms. Totlani primarily assisted students who had Individual Education Programs (IEPs), in the classroom and during recess and lunch. She has a total of 17 years of experience as an instructional aide, eight of those years at Wood. Ms. Totlani also holds a special certification to assist students with toileting. Without this certification, school personnel, including certificated employees, are not allowed to assist students with toileting, including cleaning them. In her role as an instructional assistant Ms. Totlani reports to the team at the Wood's Learning Center and is assigned by the Learning Center to assist various students one-on-one in the classroom or in groups. She is generally assigned to students with behavioral and other needs so that they can better access their education and school environment.

17. Prior to the incident, she had worked with Respondent. During the 2021-2022 school year, Ms. Totlani was assigned to watch upwards of five students and supervised more than four students on the playground. She was assigned a total of three students from Ms. Strong's class during the first three months of the school year but was not assigned to S1. During the first three months of the school year, Ms. Totlani spent a total of 30 minutes per day in Respondent's classroom to provide one-on-one support to one student (not S1) with an IEP, and an additional hour a day in the school yard during recess and lunch watching her assigned students. She worked in the classroom from 9 to 9:30 a.m. three to four days a week with the three students, during recess 10:30 to 10:45 a.m., and at lunch in the cafeteria, from 11:45 a.m. to 12:30 p.m. Ms. Totlani's routine included going back to Strong's classroom after 12:30 p.m. for less than two minutes to fill out her time log. Ms. Totlani's work days ended 3:15 p.m. or 4:30 p.m.

18. Ms. Totlani was assigned to S1 on or around January 24 and 25th, after S1's initial IEP. She understood S1 was assigned to her because of his difficult

behaviors and pattern of elopement. She received her instructions from the Learning Center and did not have an opportunity to discuss S1 with Ms. Strong prior to or at the time of her assignment. The Learning Center directed Ms. Totlani to watch S1 and stay close to him at all times due to his difficult behaviors in the classroom and in the playground, where he pushed and removed masks off the faces of other students. She was advised of his elopement risk. Ms. Totlani had personally observed S1 on two occasions urinating in the school yard. During her time in the classroom before she was assigned to S1, she did notice S1 required support and comfort; he would look around, put his head down on the desk and hold a stuffed cat.

19. On the day of February 3, 2022, at approximately 1:12 p.m., Ms. Totlani went into the classroom to report to Respondent an incident between S1 and another student on the playground. S1 was laying on his side on the slide and would not glide down the slide even after Ms. Totlani asked him to do so. The other student then kicked S1 and S1 responded by pushing and grabbing the mask off that student.

20. Ms. Totlani understood S1 was an energetic student; aside from his disruptive behaviors, she saw his positive traits: He smiled, held hands with others, and played with a ball. Nevertheless, Ms. Totlani was duty-bound to report S1's behavioral incidents to Sarah Doumerc of the Learning Center and his teacher, Respondent, which is why she entered Respondent's classroom at 1:12 p.m. on February 3, 2022.

21. Respondent had a large number of students for a TK classroom – about 25 students. There was no evidence the classroom was empty at the time Ms. Totlani arrived on February 3, 2022. During her testimony, Ms. Totlani could not recall how the desks were arranged, initially could not remember if they were in a circle or not, but then recalled they were in a line, with some in the center and some in a line on the other side of the room, and generally were "everywhere."

22. Ms. Totlani insisted she had a clear view of Respondent and S1. When Ms. Totlani arrived at the classroom door, the door opened, which was located at the lower side of the classroom, and she observed another paraeducator Cindy Randall leave. Ms. Randall did not testify and there is no evidence she was interviewed.

23. Ms. Totlani estimated she was seven or eight feet away from Respondent and S1 when she entered the room. From her vantage point at the door, she could see the backs of students at their desks closest to the wall on her side of the classroom.

24. Ms. Totlani insisted she had a clear view of Respondent and S1 from the door. Her estimates varied but she was in the room no more than a few minutes. She stood at the door about two to three seconds to "gather herself" before approaching Respondent and S1 due to the shock of what she was sure she observed.

25. Respondent and S1 were positioned toward the front of the room at the same side of the door and at the front side corner of the table furthest away from Ms. Totlani. S1's chair was pulled away from the desk. He was facing away from the door. Ms. Totlani could see S1's left side. She could see Respondent's right side and Respondent bending over S1.

26. Ms. Totlani observed S1's hands and arms tightly across his chest held there by Respondent who had used both her hands to hold S1 in this position while she said to S1 "stop." Ms. Totlani estimated S1 was held in this position no more than two to three seconds.

27. Ms. Totlani was especially troubled by what she insisted was her clear observation of Respondent standing with her right foot on S1's left foot and kicking S1's right foot once with her left foot. Ms. Totlani observed S1 react by rubbing his shin and muttering behind his mask.

28. When Ms. Totlani approached Respondent and S1 she addressed S1, asking what had happened. S1 has noted language deficits and did not respond. Respondent told her S1 bit her on her hand and S1 also spit on her. She showed Ms. Totlani a wet spot on her jeans which was colorized by the red pencil S1 had chewed. Ms. Totlani did not observe bite marks.

29. Ms. Totlani left Respondent's classroom deeply distressed by what she observed, especially Respondent's kicking of S1. She saw another instructional assistant in the hall, Yvett Zamora, and reported her observations to her. Ms. Zamora worked in Respondent's classroom with another student and sat at the table immediately next to S1 but was not there when Ms. Totlani entered the classroom. Ms. Zamora told her she had to report the incident to the principal, Dr. Shawn Johnson. Ms. Totlani knocked on Dr. Johnson's office door and when she did not get a response she took her scheduled lunch break and reported back to Dr. Johnson immediately after lunch.

30. Ms. Totlani is a mandated reporter of any suspected child abuse, as is the principal. Dr. Johnson decided she would assist Ms. Totlani, took charge of the investigation and had Ms. Totlani sit with her during a call to DCFS. Dr. Johnson took contemporaneous notes of her discussion with Ms. Totlani on February 3, 2022 but destroyed the notes after she memorialized them in a chronology (Ex. 2) and a final report which was made available to the investigators including the Torrance Police Department (TPD) where the matter was referred. Dr. Johnson reported Ms. Totlani informed her S1 had kicked Respondent first: "Student 1 began to kick Erika Strong and Shilpa Tolani witnesses Erika Strong kick S1 back in the shin." (Ex. 2.) Dr. Johnson included that in her final notes and report.

31. Ms. Totlani was insistent she never observed S1 kick Respondent and once she was advised such a statement was attributed to her, corrected Dr. Johnson, and, when interviewed by the investigating officer, also advised the investigating officer. Ms. Totlani's correction was credible. However, her failure to observe S1 kick Respondent does not establish that S1 did not kick Respondent that day or at the time of the purported incident.

32. When the principal's final notes are compared with Ms. Totlani's handwritten notes it is clear Dr. Johnson added words and statements which were conclusory not factual such as "restraining" and "holding in his chair" when recording Ms. Totlani's observations. Dr. Johnson's final notes also suggested Respondent's actions were purposeful and vengeful: "Shilpa shared that [after Respondent released S1] Erika then walked up to Shilpa to show her where S1 spit on her (pointed to her leg pant) and bit her (pointed to her hand)." (Ex. 2.)

33. After the day of the incident Ms. Totlani, at Dr. Johnson's direction prepared a hand written [undated] report of the incident where she stated she observed Respondent hold S1's hands "hard against his chest and her foot on his leg kicking him. She released her foot off him. He was seen touching and pressing his leg." (Ex. 3.)

34. After their meeting, Dr. Johnson consulted with Dr. Dylan Ferris, Chief Personnel Officer of the District, who testified at the hearing. His role was to guide the investigation of the incident. He advised Dr. Johnson to initiate an investigation, place Respondent on paid leave during the investigation, and call the parents to inform them of the accusation against Respondent.

35. Dr. Johnson contacted the Department of Children and Family Services (DCFS) who deferred to TPD to conduct the investigation. Ms. Totlani sat with Dr. Johnson during the report to DCFS and was interviewed by TPD separately. She added her views about the force of the kick after her initial report, stating it looked like Respondent was hitting a trash can.

36. In late afternoon, on February 3, 2022, Dr. Johnson contacted Respondent and informed her she “received a report” and would be starting an investigation during which time she would be on paid leave. The principal informed Respondent not to come back to work but be available to speak with her. Respondent was unaware of Ms. Totlani’s report when she received the call from the principal. Respondent asked her to explain the situation and when told it was reported she had kicked S1, Respondent immediately replied: “I never kicked him, but he has kicked me. I never kicked him.” After being told Dr. Johnson had an obligation to investigate Respondent added: “That’s the last thing I would do. I have the data and I have been working with him all week and he has been kicking me.” (Ex. 2.)

37. Dr. Johnson contacted S1’s parents to tell them of the reported incident of kicking S1, inform them it was under investigation and the teacher would not be present at school during the investigation. (Ex. 2.)

38. S1’s parents were understandably shocked by the phone call and subsequently met with the principal in person the next day. S1’s mother (P1) cried. The parents assumed the report was true and started connecting S1’s more recent behaviors and his bruising to Respondent’s purported conduct. They found the principal “emotional” when relaying Respondent’s purported conduct to them.

39. P1 testified. She recalled the principal informing them S1 was “restrained” and kicked “multiple times” in the legs by Respondent. The principal did not advise them that Ms. Totlani was the source of the report and were only informed of S1’s “physical abuse.”

40. Based upon the principal’s report, P1 attributed S1’s recent bed wetting and nightmares to Respondent. However, P1’s timeline of S1’s behavior did not coincide with the incident. P1 estimated S1’s behaviors began at the beginning of the year. School staff observed S1’s behaviors escalated and were noticeably more severe by the time of the IEP meeting on January 19, 2022. P1 had challenges with transitions and changes in his routine. He was absent from school during winter break, December 20, 2021 through January 2, 2022. During winter break S1 travelled with his family to Ukraine to visit relatives. S1 returned to school on January 3, 2022 but was absent again between January 10 and 14 due to illness.

41. P1 also noted she had asked Respondent about S1’s bruises on his legs in the past prior to the incident and was told they were probably from the playground equipment. Based upon S1’s playground conduct and the observations of other District staff, Respondent’s report of the source of S1’s bruising was accurate.

42. P1 did not observe any aggressive behavior by S1 at home. Overall, the Commission did not find the distinction between classroom and home behavior, if true, to be a persuasive indicia of Respondent’s purported bad conduct. P1’s assumption there was a direct connection between S1’s overall behaviors and Respondent’s conduct was understandable but the Commission found that assumption was not supported by sufficient evidence or reliable. S1’s behavioral history over the entire school year, was observed not only by Respondent but by

District staff and was inclusive of S1's behavior after the departure of Respondent as further explained below.

43. P1 is a registered nurse and was concerned when the police observed the bruising on both S1's legs and suggested they could be bug bites. Several days after the purported incident, P1 brought S1 to the doctor. The doctor did not testify and there are no medical reports in evidence to establish whether or not S1 suffered any injury, or a moderate or severe injury on February 3, 2022 consistent with any bruises he had on his leg and Ms. Totlani's observations Respondent kicked him with her left foot. According to P1, the doctor confirmed P1's suspicions that the marks on S1's legs were bruises, not bites.

44. The Commission questioned the sufficiency of evidence of significant bruising on S1's right leg and the absence of any evidence of bruising on his right foot. According to Ms. Totlani, Respondent, a 5 foot, eight-inch woman, who towered over her TK students, put all her weight on S1's right foot and kicked him forcefully, in a manner she later described as "kicking a trash can." Given the description of Respondent's conduct, S1, a five year-old child, would likely have sustained an injury or bruising to his foot, but there is no evidence his foot was examined, or that he suffered any bruising or injury from the excessive and sudden weight placed on his foot. Based on S1's history of play and jousting on the playground and P1's previous conversation with Respondent about his bruises, the Commission did not find persuasive evidence tying the examination of S1's bruises by law enforcement, P1 or S1's doctor to Ms. Totlani's observations Respondent kicked S1.

45. Ms. Totlani's observations on February 3, 2022, were credited in part. The Commission requested the parties submit schematic drawings of the classroom. (Exs. 9 and TT.) After carefully considering these drawings and the testimony of Ms.

Totlani and Respondent about the position of the desks, and the circumstances of the February 3 incidents, the Commission found by a preponderance of the evidence that Respondent had held S1's hands across his chest, although not as hard as described by Ms. Totlani, but found there was insufficient evidence Respondent had kicked S1 as described by Ms. Totlani.

46. From the room schematics submitted, there were four tables on the side of the room parallel to the door facing four tables. The adjoining tables formed one long table which extended from the area near the door to the front of the room. At the end of the end of the long adjoining table closest to the door there was a desk. Bookshelves lined the wall by the door extending from the from the door to the area closest to where Respondent and S1 were positioned. There was an aisle between the bookshelves and the long table where Ms. Totlani walked to consult with Respondent.

47. The classroom was filled with tables and desks to accommodate the large class. Between the long adjoining table and the wall opposite the door there were several tables in the middle of the room. Near the wall opposite the door there were two other smaller tables comprised of individual tables. There was a well of space between the end of the long table and the teacher's area which contained an easel resting caddy corner closest to where Respondent and S1 were positioned and a teacher's desk and waste basket located toward the other side of room. Due to the Covid-19 protocols only one student was at each table with the exception of one table where an aide would sit with the student. There was no evidence that Ms. Zamora was present during the incident.

48. S1's chair was moved away from the end of the table in an angle with his body facing toward the wall. Respondent was facing S1. From that angle, based upon the schematic, Exhibit TT, the Commission concluded Ms. Totlani would have been

able to observe Respondent's hands on S1 holding his hands across his chest from the doorway looking toward the front of the room. Respondent denied she held S1 in that manner but her description of her general practice of placing S1's hand on the table and putting her hand over his hand or squatting or stooping and gently placing her hand on S1's knee, were not consistent with the relative positions of S1 and Respondent and Ms. Totlani's view from the door that day.

49. Respondent held S1 with both her hands over his arms which were crossed over his chest. Ms. Totlani's did not report observing Respondent's hands on the side of S1's arms and could not have known whether Respondent held him hard as she stated in later reports to the police, or gently. According to Ms. Totlani's timeline of events she was in the room about three minutes and observed Respondent's hold on S1's arms for about two seconds. Given the history of Respondent's relationship with S1 as Respondent's teacher, the Commission was not persuaded Respondent held S1 in a hard hold. The Commission was persuaded Respondent held him gently for only the short seconds she took to say, "Stop," which she said in the course of her usual practice.

50. S1's behaviors were undoubtedly escalating before and during February 3, 2022, as confirmed by Ms. Totlani and other District staff. Ms. Totlani was assigned to S1 about the time of his IEP in January 2022 due to his escalating behaviors. Respondent started taking data of S1's behaviors at the direction of the IEP team. Respondent provided District a report of S1's most recent behaviors during the investigation of her conduct on February 3, 2022.

51. On February 2, 2022, during a three-hour period beginning at 10:46 a.m., Respondent recorded S1's separate and specific conduct: kicked another student, kicked once and hit teacher twice, head butted leg and kicked once, kicked three

times, head butted and hit twice with screaming; laid on top of another student; hit teacher twice, kicked once; spit towards another student's face; kicked teacher three times; screaming; kicked teacher's leg and spit on it twice and head butted leg; kicked teacher once, hit teacher three times; put pencil in mouth, bit off end of pencil and spit it out; hit teacher; walked across classroom to spit on teacher two times; constant hitting teacher in the leg for two minutes and when there was no reaction started kicking multiple times and two handed pushing in the stomach; and throwing trash at teacher – when asked to stop screamed and threw more and hit teacher. (Ex. D.)

52. On February 3, 2022 Respondent recorded the following data between 10:47 a.m. and 1:12 p.m. when Ms. Totlani walked into the room: spitting on ground – hit teacher when asked to stop; hit another student in line; ran out of room – hit kicked and threw himself on ground when asked to come inside – kicked teacher two times stepped on foot and swung lunchbox trying to hit teacher; was sitting on the desk when asked to sit on his spot hit teacher with two hands; grabbed all pencils from pencil box and threw them in air at teacher, then kicked teacher; laid on top of student and would not get up; threw pencils at teacher – as teacher walking away pushed it back then grabbed leg trying to bite leg in multiple times first in thigh then calf then ankle – teacher stepped out of his arm reach; bit end of pencil – hit teacher 3 times when taking pencil away; hit teachers legs constantly for 15 seconds – tried to spit two times; grabbed crayon box – when teacher told him no because they were not his, threw them in the air; was grabbing another student's stuff and then starting hitting him - when teacher asked him to sit down he hit teacher three times; teacher was talking to another student he came up grabbed teachers hand, pulled his mask down and spit on teacher. (Ex. D.)

53. Respondent reported at around the time Ms. Totlani walked into the room, S1 had bit a pencil as teacher was trying to get it from him, threw it in the air and it almost hit another student – grabbed teachers hand and bit it – spitting on teacher three times – hit teacher too many times to count. (Ex. D.) During that incident, Respondent had turned away from S1 to throw out the pencil in the trash when he ran behind her and punched her in the back. Respondent's reports of S1s behavior was supported by the evidence and uncontradicted.

54. After Ms. Totlani left the room, S1 calmed down and Respondent was able to work with him. She used his stuffed animal to comfort him and worked on an art project which involved stickers, which was a preferred activity.

55. Dr. Johnson, accompanied by Dr. Ferris met with Respondent and her union representative to discuss the charges on February 17, 2022. Dr. Ferris did not take an active part in the investigation and relied on Dr. Johnson's reports and notes. The only conduct discussed was the alleged conduct on February 3, 2022. Respondent was firm in her denial the incident occurred as Ms. Totlani observed and shared S1's behavioral history. She described S1's "daily" and "violent" behavior which was consistent with her data above. She told them he had been kicking, hitting and started "biting lately." (Ex. RR.)

56. During the meeting Respondent was asked specific questions about the incident. The other students in the class were working on Valentine's Day projects. She denied ever restraining S1 by holding S1 down in his chair. She had just asked S1 to sit down after he had hit her. It is her practice to repeat herself several times until he sits down. She leans down to his level and places her hand on his hand, one hand over one hand. She admitted to leaning over and telling S1 "we do not hit." She did not see Ms. Totlani when she first came in but saw her as she got closer. When Ms. Totlani

approached Respondent stood up and was standing next to S1 who was making a whining noise. She gave him his stuffed animal. While she was speaking to Ms. Totlani S1 kicked her. She crouched down and put her hand on his knee/shin and said, "No we don't kick" and stood back up to finish her conversation. She recalls Ms. Totlani say, "Oh wow, I have never seen him do that – hit or kick you," to which she responded, "Yeah, unfortunately it happens a lot. I've also been bit and spit on." (Ex. RR.)

57. During the February 17, 2022 meeting Respondent was clear she never restrained S1. To assist S1 at times she made physical contact with him when he fell to the floor by placing her hands under his arms and saying "Ok, let's get up!" After that he would get up and they would walk together. When he would throw himself on the floor, she would respond by moving away and sometimes she would place her hand under his head to keep him from hitting his head. (Ex. RR.)

58. Respondent's statements during the February 17, 2022 meeting about S1's behaviors, his kicking her during her exchange with Ms. Totlani, as well as her interventions and her contacts with staff when she needed assistance were consistent with the evidence of S1's history, staff reports and Respondent's testimony. When Respondent's interventions failed to modify S1's behaviors she called for assistance. The evidence confirms Respondent's representation she reported her concerns to Charly Guevara, the school counselor, Ms. Doumerc, the special education/resource teacher, and Tracy Nguyen, the school psychologist. (Ex. RR.)

59. "Restraint" as defined by District staff beginning with the testimony of Dr. Ferris, was used to refer to conduct that prevented movement. Dr. Ferris distinguished restraints from "physically gathering" actions which included picking up a student under his arms. Dr. Ferris conceded the distinction between a "restraint" and

“physically gathering” could be confusing. Respondent denied holding S1 down in the chair and the evidence did not support that she did.

60. District staff, including Ms. Nguyen and Ms. Doumerc, who regularly dealt with students with behaviors, did identify preferred methods of physically guiding S1, including hand instead of wrist holding, guiding him gently by touching his arm and releasing him when he drops to prevent injury and escalation of behaviors. These preferred methods did not rise to the level of a persistent violation of District regulations.

STAFF REPORTS OF OTHER INCIDENTS WITH S1

61. Once the principal was notified of Ms. Totlani’s observations, she requested other staff to report their observations of Respondent’s conduct with S1. The personnel involved were mandated reporters and if they considered the incidents abusive they were obligated to report the incidents themselves but never did.

62. Ms. Doumerc had a negative view of Respondent. When she spoke to Dr. Johnson on February 4, 2022, she told her Respondent spoke in a harsh tone to her TK students and observed her “towering” over them. (Ex. 2.) When the principal asked Ms. Doumerc about Respondent’s behaviors, she expressed particular concern about an incident in the playground on January 27, 2022 where Ms. Doumerc observed S1, not as the principal aggressor, but nonetheless a secondary aggressor. A student had pushed S1 after which S1 pushed the student back. Ms. Doumerc believed Respondent saw the entire incident, which she did not. When Ms. Doumerc approached Respondent to tell her another student pushed S1 Ms. Doumerc reported Respondent grabbed S1’s arm, waved her finger in S1’s face and spoke to him in a harsh tone, “We don’t push others.” At that point, S1 dropped to the ground. Respondent kept holding

on, “pulling” S1 arm after he dropped and S1 began to kick Respondent. (Ex. 2.) Ms. Doumerc’s negative view of Respondent was reinforced during the hearing when she expressed suspicion about Respondent’s ability to write so many notes about S1’s behavior. Respondent was requested to do so and used her note section in her phone.

63. In Ms. Doumerc’s written statement of February 8, 2022, she explained she intervened by telling Respondent to let go of S1’s wrist, which she did, and told her to avoid holding his wrist “since it triggers him.” (Ex. 5.) She demonstrated how to gently hold the side of his arms and guide him and when Ms. Doumerc did that S1 joined the line and walked back to the class.

64. Ms. Doumerc was troubled by what she saw was Respondent’s lack of attention to what she was saying during that interaction. She thought Respondent was dismissive of her and did not acknowledge S1 was not the aggressor. During the hearing Respondent credibly addressed the circumstance. She did not see the other student and by the time Ms. Doumerc was speaking with her she was not only tracking S1 but speaking with another student and attending to a total of 25 students lining up from her class to return to the classroom. She was admittedly distracted and could not recall speaking with Ms. Doumerc.

65. Ms. Doumerc’s report of the incident did not fully explain the circumstances nor was it based upon her prior experience with S1 or Respondent. Ms. Doumerc only became involved with S1 during the assessment process before winter break. She did provide pull-out resources to another student in Respondent’s class prior to Christmas but otherwise had little involvement with Respondent. After S1 was provided with pull out services, Ms. Doumerc was able to observe S1’s behavior when he was in a small group of students at the Learning Center. Ms. Doumerc noted S1 was fidgety but otherwise well-behaved. Ms. Doumerc’s observations in her small class

setting were not reflective of S1's struggles in a large classroom or playground setting but did demonstrate S1 was better suited to a small group environment.

66. Tracy Nguyen also observed and testified to Respondent's interaction with S1 on the playground on January 27, 2022 did not think it was important enough to include it in her statement to the principal. (Exs. 2 and 4.)

67. Ms. Nguyen was the school psychologist with about four-years of experience in that role. She had strong and rigid opinions about Respondent's conduct but the Commission found her credibility limited by her relatively short tenure as a practitioner, her limited classroom experience and her few encounters with Respondent and her classroom. Ms. Nguyen understood interventions but did not fully appreciate the dynamics of a crowded classroom coupled with the limited one-on-one support given to S1 in Respondent's classroom.

68. Ms. Nguyen did not appreciate how Respondent intervened with S1 on the playground, on January 19, 2022. Respondent had contacted Mr. Guevara the school counselor for assistance with S1 on the playground. Ms. Nguyen responded and when she went to the playground, she observed Respondent holding S1 by the hand near a bench next to another kindergarten student. Notably, Ms. Nguyen had no comment about Respondent holding S1's hand at the bench but pointedly noted Respondent was inappropriate when, after reporting both S1 and the other student were having a hard time, she asked Ms. Nguyen "Which one do you want?" Ms. Nguyen responded sharply: "You're [S1's] teacher so you can take him while I will stay with [the other student]." (Ex. 4.) She added in her report that she observed Respondent holding S1's hand walking quickly toward the classroom without stopping when S1 pulled away from her. (Ibid.)

69. Respondent credibly addressed Ms. Nguyen's complaint. Respondent was joking when she asked Ms. Nguyen to pick a student. S1 frequently pulled away from Respondent, often because he enjoyed the sense of pulling or leaning back from her hand. The Commission found Ms. Nguyen's complaint subjective and excessively harsh given the circumstances. Respondent had appropriately used interventions to calm S1, students had already returned to their classrooms, and Respondent had to return to her classroom with S1 and attend to her students.

70. Ms. Nguyen reported an incident both she and Dr. Johnson observed which occurred on January 31, 2022. Respondent had called Mr. Guevera and Ms. Nguyen retrieved her voice mail message about five minutes later. Respondent generally relied on the school counselor but when Ms. Nguyen asked her if she could help, she readily accepted the assistance. Respondent reported that "S1 is having a tantrum where it is to the point where he can hurt other children, I need Mr. G to come in." (Ex. 4.) On her way to Respondent's classroom, Ms. Nguyen was joined by Dr. Johnson who endorsed Ms. Nguyen's observations of events. Respondent appropriately called for additional assistance on a few occasions when her interventions were not effective and S1's behavior escalated to the point other students might be in danger, particularly when he started throwing things. When she entered the room Respondent was holding S1's hand and turned S1 over to her while stating "He just spat on me." (*Ibid.*) S1 appeared to have been crying. Dr. Johnson immediately responded by putting her hand up in front of Respondent as a signal for her to stop speaking while saying "Not in front of the kids." (*Ibid.*) Respondent reacted in the moment by responding "They all saw what happened." (*Id.*) Dr. Johnson acknowledged Respondent was correct, "I know, but not in front of the kids." Respondent commented "I can't [do this now]." (*Id.*) Respondent complied with the Principal's request and Ms. Nguyen took S1 to the back of the classroom, gave him a

soft toy to squeeze and modelled breathing for him to imitate. S1 calmed down. Ms. Nguyen continued to work directly with S1 during a craft exercise where she verbally praised him, broke down the tasks for him. Ms. Nguyen observed S1 attempts to break crayons within his reach so she gave him one crayon and blocked him from breaking crayons. She left when the exercise was completed and there was 10 minutes left before dismissal.

71. Respondent admitted during her testimony her response to the principal was not appropriate. However, the Commission found Respondent acted appropriately in calling for assistance and her statement near the students, although not appropriate under the best of circumstances, was understandable given the size of the classroom, the number of students and the need for assistance with S1. Ms. Nguyen's effective one-on-one support demonstrated to the Commission S1's need for one-on-one support throughout the day, which was not supplied, and not a reflection of Respondent's skill and care of S1.

72. Ms. Nguyen expressed additional concerns about Respondent's behavior including her "pushing" S1 which the Commission found subjective and not persuasive.

73. Ms. Zamora, an instructional assistant assigned to Respondent's classroom, was interviewed by the principal as part of her investigation. Ms. Zamora has six years of experience as an instructional aid assisting students who required social-emotional support. She was assigned to S1 in or around late September or October 2021 after Respondent requested support from Mr. Guevara, the school counselor. She provided support about 40 minutes each day from about 10-10:40 a.m. Ms. Zamora reported to Mr. Guevara and received instructions from him. She was told to sit next to S1, prevent him from throwing things, eloping from the classroom, and disrupting the class. Prior to her assignment she had observed S1 on the playground

running from the teacher and pulling masks off other students' faces. Ms. Zamora reported S1's behaviors which were particularly egregious. On November 5, 2021, she noted S1 was "now displaying more anger when she prompts following a directive." She noted he runs away when she holds his hand, does not do well with changes in routine and when he stays indoors for recess he will cry, stomp, or attempt to run out of the classroom. Ms. Zamora reported she had to stand in front of the door to prevent him from leaving. She noted S1 cannot work independently or engage with the class and can rip paper, talk to himself and just walk around the classroom. She noted he can be calm and when he is calm is quiet and respectful. He enjoys counting videos and dancing. (Ex. S.)

74. Ms. Zamora confirmed the reports of S1's behaviors during her testimony. She had never observed Respondent hit, push or kick any student, including S1, and other than what she reported to the principal, had never seen Respondent behave inappropriately. She confirmed S1 hit, kick and spit at Respondent and Respondent would protect herself by holding him away from her. Ms. Zamora also recalled being punched by S1 and injured.

75. On a date not established by the evidence Ms. Zamora was walking out of the restroom down the hall from Respondent's classroom when she witnessed Respondent standing at her doorway. S1 was face down on the floor between Respondent's legs and Respondent squeezing his head with her feet. She stated she reported her observation to Mr. Guevara so that he could help Respondent with techniques. Mr. Guevara did not recall her report.

76. S1 was an elopement risk and often would try different ways to get around Respondent or whoever was at the door. The District's protocols during Covid generally required the classroom doors remain open; however, Respondent had to

keep her door closed because of S1's pattern of elopement. Her door was not far from the exit of the building which could be accessed after making a quick turn down the hall where S1 would no longer be visible. Ms. Zamora had experiences with S1's elopement as well as his other behaviors which are described below. During the hearing, she estimated S1 would just get up from his chair and run on a daily basis, on average three to four times daily.

77. Respondent denied ever closing her legs on S1 in a headlock. She described S1's pattern of dropping to the floor before her at the door as a way to elope. At dismissal time she had the door open and stood in front of it to prevent S1 from eloping. The students were to stand by their desk and then come out. Often S1 rammed his head into her and then would lay his tummy on the ground and put his head between her legs and his hands on her foot. She did not want to hurt him so she would not move. She let him calm down and then she verbally directed him by asking him if he was ready to go and stand by his desk. She never pinned or squeezed his head between her legs. It would generally take a minute for his behavior to resolve.

78. Ms. Zamora elaborated during testimony on her observation of the incident that day which occurred close to the end of the day. She was about 15-20 feet away from Respondent, who was already at the door. From Ms. Zamora's position she could observe S1 on the floor with his stomach face down and also on his hands and knees attempting to crawl through Respondent's legs. Ms. Zamora could not tell if S1 was squirming or see his face – he might have been looking down - to register whether he was uncomfortable or in pain and she could not see his entire body. Ms. Zamora could see his head from the back of Respondent's feet. The observation occurred during a "quick minute." She had never seen anything like that before.

79. The Commission concluded Ms. Zamora's could not clearly observe from where she was standing whether S1 was in a head lock and found Respondent's testimony more persuasive. Ms. Zamora had never seen Respondent act physically in an abusive manner toward S1 or any student.

80. Overall, Ms. Zamora, when pressed during the hearing, would not fault Respondent with inappropriate behavior toward S1. She maintained Respondent "could have handled [the situation] differently."

81. The Commission found that other isolated statements or actions attributed to Respondent were taken out of context, very subjective and elevated to a level of gravity which was out of proportion to the circumstances. Ms. Nguyen found during one encounter Respondent "pulled" S1 toward her. Respondent was reported to have said in front of other students S1 does not belong here. It is uncertain if Respondent made this exact statement: Respondent recalls reporting to Ms. Doumerc at one time when she was standing next to her door talking about the support S1 requires and stating she was not sure it was the best placement for S1 given the amount of support he needed. Respondent was correct; S1 needed more support. The better practice would be to discuss S1 with staff privately, but Respondent was in a busy classroom and her interactions with staff about S1 generally occurred quickly while she was managing the classroom.

82. The record established Respondent was proactive in seeking support from District staff. She regularly called for additional assistance when S1's behavior elevated to a point where he was a potential or actual danger to himself and other students. Mr. Guevara generally helped in the afternoon when available to assist her during dismissal time. He provided one-on-one counseling to S1 as the year progressed. Respondent referred S1 to the resource team, collected data as advised by

Ms. Doumerc, and utilized many interventions to comfort S1, including showing him animals on her watch and giving him a comfort toy.

P1'S REPORT OF SCHOOL GATE CONFERENCES

83. In the course of Dr. Johnson's consultation with S1's parents, P1 disclosed Respondent's daily negative reports of S1's behaviors at the school gate when P1 picked up S1. P1 asked Respondent each day how S1 was doing and Respondent consistently reported bad days. One day, another parent came over and scolded Respondent for having private conversations in a public place. Respondent sent email communications to P1 apologizing to P1 and offering other options to communicate with her.

84. Respondent was very communicative with S1's parents and responsive to P1. Due to Covid restrictions parents were not permitted on school grounds or in the classroom. She met with P1 at the gate and openly shared with her S1's challenges that day for which she was later criticized. Respondent kept an open avenue of communication with P1. P1 had informed her S1 used two to three word phrases in Polish at home. (Ex. K.) She consulted with P1 on S1's comfort toys and Polish-language books and used what P1 sent with him to school to comfort him. Respondent held a student conference with P1 on November 1, 2021 at which time a speech and language assessment was discussed and P1 shared S1's deficits at home. The Commission determined given the Covid protocols, Respondent's overall attempts to find supports for S1, these schoolyard conferences held at the behest of P1, although not the best way to share information, did not reflect a pattern of inappropriate behavior or ill-will toward S1 or undermine school regulations.

Incidents Alleged With Other Students

BATHROOM INCIDENT

85. Ms. Totlani used the opportunity during her meeting with the principal on February 3, 2022, to add another complaint about Respondent's purported refusal to allow another student, S3, to access the bathroom on January 27 or January 28, 2022 around 11:40 a.m. Again, Ms. Totlani has a keen awareness of time; nevertheless, as a mandated reporter, she did not feel compelled to report this incident earlier.

[Respondent] also does not allow a student [S3] to use the restroom. [W]hen asked by the student tells him to wait thus causing the student to have a[n] accident. I personally saw a kid in the hallway with his half pants down and wet running to the nurse.

(Ex. 3.)

86. There is insufficient evidence Respondent failed to respect any student's request to use the bathroom. Respondent credibly explained she requested students try to wait until a break in instruction but respected students' need for immediate access to the bathroom. When S3 had an accident, he was sent to the nurse as required. The nurse is authorized to clean students and keeps a change of clothes for them. Notably, only certain District staff can assist students with toileting. Ms. Totlani has specialized training and certification to assist with toileting; Respondent does not. Respondent has a large class of TK students. The Commission found it unreasonable to fault Respondent for student bathroom accidents which were reported only after the Principal opened an investigation of Respondent.

FAILURE TO ASSIST CRYING STUDENT

87. Ms. Zamora faulted Respondent for ignoring the needs of S2 who consistently cried for help with assignments. Ms. Zamora was unaware Respondent had consulted with S2's parents about his behavior and S2's parents who were well aware of his conduct. At home, S2 would cry when he did not want to do something and his sister would do it for him. According to Respondent, S2 cried frequently. He cried when he made mistake with his work, when a water bottle spilled, when he could not open his snack, or anytime he could not figure something out. The parents wanted Respondent to encourage S2's independence. Respondent implemented strategies to reinforce his independence and reduce his maladaptive behaviors such as working on him raising his hand for help and then asking him how she could help. As such, Ms. Zamora's subjective observation Respondent's approach to S2 was evidence of disrespect or ill-will toward her students was without support.

THROWING SCHOOL SUPPLIES

88. Ms. Zamora was disturbed by Respondent's practice of throwing school supplies for projects in the middle of the table. She considered Respondent's practice to be part of a pattern of disrespect and poor regard for her young TK students. Ms. Zamora's observation was discredited by Respondent who explained she purposely tossed school supplies in the middle of the table so instead of handing them directly to student so students could reach and learn to orient and place their supplies in front of them. By tossing the supplies in the middle of the table she was able to assess the abilities of her young students. As such, Ms. Zamora's subjective observation Respondent's practice of throwing school supplies was evidence of an attitude of ill-will or disrespect toward her students was without support.

TONE AND LANGUAGE

89. Ms. Nguyen made plain in her written statements and testimony she was critical of Respondent's manner and interventions with S1 and other students. After Dr. Johnson initiated the investigation and asked Ms. Nguyen if she ever had seen anything "inappropriate between [Respondent] and a student" Ms. Nguyen shared her opinion, which was similar to Ms. Doumerc, and instructional assistants, Ms. Totlani and Ms. Zamora, Respondent did not use the appropriate manner, tone or language to speak with her young students. Ms. Nguyen reported she heard Respondent say to students on the playground, "get in line," "come here," and "you are not supposed to be here." (Ex. 2.)

90. Ms. Doumerc and Ms. Nguyen also objected to Respondent's demeanor. They referred to her stature as "towering," described her harsh tone and felt her "sharp" playground instructions were inappropriate toward small children.

91. When these remarks are considered in the context of the Principal's investigation, the Commission found them subjective and after thoughts by District staff asked to comment about Respondent, and not reflective of Respondent's history as a TK teacher. Respondent admitted she is a tall and "loud" person. Ms. Zamora conceded Respondent was "firm." There was no evidence of an objectively correct tone and words to use towards students.

S1's Challenges During the 2021-2022 School Year

92. The Commission found the District's evidence was compromised of isolated incidents brought to its attention by staff during the District's investigation of the February 3, 2022 incident and failed to put these incidents in the context of the behavior Respondent was addressing with S1 in a classroom with a large number of TK

students. The Commission found these incidents became exaggerated and elevated to a pattern of conduct that was unjustified by the circumstances or Respondent's history.

93. School personnel in a position to regularly observe S1, including Respondent and instructional aids, Ms. Totlani and Ms. Zamora, noted a pattern of behaviors that escalated from the beginning of the school year, and then after Respondent was removed from the classroom.

94. S1 entered school at four years of age and turned five years of age two months later. Due to his age, he was placed in TK, not kindergarten. At the time he entered Wood he was not made eligible for special education services under Part B of the Individuals with Disabilities Education Act (IDEA) and there is no evidence he had been made eligible for or had been receiving services under Part C of the IDEA which applies to children three years of age and younger.

95. S1 was from a bilingual household where Polish is spoken. From the start of the school year, he suffered from an as yet undiagnosed speech and language deficit which did not clearly result from having another language spoken at home. P1 reported S1 does not speak in complete sentences in either language. His language deficit was further complicated by the Covid-related school protocols which required every child to wear a mask.

96. School personnel were in general agreement S1 was exhibiting behavioral issues which interfered with his learning. Early in the school year, no later than mid-September 2021, Respondent, working with the Wood's resource team, which included Mr. Guevara, Ms. Nguyen, Dr. Johnson, among others, who collectively

determined it was appropriate to form a Student Intervention Team (SIT), beginning with a Pre-SIT meeting. (Ex. I.)

97. On October 14, 2021, at the Pre-Sit: Goal-Setting/Intervention meeting Respondent reported S1's strengths which included "[N]ot crying daily [¶] Use stuffed animals to console [¶] Let teacher work with him hand over hand [¶] Sometimes listen to prompts when upset-Teacher uses word and visual cues [¶] Most of the time lines up without eloping-follows model student then lines up himself." (Ex. J.) The primary concerns of the SIT were: "Student is upset and crying throughout the day, everyday [¶] Student is eloping from the classroom, running away from the line in the hallway[¶] Struggling academically-no recognition on letters or numbers." (Id.) The target goal for his behavior was for him to "[f]ollow a routine to transition in and out of the classroom during start of day and snack time," and to develop a language goal. (Id.)

98. The interventions recommended to assist S1 and Respondent included working daily with the teacher on hand over hand tracing, additional time for assignments, bring stuffed animals to console, close classroom door, model how to line up and enter class and work daily with instructional aid building vocabulary in a small group, daily support with an instructional aid on behavior push in class, program specialist to help develop curriculum to build language. Additional recommendations included counseling and having Polish-language books available for S1.

99. During the early part of the year, before the IEP, Respondent was concerned enough about S1's behaviors to ask for the SIT to convene. In the "Pre-Sit Notes 10.14.21" the team reported S1 "[s]ometimes elopes around the corner of the building (teacher leaves door closed) [¶] [s]tudent yells and babbles different times of day randomly[¶] [d]estructive behavior-knocks students things off table [¶] [s]truggling academically [¶] [and s]eeking attention." (Ex. K.)

100. Under the category of "Notes" other characteristics of S1 and interventions Respondent has attempted.

Repeats different words that he hears often-alright,
another students name

Trying to teach how to say good morning, VIP role today,
Teacher says Good Morning, then students respond Good
morning [S1]

Mom says he says 2-3 words phrases in Polish, mom is
concerned about language delay

Mom says he likes to build things-teacher tried to give
blocks during discovery time

Mom said he stopped eloping with her in April

Currently working daily with IA [instructional assistant] on
building vocabulary

ABC tracing book daily with teacher hand over hand (9:45-
10:15 or 1:00-1:45) looks away, teacher stops to get
attention again

Has tried preferred seating near teacher

Teacher has tried google translate with simple words or
phrases but no response.

(Ex. K.)

101. The Pre-Sit notes of October 14, 2021 also record “notes from Teacher”: “[v]ery upset and crying the entire day [¶] [c]annot seem to calm himself down [¶] [c]ries for hours on end even during play time and preferred tasks – [a]verage 4 elopements per day leaving classroom[¶] [w]hen asked to line up outside classroom or after leaving snack playground runs down hallway towards the front gate [¶] Mom says his stuffed cat calms him when upset at home.” (Ex. K.)

102. At the Pre-SIT meeting held with both S1’s parents on November 9, 2021, just before S1 turned five years of age, improvements were noted by Respondent: S1 was not crying daily; stuffed animals were used to console him; he let Respondent work with him hand over hand; he sometimes listened to prompts when upset when Respondent used words and visual cues; he lined up without elopement by following a model student. S1 was still eloping and struggled with new routines, and still wandered the classroom. (Ex. L, Form A.)

103. S1 did not demonstrate the noted improvements in his behaviors were consistent and reliable. On November 5, 2021 Ms. Zamora, referred to in a written note as his “social emotional” instructional aide, reported S1 was displaying “more anger when she prompts following a directive,” her interventions when S1 “attempts to hit someone,” his pattern of running away from her or stomping his feet while “flailing” his arms away from her when she attempts to hold his hand to provide support. (Ex. S.) Ms. Zamora confirmed S1’s difficulties with routine changes and when he has had to stay indoors at recess, he cries, stops or attempts to elope from the classroom. Ms. Zamora has had to block the classroom door to prevent him from eloping. He also has difficulty independently completing work or engaging in classroom work; he will “rip paper, just sit in his seat and talk to himself or walk around the classroom.” (*Ibid.*) Ms.

Zamora noted he could at times be calm and when he was "quiet and respectful." He also enjoyed the counting videos and danced when they were shown. "(*Id.*)

104. At the November Pre-Sit meeting, the parents reported S1 runs, loves the park, animals, dancing and going to new places and traveling. S1's parents further reported S1: "parallel plays" with children at the park, and together with cousins where he communicates with gestures, and speaks a combination of Polish and English; understands one-step directions in both languages, and uses gestures or repeats himself when there are tasks he does not want to do; he writes with help letters and now "signs" letters; speaks a lot to parents but not always understandable although he can repeat words correctly; he holds hands walking on the street, demonstrates he wants to run when he sees grass and "sometimes" listens when asked to stop; and he misses his grandparents such that he carries their pictures with him when he plays. (Ex. K.)

105. At the November Pre-Sit meeting a goal was set for S1 to follow a routine to transition in and out of the classroom and parents agreed to use a token board to reward S1 for work on nonpreferred and challenging tasks. (Ex. K.)

106. Respondent was concerned about S1 but it was early in the school year and she considered his behaviors troubling and a possible consequence of his speech and language deficits. Respondent was focused on using a variety of interventions in the hope his behaviors would improve as he became more adept at following the curriculum (visual schedule, token board, Polish-language books, stuffed toy). (Ex. I.)

107. S1's parents were encouraged to authorize a speech and language assessment which they did. After S1's parents agreed to an assessment plan for speech

and language, the SIT meetings ended because these meetings were superseded by the IEP process which is initiated by the assessment plan.

108. After the District conducted assessments an IEP team meeting was held on January 19, 2022 which Respondent attended with other staff and S1's parents. The IEP team did not use the term aggressive, according to Ms. Doumerc, during her testimony, but did identify S1 pushed, which they assumed was a way to get attention or play. S1's parents informed the IEP team S1 followed super heroes who pushed into others to show their super powers. S1 was provided pull-out services with Ms. Doumerc in a small group 30 minutes, two days weekly. (Ex. SS.)

109. S1's behaviors continued to accelerate after Respondent was removed from the classroom on February 3, 2022. The District decided to continue to track S1's behaviors and encouraged S1's parents to agree to a Functional Behavior Assessment (FBA), which would assist with the development of a Behavior Intervention Plan (BIP), but S1's parents refused. On Monday after the incident, February 7, 2022, Ms. Zamora reported S1 had a "really bad day today with teacher and YMCA person and myself." (Ex. X.) On February 16, 2022, Ms. Zamora reported S1 eloped from the class three times after she attempted to "sit him down." He ran down the hall laughing as he looked back at Ms. Zamora. He ran out into the hall even after she closed the door. She sat behind him and he threw the books and coins she gave him to work with. He banged his head into her, hit her in the face, and after she sat behind him hugging him, he turned to spit on her, and spit on her two more times, after she told him "not nice." (Exs. Y and Z.) Ms. Zamora reported other incidents of S1 hitting her. She also reported S1 hitting a "little kid" in the back of the neck with a closed fist. (Ex. II) One month after the incident, on March 5, 2022, Ms. Zamora reported a "few incidents" in the playground. (Ex. OO.) In addition to his aggression towards other students, which

included him sitting on top of a student's head screaming and required two aides to remove him, S1 starting swinging and hitting Ms. Zamora. The other student had to be taken to the nurse.

110. There is no evidence S1's behavior improved over time during that school year. The District attempted to meet with S1's parents on other occasions between February and April 2022 and finally met with them the last day of school to discuss an FBA and BIP with behavioral goals. The District was unsuccessful in securing parent's agreement.

Respondent's Character Evidence

111. Respondent provided persuasive testimony of her commitment to the teaching profession in general, and Wood in particular. Respondent was in "shock" when she was informed by the principal on February 3, 2022 of the charge against her and removed from the classroom. She was "worried" about her students. She contacted the substitute teacher to provide information about her students. She loves being a teacher and wants to get back to work. Respondent's testimony was heartfelt; she began to cry when speaking about her students. It was clear from her demeanor and presentation, Respondent is an enthusiastic and high energy person, a former cheerleader, who could be loud, as she readily admitted. Respondent generally compensated for her height by crouching down or squatting.

112. Respondent stated it was difficult to obtain the level of behavior support needed for S1 after the IEP without the designation of autism. S1 did have some pullout support from counseling and the Learning Center, but otherwise support in the classroom before February 3, 2022 was limited.

113. Respondent presented three character witnesses, retired teachers from Wood, who knew Respondent through her involvement with the teaching community at Wood and through her mother, also a retired teacher, and two character reference letters.

114. Jane Ozawa, who retired as special education educator from Wood in 2020 and had 20 years of experience in the District and a total of 25 years as an educator, knew Respondent as a new teacher during the 2015-2016 school year and as the daughter of another teacher at Wood. During the 2015-2016 school year she had on her IEP student caseload a student who was in Respondent's class. She observed Respondent to be conscientious and a hard worker. She saw her leaving school late in the evening. She found her to be energetic and inquisitive. Her first impression of Respondent's classroom was of "positive chatter" and a lot of movement and sound from the TK students. She found Respondent's students to be highly interactive and engaged with Respondent.

115. Ms. Ozawa was also impressed with Respondent's enthusiastic efforts to advance a sense of community among the teachers through the Sunshine Club where teachers and aides would interact. Respondent would create signage to create a positive environment. She observed her on the playground, her interactions with parents, and noted Respondent was very vigilant and caring of her students. She described Respondent as the best "backward walker teacher." She highlighted Respondent's inquisitive nature, her proactive questioning before an IEP and her desire to get answers when she did not understand something.

116. Juliann Akerson has primarily worked as a fourth grade school teacher at Wood for her entire 36-year teaching career, and currently is teaching a combined fourth and fifth grade class. She knows Respondent's mother and has known

Respondent from birth. She was at the hospital when Respondent was born. Ms. Akerson knew Respondent as an energetic, cheerful and always positive person, always willing to help others.

117. Ms. Akerson did not observe Respondent in her classroom setting but knew her from her work on campus with the Sunshine Club where Respondent helped plan social events for the staff. Respondent loaded a cart and rolled it to each classroom to distribute treats to the teachers and staff. More importantly approximately seven years ago, Ms. Akerson observed Respondent's involvement in helping develop incentives for students to use as part of a positive behavior intervention system (PBIS) and connecting school staff to PBIS.

118. Melissa Zornitsky retired as a teacher from Wood in 2020 after 32 years. She knows Respondent as an enthusiastic and joyous person, not someone who exercises an inappropriate tone of voice. She knew her passion for becoming an educator. She had observed her on occasion in the hallway and in assembly standing with her students and when one of Ms. Zornitsky students made a presentation to Respondent's class. She never observed Respondent behaving inappropriately. She only knows her as a positive person, full of joy.

119. Respondent obtained two letters of recommendations from other teachers at Wood. Ann Hilke, a Lead Teacher, with 32 years as an educator has known Respondent since she was a child. She also has known her as a teacher at Wood for seven years and joins other character witnesses in noting her reliability, enthusiasm, and hard work as well as her ability to work with a very young and diverse pupil population. She too considers Respondent to be kind, helpful and positive. (Ex. B.) Karen McCormick, a fifth grade teacher, has worked with Respondent in a variety of positions, particularly noting her accomplishment as a grant writer, earning over

\$5,000 to enhance PBIS and other classroom programs. She also was aware of her dedication as the teacher liaison to the Parent Teacher Association (PTA). She considers Respondent a “dedicated professional who knows how to motivate her students to strive for excellence.” (Ex. C.)

120. The Commission considered Respondent’s testimony and her character references with care. The Commission was cognizant of the close relationship some of the witnesses had with her mother and their lack of familiarity of Respondent in the classroom. Nevertheless, there was a consistent theme of Respondent’s caring character which was consistent with the evidence of Respondent’s interventions on behalf of S1. Based on the entirety of the record, the Commission was not persuaded Respondent persistently violated school rules or regulations or was unfit to teach.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving the charges by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038–1039.) “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations] [¶] The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325, emphasis in original.)

2. The Commission weighed all the evidence and testimony and the demeanor of each witness in rendering its decision. The trier of fact may “accept part

of the testimony of a witness and reject another part even though the latter contradicts the part accepted. [Citations.]” (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.* at p. 67–68, quoting from *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 777.) The Commission found the credibility of certain witnesses, Ms. Nguyen and Ms. Doumerc, and in part, Ms. Zamora, suffered by the expansion of Dr. Johnson’s investigation to other conduct observed by District staff but not considered important enough to report as part of their duties as mandated reporters (e.g., harsh tones, dismissive of advice, throwing items). These more subjective observations reflected a negative attitude toward Respondent unrelated to her conduct. (Gov. Code, § 11425.50, subd. (b).)

Causes for Termination

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Education Code sections 44932, subdivision (a), 44939, and 44942 are established by a preponderance of the evidence.

EVIDENT UNFITNESS FOR SERVICE

4. Certificated employees are subject to dismissal for evidence unfitness for service pursuant to Education Code section 44932, subdivision (a)(6).

5. Evident unfitness for service means “clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. [Fn. omitted.]” (*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. [Citation.]” (*Id.* at p. 1465, emphasis in original.) “‘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.)

6. The Commission concludes Respondent’s conduct did not demonstrate a fixed character trait or defect in temperament. The primary conduct alleged, holding Respondent’s arms on his chest on February 3, 2022 was, at most, a momentary lapse in judgment. There was insufficient evidence Respondent held S1 down in the chair as Ms. Totlani claimed during the few seconds Respondent held her hands on his arms. Even if Respondent’s conduct prevented SI from moving, the District’s own witness, Dr. Ferris conceded the distinction between a restraint and a “physical gathering” such as lifting S1 up by the arms was not clear. Respondent did not have a pattern of receiving prior warnings or directives against the actions she has been accused of or a pattern of being unwilling or incapable of refraining from untoward physical contact with S1 or any other student. On the contrary, the evidence established Respondent had a history of involvement with the school community and with encouraging the adoption of a PBIS. She was proactive with S1, requesting support for S1 when his behaviors appeared to be endangering himself or others, initiating the Pre-Sit, communicating with S1’s parents and diligently trying different tools to engage with S1. She participated in the teaching community where she sought support and advice. Ms.

Dourmerc's judgment of Respondent as dismissive of her was not supported by the evidence.

7. The District was not persuasive in its attempt to show Respondent was routinely inappropriate with other students by referencing, S2 and S3, or the subjective observations of her "harsh" tone and uncaring manner, or that she was responsible for S1's escalating behaviors. The evidence established S1's behavior in a small group setting with Ms. Doumerc or with one-on-one support with a trained school psychologist demonstrated the difficult challenges Respondent faced addressing the needs of one student in a class with a large number of students. S1's behaviors which had escalated prior to February 3, 2022, remained problematic throughout the school year. There was no evidence of any complaints from other parents about Respondent's behavior during the 2021-2022 school year or any other school years.

8. The Commission found Respondent's one act of briefly placing her hands on S1's arms inappropriate but did not find it that it clearly met the definition of the specified abusive acts described in the Board's policies. The Commission did not find other actions by Respondent against S1 or any other student qualified as abuse or harassment according to Board policies. The Commission found that some of Respondent's techniques and exercise of judgment (factual finding 10) could have been better, such as, holding S1 by the hand, not the wrist; releasing S1's hands when he dropped to the floor; speaking to District staff outside the classroom and not near other students; and not speaking to P1 at the gate. The Commission did not find Respondent pushed S1, pulled or dragged S1 as described. The Commission did not find there was "selective punishment" of S1. The Commission did not find the content of Respondent's open discussions with P1 inappropriate. She responded to P1's questions. The Commission credited Respondent's explanation of S1's habit of leaning

away from her when holding his hand. None of these actions, in isolation or collectively, reflect a fixed character trait or defect in temperament that overshadowed Respondent's history of positive engagement with her students. The Commission did not find Respondent physically intimidated her students.

9. Neither does Respondent's conduct indicate an unfitness to teach according to the factors described in *Morrison, supra*, 1 Cal.3d 214, which are analyzed below. That the Respondent did not have any prior history of similar conduct of briefly holding S1's arms, and the other incidents described as being poor methods, such as wrist holding instead of hand holding, did not reflect a consistent pattern of behavior evidencing a defect in temperament or a character trait to support a finding of evident unfitness for service. The Commission concluded Respondent possesses the character and temperament fit, adapted and suitable for teaching. As such, the Commission does not find cause to dismiss Respondent based on evident unfitness for service.

ANALYSIS OF THE MORRISON FACTORS

10. In deciding whether cause exists for dismissal under evident unfitness for service, it also must be established that a teacher's misconduct relates to her fitness, within the meaning of *Morrison, supra*, 1 Cal. 3d at p. 227-230. The Morrison analysis does not apply to a cause for dismissal of persistent violation of school rules, laws or policies, because this cause, by definition, has a direct nexus with teaching. (*Id.*, pp. 227-230.)

11. As noted above the Commission considered the pertinent *Morrison* factors in determining whether Respondent is fit to serve as a teacher within the meaning of Education Code section 44932, subdivision (a)(6). That analysis is discussed below. However, not all *Morrison* factors need be present for the *Morrison* test to be

satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland, supra*, 2 Cal.App.4th at p. 1457.)

12. Here, it is concluded that the *Morrison* factors demonstrate Respondent is fit to serve as a teacher by reason of the factual findings.

13. The District did not present sufficient evidence to establish Respondent was unfit to teach based upon her conduct as detailed above. The *Morrison* factors reinforce the Commission's analysis and decision and took into account Respondent's singular and most serious action of briefly holding S1's arms against his chest, as well as other conduct which the District staff noted was inappropriate, including wrist holding or holding onto S1 when he dropped to the floor, and speaking about S1 publicly or in front of other students in the classroom.

14. The likelihood the conduct may adversely affect students or fellow teachers. Respondent's proven conduct occurred during a protracted period of time and on very few occasions. She held S1's arms against his chest on one occasion, but not tightly, and for a few seconds. This conduct deeply affected Ms. Totlani. Respondent was observed holding S1 by the wrist instead of his hands and holding onto him after he dropped to the ground. These actions were inappropriate and appeared to disturb District staff, but there was little evidence it adversely affected S1 as his behaviors were persistent and not easily related to Respondent's conduct. In addition, District staff and Ms. Doumerc only reported this other conduct after an investigation was initiated.

15. The degree of such adversity. Respondent's proven conduct of holding S1's arms across his chest on one occasion was serious but an isolated incident. She consistently used other methods such as patting his hand, holding his hand and using interventions such as a plush toy. She was observed not using preferred methods described above on a few occasions but these did not add to the adversity. Though these methods may have not been preferred methods, they were not used to harm S1 as evidenced by her proactive engagement with the school community on his behalf and her consistent use of other positive interventions, as well as the absence of any report until after the investigation was initiated.

16. The proximity or remoteness in time of the conduct. Respondent's misconduct is relatively recent. It occurred during the 2021-2022 school year. There was no prior history of similar behavior.

17. The type of teaching certificate held by the party involved. Respondent possesses a multiple subject teaching credential and a CLAD from the State of California. Respondent also completed the required credits for early childhood education and coursework to teach TK students.

18. The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Respondent established there were extenuating circumstances during the occasions she was observed briefly holding S1's arms or holding S1 by the wrist instead of his hand. The evidence established unique and challenging circumstances which required a great deal of interventions which were initiated by Respondent.

19. The praiseworthiness or blameworthiness of the motives resulting in the conduct. Respondent was not motivated by ill will toward S1. She made a mistake. By

history she had been working diligently with S1 and had been requesting assistance to protect him and her other students. She should have used her usual intervention of putting her hand on his hand on top of his knee and saying, "no" or "we don't hit". Instead, she crossed his arms. Her motives were consistent with her use of her typical interventions and were neutral.

20. The likelihood of recurrence of the questioned conduct. The record demonstrated this was an isolated incident and her conduct on February 3, 2022 is unlikely to reoccur. The other incidents alleged were isolated and did not reflect a pattern of poor interventions.

21. The Commission considered Respondent's teaching assignment and the age of the students in her class and considered her act of holding S1 arms serious and disturbing to District staff. Nevertheless, the evidence demonstrated Respondent's conduct during this protracted period of time was isolated and could easily be corrected by additional training. As such, cause does not exist to dismiss Respondent on the ground of evident unfitness for service.

PERSISTENT VIOLATION OR REFUSAL TO OBEY BOARD REGULATIONS

22. Certificated employees are subject to termination for persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed by the governing board of one's employing school district is another independent basis for dismissal pursuant to Education Code section 44932, subdivision (a)(8).

23. Cause for dismissal, as alleged herein, may be based on the violation of school rules or District policies. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176.) However persistent refusal requires a "showing of intentional and continual refusal to cooperate." (*Id.*, p. 1196,

emphasis omitted.) The term "persistent" in this context can be defined as "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated, [Citation.]" and "motivated by an attitude of continuous subordination." (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission On Professional Competence* (1985) 174 Cal.App.3d 317.)

24. The Commission concludes District did not establish by the preponderance of the evidence Respondent had persistently violated District rules or policies pursuant to Education Code section 44932, subdivision (a)(8). It was not clearly established Respondent violated Board Policy 4119.21 by holding S1's arms for a few seconds. Respondent's conduct on February 3, 2022 did not neatly fit into the Board's written policies by reason of factual findings 9. At most, her actions constituted bad judgment (factual finding 10) but not physical abuse or harassment. Moreover, as set forth in the factual findings, the Commission concluded Respondent either did not commit other conduct charged with either S1 or any other student, or the incidents which were found to occur, were isolated or insubstantial due to exigent circumstances and did not rise to the level of a violation of District policies barring physical or emotional abuse. In particular, holding S1 by the hand not the wrist and letting S1 go after he dropped to the ground, were not preferred methods followed by District staff and part of unwritten rules and practices, but the District did not produce a written policy specifying the approved methods. Regardless, the Commission found District did not provide sufficient evidence Respondent persistently violated District rules or regulations by exercising bad judgment on isolated occasions. On the contrary, the evidence demonstrated Respondent was proactive in her care of S1, sought input from the counselor and S1's parents and applied appropriate interventions. As such, cause

does not exist to dismiss Respondent for persistent violation of or refusal to obey school laws or reasonable regulations of the District.

ORDER

The Statement of Charges against respondent Erika Strong is hereby dismissed, and she shall not be terminated as a certificated employee of the Torrance Unified School District.

DATE: 12/30/2022

Sydney Yarbrough-Baune
Sydney Yarbrough-Baune (Dec 30, 2022 15:58 EST)

SYDNEY YARBROUGH-BAUNE

Commission Member

DATE: 12/30/2022

Katie Masterson
Katie Masterson (Dec 30, 2022 12:48 PST)

KATIE MASTERSON

Commission Member

DATE: 12/30/2022

Eileen Cohn

EILEEN COHN

Administrative Law Judge

Office of Administrative Hearings