

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension
and Dismissal of:

OAH No. 2013040442

CHINEDU EMECHETE (EN 710102), a
permanent certificated employee of the
Los Angeles Unified School District,

Respondent.

DECISION

This matter was heard by the Commission on Professional Competence (Commission) in Los Angeles, California, on September 3, 4 and 6, 2013. The Commission consists of Deanna Clark, Los Angeles County Office of Education (retired); Robin Scott, Santa Ana Unified School District; and Administrative Law Judge Eric Sawyer, Office of Administrative Hearings (OAH), State of California, who presided.

Kristine E. Kwong, Esq., Musick, Peeler & Garrett, represented Complainant Los Angeles Unified School District (District).

Richard Schwab, Esq., Trygstad, Schwab & Trygstad, represented Chinedu Emechete (Respondent), who was present on each day of hearing.

The parties presented opening statements, oral and documentary evidence, and closing arguments. The case was deemed submitted for decision at the conclusion of the hearing on September 6, 2013. The Commission thereafter deliberated in executive session on September 9, 2013.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (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. At all times relevant Respondent was a permanent certificated employee of the District.

3. On or about March 7, 2013, Vivian K. Ekchian, in her official capacity as the District's Chief Human Resources Officer, verified on information and belief an Accusation and Statement of Charges against Respondent, alleging factual and legal grounds for Respondent's immediate suspension without pay and termination of his employment.

4. By a letter dated March 20, 2013, Respondent was advised by Ms. Ekchian that the Accusation and Statement of Charges had been filed with the Board, and that during a closed session of a Board meeting held on March 19, 2013, the Board decided to dismiss Respondent within 30 days, unless he demanded a hearing. Respondent requested a hearing.

5. The District filed the Accusation and Statement of Charges with OAH and served the same on Respondent. Respondent timely filed a Notice of Defense, which contained a request for the hearing that ensued. Respondent was timely provided with notice of the hearing before the Commission. The parties subsequently executed a written stipulation waiving the statutory requirement that the hearing be held within 60 days from Respondent's request for a hearing.

6. On or about August 21, 2013, Complainant's counsel in this matter verified on information and belief an Amended Accusation and Statement of Charges, which changed the date of the events alleged in charge number 1 of the initial Accusation, and removed one of the three charges contained in the initial Accusation.

7. On or about August 21, 2013, Respondent's counsel filed an objection to the Amended Accusation and Statement of Charges, which requested that the Commission "deny the District's Amendment to Charge 1 of the Accusation." The objection was not specifically raised with the Commission until the final day of the hearing, and it was denied for the reasons stated on the record.

Respondent's Background Information

8. Credential. Respondent presently has a clear multiple subject credential, which authorizes him to teach all subjects in a self-contained class and, as a self-contained classroom teacher, to team teach or to regroup students across classrooms. Respondent also possesses a clear crosscultural, language and academic development (CLAD) certificate, which, when held in conjunction with a prerequisite credential or permit specified in the Education Code, authorizes Respondent to provide specified services to limited-English-proficient pupils.

9. Employment with the District. Respondent was hired by the District in 1998, and throughout his career with the District he has taught at the 52nd Street Elementary School. From 2004 through 2007, Respondent also worked part-time as an English as a second language (ESL) teacher at an adult school within the District.

10. No evidence was presented indicating that Respondent has any prior disciplinary history with the District. Respondent's most recent District evaluation in 2010 indicated that he met District expectations in teaching the curriculum. All students who testified in this matter without hesitation said that they liked Respondent and felt they learned from him. Respondent's demeanor during the hearing was soft-spoken and respectful.

52nd Street Elementary School

11. During the 2011-2012 school year, Respondent taught a second grade class at the 52nd Street Elementary School (or the school). The school is located in the south central part of the City of Los Angeles, an urban area. The school is located within a poor neighborhood, with significant family relocation, lower incomes, and many students who live with extended family members. For these reasons, students do not have consistent educational histories. Many of the students are subject to violence within their families and/or neighborhoods.

12. Leaders of the school decided to implement and follow a School Wide Positive Support Program (SWPSP or the program), beginning in the 2009-2010 school year. Osbaldo Jimenez, who became principal of the school in April 2010, testified that the first phase of the program had not been fully or correctly implemented that school year. Therefore, Principal Jimenez essentially repeated the first phase of program in the 2010-2011 school year. The second phase of the program was implemented in the 2011-2012 school year.

13. Principal Jimenez felt that discipline at the school by faculty was poor and needed to be improved. One problem he identified was lack of respectful behavior by students toward teachers and vice versa. The program was meant, in part, to address that problem, by focusing on respectful conduct of all parties at school.

14. Because many students had seen or been subjected to violence in their personal lives, Principal Jimenez also wanted to remove physical contact between faculty and students as much as possible, so students would have a safe haven at school. Therefore, as part of the program, Principal Jimenez advised faculty that they were not to touch students, unless such was necessary to prevent injury to the student or others. However, the District presented no written document stating the same, including the school's "Moving Forward" document which outlined parts of the program. Nor did the District present any policy or bulletin that expressly forbids touching a student under appropriate circumstances.

15. The District presented its policy bulletin number BUL-5046.0, which states that corporal punishment as a disciplinary measure is not to be used within the District. This bulletin cites as supporting authority, in part, Education Code sections 44807, 49000, and 49001.¹ The Commission takes official notice of said statutes and finds them important in understanding the contours of when a teacher is legally entitled to touch a student as permitted by the Education Code. For example:

¹ All further statutory references are to the Education Code.

A. Section 49001 defines "corporal punishment" to be the willful infliction of, or willfully causing the infliction of, physical pain on a pupil.

B. Section 44807 provides, in part, that a teacher shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning.²

16. When Respondent testified, he took concerted efforts to describe how he first uses verbal and other non-physical techniques to gain student attention, cooperation and order in the classroom. The few examples he gave of when he actually touched a student all related to safety issues, such as when he put out a hand to help a student down from the top of a precarious table or when he placed his body between two students to break up a fight. It was therefore apparent from Respondent's testimony that he understood it was Principal Jimenez's expectation that staff at the school not touch pupils, for any reason, unless necessary for safety.

Findings Related to the Charges of the Amended Accusation and Statement of Charges

17. J³ was a student in Respondent's second grade class. He was extremely active, had no respect for authority, was below grade level in all subjects, and was physically large for his age and bullied other students. He posed a significant behavior problem for Respondent, as well as his after-school program provider Jaime Lopez. J was capable of dishonesty, as demonstrated when he once pulled a fire alarm in the presence of another classmate, only to later deny having done so to Respondent after being confronted.

18. In early February 2012, J was seated at his desk doing work. By his own admission, he was not seated properly. Although the interim events were not established, Respondent ultimately asked J to go to the time-out table. J refused. Respondent asked a second time, and J refused again. So Respondent took hold of J by the wrist and led him to the time-out table, telling him in a firm tone to "sit down properly." It was not

² In the case of *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, the court examined the interplay of these two statutes. The court concluded that to be considered corporal punishment, the teacher must *willfully* inflict physical pain. Since teachers stand in loco parentis while children attend school, a reasonable amount of force may be used on students to gain control or obedience in the classroom, as is the case at home for parents. Thus, the court concluded that light touching by a teacher of autistic children in order to guide them and gain their obedience in the classroom was not battery, because the touching was reasonable and did not amount to a "willful infliction of physical pain." (*Id.*, at p. 875.)

³ Students' last names are omitted to protect their privacy.

established that Respondent forcibly placed J [REDACTED] in the seat at the time-out table. It was not established that J [REDACTED] suffered any pain from this event, nor was it established that J [REDACTED] suffered any injury from this event. One or more students present in the classroom at the time may have seen tears welling in J [REDACTED]'s eyes, but it was just as likely that those resulted from embarrassment over being assigned to the time-out table as opposed to suffering from pain.

19. The more extreme version of events regarding J [REDACTED] alleged by the District was not established, for various reasons. For example, neither J [REDACTED] nor his mother immediately complained about the incident to Principal Jimenez. Instead, J [REDACTED]'s mother approached Principal Jimenez days after it happened, and after Principal Jimenez had advised J [REDACTED]'s mother that she may be responsible for fees from the fire department should J [REDACTED] set off another fire alarm as a prank. In addition, J [REDACTED]'s version of events was vague and, as discussed above, his credibility is somewhat in question. The other students who saw this event did not corroborate the District's more extreme version; although a few testified that Respondent "grabbed" J [REDACTED]'s wrist, their demonstration of what happened was far less dramatic. And Angelica testified that she told Principal Jimenez that J [REDACTED] was not hurt. Furthermore, the District's attempt to show that this event was serious enough to cause deterioration in J [REDACTED]'s behavior was similarly unpersuasive. For example, Mr. Lopez, the after-school program provider, testified that he noticed J [REDACTED]'s behavior drastically changed in December 2011, well before the event in question. On the other hand, J [REDACTED]'s mother testified that J [REDACTED] did not have any serious behavior problems in the third or fourth grade, after the event in question.

20. K [REDACTED] was another student in Respondent's second grade class. K [REDACTED] had poor self-control, was defiant, had no regard for authority, and posed a significant behavior problem in Respondent's classroom.

21. On a date not established, but by Principal Jimenez's estimate was sometime between mid-February and early March 2012, K [REDACTED] was misbehaving in Respondent's classroom. Respondent took hold of K [REDACTED] by the wrist and walked him from his desk to a time-out table he had situated near a wall in his classroom. K [REDACTED] was not cooperating. When they got to the time-out table, Respondent told K [REDACTED], firmly, to "sit down." K [REDACTED] was still not cooperating, so Respondent told him more than once to "sit down" in a firm tone. It was not established by a preponderance of the evidence that Respondent yelled at K [REDACTED] in doing so.

22. The more extreme version of events regarding K [REDACTED] alleged by the District was not established by a preponderance of the evidence. For example, it was not established that Respondent sat down K [REDACTED] into the seat at the time-out table forcefully by pushing down on his shoulders or arms, or that this event caused pain to K [REDACTED]. K [REDACTED]'s testimony in these regards was not persuasive. At times, his testimony seemed to have been influenced by others, based on some words he used not typical for children of his age. No other student in the classroom corroborated K [REDACTED]'s version of events, e.g., the only other witness who testified to this event, fellow student A [REDACTED] did not describe such a set of circumstances. No complaint was lodged by K [REDACTED] or his guardians about this event.

The District's Investigation of Respondent's Actions

23. By no later than February 7, 2012, J■■■■'s mother approached Principal Jimenez in a parking lot after a public meeting and told him that Respondent "pulled" her son's hand "harshly." Within a day or two, Principal Jimenez interviewed J■■■■, and then a few other students in Respondent's classroom. Principal Jimenez concluded a more extreme version of the incident with J■■■■ occurred, and that Respondent had acted improperly. Principal Jimenez decided to use progressive discipline with Respondent, so he reminded him of his directive that faculty not touch students, unless necessary for safety reasons, and some other related District policies and bulletins. Principal Jimenez decided not to document this incident or his counseling with Respondent, or take any other disciplinary action.

24. On March 7, 2012, an officer of the Los Angeles Police Department was conducting an investigation pertaining to an unrelated complaint and learned from another student of the incident involving K■■■■. The officer interviewed K■■■■ and a few other students. Once Principal Jimenez was advised of the event involving K■■■■, he pulled Respondent out of his classroom assignment and began investigating that matter. Principal Jimenez concluded a more extreme version of the events regarding K■■■■ occurred, which he communicated to his superiors.

25. On May 17, 2012, Principal Jimenez formally met with Respondent. On that day, Respondent was given a written notice of unsatisfactory acts pertaining to the events regarding J■■■■ and K■■■■. Respondent did not return to the classroom after being removed during the investigation of the matter with K■■■■.

LEGAL CONCLUSIONS

1. The District has the burden of proving cause for discipline in this matter by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), is established. In addition, a governing board may immediately suspend a certificated employee without pay pursuant to section 44939 upon the filing of a statement of charges alleging immoral conduct.

3. It was not established by a preponderance of the evidence that cause exists for the dismissal of Respondent for unprofessional conduct pursuant to section 44932, subdivision (a)(1). Respondent was responding to classroom disturbances created by K■■■■ and J■■■■. He had to stop their behaviors to redirect them so they could learn. The other students in the classroom had the right to receive curriculum without disturbance. By taking the two students to the time-out table in his classroom, Respondent was regaining classroom control; he was not engaging in or inflicting corporal punishment. Although

Respondent took physical hold of both students in non-safety situations and therefore did not comply with Principal Jimenez's prior directive to faculty at the school, we do not conclude that in doing so Respondent acted unprofessionally. Teachers have used the same type of classroom management techniques for years. (Factual Findings 1-22.)

4A. Cause for Respondent's dismissal was established by a preponderance of the evidence for unsatisfactory performance pursuant to section 44932, subdivision (a)(4).

4B. The term "unsatisfactory performance" is not specifically defined in the Education Code or case law. Inasmuch as there is separate cause for dismissal for unprofessional conduct in subdivision (a) of section 44932, and we are not to presume the Legislature intended to enact completely duplicative statutes (*In re Maes* (2010) 185 Cal.App.4th 1094, 1110), unsatisfactory performance must mean something different from unprofessional conduct. In fact, section 44938, subdivision (c), specifies that "unsatisfactory performance" does not include any other cause for dismissal specified in section 44932.

4C. While unprofessional conduct can be determined by analyzing a teacher's conduct relative to the broader educational community, unsatisfactory performance must be analyzed with an eye toward the teacher's performance as evaluated by his or her employing school district. Section 44938 supports this proposition. Section 44938 requires a charge of unsatisfactory performance to be preceded by a written notice of unsatisfactory performance, and refers to section 44660 et seq., which in turn establishes guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for discipline may be established if a certificated employee performs unsatisfactorily to his employing school district.

4D. However, one court observed that the purpose of the statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well. (*Bakersfield Elementary Teachers Ass'n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757.) Therefore, a reasonable limitation is that an employing school district cannot be arbitrary or capricious in making decisions regarding whether a certificated employee has performed unsatisfactorily.

4E. In this case, Respondent knew of Principal Jimenez's directive to not touch students unless safety issues were involved. As far as Respondent knew, it was his employing school district's expectation for him to not touch students when trying to regain control of his classroom, unless safety issues were involved. In light of the school's population of students subjected to violence and acts of aggression in their homes and community, Principal Jimenez's expectation in this regard was reasonable. By touching two students in trying to gain control of his classroom, Respondent did not meet the expectations

of his immediate supervisor, Principal Jimenez, or his employing school district. The Commission therefore finds that, in these two limited instances regarding J [REDACTED] and K [REDACTED], Respondent's performance was unsatisfactory to the District.⁴ (Factual Findings 1-25.)

5A. It was not established by a preponderance of the evidence that cause exists for the immediate suspension and/or dismissal of Respondent for immoral conduct pursuant to sections 44932, subdivision (a)(1), or 44939.

5B. The term "immoral conduct" has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

5C. In this case, Respondent engaged two students using a classroom management technique the Commission finds generally acceptable in the teaching community. As discussed above, we do not find that conduct was unprofessional. Respondent did something teachers in elementary schools have done for years, and the District had only recently decided that it was no longer a "best practice" at the school. Respondent's intent was not to inflict pain or punishment on either student, but to simply redirect the students' behavior back to the curriculum. Under these circumstances, Respondent's conduct does not meet the definition of immorality provided by the *Weiland* case, in that his actions were not corrupt, indecent, shameless, etc. (Factual Findings 1-22.)

6A. It was not established by a preponderance of the evidence that cause exists for the dismissal of Respondent for evident unfitness for service as a teacher pursuant to section 44932, subdivision (a)(5).

6B. "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 District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "Evident unfitness for service" connotes a fixed character trait,

⁴ As noted, section 44938, subdivision (b)(1), requires a school district to give written notice of the performance deemed to be unsatisfactory at least 90 calendar days before filing a statement of charges. Such notice shall specify the instances of behavior "with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." Given the timing of the events in question, particularly when Respondent was counseled by Principal Jimenez vis-a-vie the incidents with K [REDACTED] and J [REDACTED], and when Respondent was given written notice specifying his alleged unsatisfactory performance, the Commission has some lingering concern whether Respondent was given a fair opportunity to correct his faults and overcome the District's dissatisfaction before he was permanently removed from the classroom. However, given our finding in Legal Conclusion 9, post, further discussion on this point is unnecessary.

presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.*)

6C. In this case, the two events in question happened over a short period of time, i.e., a few weeks. Respondent had no prior disciplinary history regarding such conduct. Thus, it was not established that Respondent has engaged in a long-standing pattern of such activity. His response to the two incidents in question was part of a designed classroom management technique, not an emotional response over which he had no control. No evidence was presented indicating that Respondent engaged in similar treatment toward other students present in the classroom during the events in question, which shows his behavior was not escalating. Under these circumstances, it was not established that Respondent was or is suffering from a temperamental defect or is otherwise unfit to serve as a teacher. (Factual Findings 1-22.)

7A. It was not established by a preponderance of the evidence that cause exists for the dismissal of Respondent pursuant to section 44932, subdivision (a)(7), for persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

7B. Cases interpreting section 44932, subdivision (a)(7), require a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) In this case, Respondent was counseled by Principal Jimenez after the J■■■■ investigation. He was told, in part, to not use physical force in responding to classroom situations unless safety issues were present. Although the incident involving K■■■■ happened a few weeks later, it was not established whether it happened before Respondent had been counseled by Principal Jimenez as a result of the J■■■■ incident. So, we cannot conclude that Respondent ignored Principal Jimenez's counseling after the incident with J■■■■ and subsequently engaged in the same conduct with K■■■■. The District presented no written policy or bulletin that prohibited Respondent from acting as he did. Although Principal Jimenez had directed faculty not to touch students unless as a last resort, his directive was only verbal. Therefore, it was not established that Principal Jimenez's directive can be considered a "school law" or "reasonable regulation" of the "school district employing him." In any event, it was not established that Respondent's failure on two occasions to follow Principal Jimenez's verbal directive was "intentional," "continual," or "persistent" for purposes of this statute or the *San Dieguito Union High School District* case. (Factual Findings 1-25.)

8. Generally, cause for discipline must relate to a certificated employee's fitness to teach, within the meaning of the various factors enumerated in the case of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. Here, the Commission has only found cause to dismiss Respondent based on his unsatisfactory performance. The *Morrison* analysis does not apply to a cause for dismissal for unsatisfactory performance. (*Id.*, at pp. 227-230.) Therefore analysis of the *Morrison* factors is unnecessary, as it is presumed that Respondent's unsatisfactory performance for the District is related to his fitness to teach.

9A. "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 222.)

9B. In this case, Respondent's dismissal from the District is not warranted under the circumstances. The provisions of the Education Code allow a certain degree of physical contact between student and teacher. Respondent engaged in physical contact with K [REDACTED] and J [REDACTED] that was not specifically prohibited by a written policy or bulletin of the District. Respondent used this limited contact with two students to divert their negative behaviors and regain control of his classroom, which benefitted both misbehaving students, as well as their classmates. Respondent's conduct in this case was not illegal, immoral, unprofessional, or insubordinate. We simply find his performance was unsatisfactory as it related solely to how he responded to two students' misbehavior in his classroom. Respondent has no other disciplinary history with the District, and no other evidence suggests he is unfit to serve as a teacher. We are confident Respondent will now heed Principal Jimenez's directive and will not engage in similar conduct in the future. (Factual Findings 1-25.)

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ORDER

The Amended Accusation and Statement of Charges against Respondent Chinedu Emechete is hereby dismissed.


DATED: October 4, 2013



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

I concur.

DATED: October 3, 2013



Deanna Clark, Commissioner

I concur.

DATED: 10/7/13



Robin Scott, Commissioner