

BEFORE THE
BOARD OF EDUCATION OF THE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

FRANCISCO ARELLANO (EN 623166), a
permanent certificated employee,

Respondent.

OAH No. 2012040389

DECISION

The Commission on Professional Competence (Commission) heard this matter in Cerritos, California, on February 11-15, March 11-14, 2013, and thereafter held deliberations. The Commission consisted of Miriam Chapa, Luciano Ortiz, and Administrative Law Judge Amy Yerkey, State of California, Office of Administrative Hearings, who presided.

Michele M. Goldsmith, Attorney at Law, of Bergman Dacey Goldsmith, represented Complainant Los Angeles Unified School District (District).

Ronald C. Lapekas, Attorney at Law, represented Francisco Arellano (Respondent), who was present throughout the hearing.

The District employed Respondent as a third-grade elementary teacher. The District alleged that Respondent demonstrated unprofessional conduct, immoral conduct, evident unfitness for service, and persistent violation of school laws and regulations, based on multiple incidents that occurred from 2007 through 2008. Respondent denied the alleged causes for dismissal and the underlying charges upon which they were based.

Based on the evidence presented, the Commission determined that the District established its allegations in the Accusation and Statement of Charges. Accordingly, Respondent's dismissal is upheld, as explained below.

FACTUAL FINDINGS

Jurisdictional Findings

1. Respondent is a permanent certificated employee of the District.

2. On March 14, 2012, the District gave notice to Respondent of its intent to dismiss him. At the same time, the District notified Respondent of his immediate suspension. Respondent thereafter made a request for hearing.

3. On April 16, 2012, the District served an Accusation and Statement of Charges (Accusation) seeking Respondent's dismissal. Respondent timely filed a Notice of Defense and requested an administrative hearing.

4. Vivian K. Ekchian, Chief Human Resources Officer, made and filed the Accusation and Statement of Charges in her official capacity.

5. All prehearing jurisdictional requirements have been met.

The October 27, 2008 Incident

6. Mary Mendoza (Mendoza) is an administrator who has been employed with the District for 34 years. In the 2008-2009 school year, Mendoza was the Principal at San Fernando Elementary School. On October 27, 2008, Mendoza made unannounced visits to classrooms throughout the school. When she walked into Respondent's classroom, Mendoza observed two female third-grade students, Child Numbers 1 and 2¹, sitting on Respondent's lap, one on each leg. Mendoza had a clear line of sight to Respondent's desk, and the evidence demonstrated that she accurately viewed the girls sitting with their buttocks on Respondent's upper thigh. When Respondent noticed Mendoza, he stood up and the children came off his legs. He then asked the girls to return to their seats. Mendoza observed that the girls had a matter-of-fact response to Respondent's direction to go back to their seats, and she opined that this was not the first time that they had sat on his lap. Mendoza thought that this could be a regular occurrence because the girls did not seem embarrassed or surprised.

Student Testimony

7. Ten students testified at the hearing. Each had Respondent as their third grade teacher. As established by their testimony, during the 2007-2008 and 2008-2009 school year, Respondent had female third grade students in his class sit on his lap on numerous occasions. Child number 9, who is currently 13 years old and in seventh grade, was a student in Respondent's class during the 2008-2009 school year. She recalled observing that Child number 1 and 2 sat on Respondent's lap multiple times, both during school time and free time. Child number 9 did not sit on Respondent's lap because she thought it was wrong for a student to sit on a teacher's lap.

¹ Students' names are confidential; they will be referred to by the corresponding number on the "Confidential and Sealed Student Witness List," which is under seal.

8. Child number 4 was a student in Respondent's class during the 2008-2009 school year. She observed Child numbers 1 and 2 sit on Respondent's lap on numerous occasions. As established by her testimony and the testimony of the other student witnesses, both Child numbers 1 and 2 sat on Respondent's lap on a regular basis, almost daily. Any time the female students had a question, Respondent would tell them to sit on his lap. She also observed Child numbers 1 and 2 giving Respondent a kiss on the cheek. Respondent told Child number 4 to sit on his lap. She felt "weird" and uncomfortable about the situation, and she did not want to be in Respondent's class.

9. As established through the testimony of Child number 14, Respondent allowed his female third-grade students to kiss him on his cheek. Child number 14 saw Child number 12 give Respondent a kiss on the cheek after school. Child number 14 felt "weird" when he witnessed that interaction.

10. Child number 14 recalled that when the female students in Respondent's class would approach Respondent to report that they were done with their work, Respondent grabbed the girls around their waist or hips and pulled them into his lap. Child number 14 saw this happen to several different girls on numerous occasions. Child number 14 heard Respondent complimenting the female students, telling them that they looked pretty. He observed that Respondent touched the hair and face of the female students, and saw Respondent caress a female student's face.

11. Child number 11 was a student in Respondent's class during the 2007-2008 school year. She remembered seeing female students sit on Respondent's lap during class. She observed Respondent kissing female students on their cheek, more than one time, during class time.

12. As established through the testimony of the student witnesses, Respondent conducted inappropriate activities during class time. He allowed his students to play Xbox video games and board games during class time. Child number 9 specifically recalled playing car racing games. Child number 9 stated that Respondent taught salsa dance to the class, and she remembered the class dancing around the table. Child number 4 also recalled that Respondent allowed the students to play video games during class time, and that he would trade toys with the students. She stated that instead of learning, the students in Respondent's class played video games and danced. Respondent taught the students to salsa dance, by standing on a table and demonstrating the salsa steps. Respondent used the female students as his dance partners.

13. Child number 9 recalled that Respondent had a closet filled with pictures and toys. The pictures included scantily clad women, some in bikinis. She specifically referenced the Latin band "RBD." The female members of this band were typically pictured in tight, revealing clothing, including short-shorts and low-cut, tight-fitting tops, half-shirts with their midriff exposed. Child number 9 felt offended by their appearance. Child number 9, along with other students in the class, viewed the pictures when Respondent opened his closet. Sometimes Respondent left the closet door open, and the pictures were on display.

She remembered that the boys would sometimes comment that the girls in the photos were sexy. Child number 9 did not like the pictures because she did not like seeing the women in bikinis. She thought that sitting on Respondent's lap and having those pictures "wasn't right."

14. Child number 4 recalled seeing posters of bikini-clad women hanging up in Respondent's classroom. She felt uncomfortable in Respondent's class because she was afraid that he was going to touch her, since she saw the other girls sitting on his lap. She stated that Respondent did not have the female students sit on his lap when the teaching assistant was present. She thought that it was wrong for Respondent to have students sit on his lap, and to have the pictures of women in bikinis displayed in his classroom.

15. Child number 14 also described the inappropriate pictures in Respondent's classroom. Child number 14 stated that Respondent had pictures of girls in bikinis in his closet, and when Respondent opened the closet, it was visible to the students. He also recalled that Respondent talked about girls, and encouraged the students to bring in pictures of women in bikinis. Respondent told the students that if they brought in pictures, he would give them extra credit, or more free time, no homework, more time to go on the computer or video games, and also gave the students toys as a reward. Child number 14 remembered that Child numbers 13 and 5 would use the Google search engine to look for "girls or naked girls" on the computer. When they successfully obtained images, they printed the pictures and gave them to Respondent. Child number 14 thought that the images were disturbing and inappropriate. He now knows that Respondent's behavior of having female students sit on his lap was also inappropriate conduct.

16. Child number 14 acknowledged that initially when he was asked about viewing inappropriate conduct in Respondent's classroom, he denied seeing anything. He explained that at the time, he panicked because he thought he was in trouble. He also cited his young age at that time. Child number 14 emphatically verified that the testimony that he provided at the hearing was truthful.

17. Child number 5 was a student in Respondent's class during the 2007-2008 and 2008-2009 school years. Significantly, he recalled seeing female students sit on Respondent's lap during both school years. During 2007-2008, he specifically named Child number 3 as having sat on Respondent's lap. In the 2008-2009 school year, Child number 5 saw Child number 1 sit on Respondent's lap many times. He observed that when the female students sat on Respondent's lap, Respondent put his arms around their waist. Child number 5 described male students looking at girls in bikinis on the classroom computer. He described how the female students would pass by and see the male students looking at the bikini-clad women on the computer. He remembered pictures of women in bikinis in Respondent's closet, and that Respondent used to joke that the bikini-clad women were his "girlfriends." Child number 5 played video games in Respondent's class. Child number 5 recognized that playing video games during class time was not a good way to learn, but he admitted that he liked it.

18. As established by the testimony of Child number 2, she was sitting on Respondent's lap on the day that Mendoza walked into the classroom. She explained that she had a question, and when she approached Respondent, he motioned for her to sit on his lap. Child number 2's testimony, as well as the other student witnesses' testimony, established that this was a common practice for Respondent. Child number 2 saw Respondent use the technique of motioning for a female student to sit on his lap with Child number 1 and Child number 7. During the 2008-2009 school year, Child number 2 observed Child number 1 sitting on Respondent's lap about 15 to 20 times, and she saw Child number 7 sit on his lap about 10 times. Child number 2 also observed Child number 1 kiss Respondent, and she saw Respondent kiss Child number 1. She saw Respondent rub the shoulders of about five female students, including herself. Child number 2 felt confused about sitting on Respondent's lap because on the one hand, she thought that it showed care, but she also knew it was wrong because a teacher is not supposed to do that. Initially, she was unsure about the appropriateness of sitting on his lap; she did not know better. She was especially concerned that Respondent would try to make her sit on his lap again. She did not feel comfortable in his class, and lost motivation to complete her schoolwork. Child number 2 did not want to ask questions of Respondent, because she did not want to sit on his lap again. Child number 2 also recalled being teased by other students after Respondent was removed from the classroom. The other students blamed her and Child number 1. Child number 2 did not say anything about it because she wanted to forget about it, since she did not like having bad memories. The teasing upset Child number 2 and made her feel even worse about the incident.

19. Child number 2 recalled that Respondent had videogames in his classroom, and that students played on the computer during class time. She also remembered seeing pictures of women in bikinis hanging in his closet. Child number 2 specifically recalled that Respondent showed the pictures to the boys as she walked by, and that the boys enjoyed looking at the photos. She also saw pictures of the Latin band "RBD" wearing provocative mock school uniforms. She thought it was "gross" and made her feel uncomfortable, because a teacher should not have those pictures in class or show them to students.

20. Child number 2 described another incident where Respondent administered the California Standard Test (CST) and gave the answers to students by blinking once for "A" and twice for "B." She recalled that Child number 5 kept looking back at Respondent, and then he yelled out "you're giving us the answers!" After that, Child number 5 got almost every question on that section right. Child number 2 did not get the answers from Respondent, but she witnessed him blinking. She also stated that Respondent would often assign homework but would not check it, because he did not put a stamp on it. Child number 2's mother was concerned that Respondent was not following through by reviewing homework.

21. Child number 10 testified at the hearing. She had Respondent as a third-grade teacher in the 2008-2009 school year. She recalled that female students sat on Respondent's lap during class, and that they also gave him kisses on his cheek. Child number 10 also recalled that the female students played with Respondent's earring because they thought it

was “cool.” She admitted that one time she kissed Respondent’s ear and he laughed. Child number 10 sat on Respondent’s lap about four times. While sitting on Respondent’s lap, he placed his arms around her waist. She remembered that Respondent had a video game system and recalled other students playing games during class time. Child number 10 does not think it is appropriate to have sat on Respondent’s lap, because “we were just supposed to be there to learn, and not doing other stuff with the teacher, so I don’t think it was right.” She now thinks that it is “weird” and “gross” that she kissed her teacher. Child number 10 spoke about how she initially trusted Respondent, and that as a teacher, he should be trusted not to act inappropriately with his students, but he failed in that respect.

22. When asked to describe how he felt in Respondent’s classroom, Child number 14, along with many of the other student witnesses, stated they felt “weird.” Child number 14 noted that he did not learn anything in Respondent’s class.

23. Child number 1 testified at the hearing. She sat on Respondent’s lap on many occasions, more than five times, at Respondent’s instruction. Every time she sat on his lap, it was when she had a question. Respondent would then tell her to sit on his lap. She did not recall other students besides herself and Child number 2 sitting on Respondent’s lap. When she sat on his lap, her legs were around his thighs. She described that Respondent would pull her toward his body and rub his hand on her leg; he massaged and rubbed her leg. Respondent also had his arms draped over her shoulders and at times would put his arm around her waist. Respondent talked about how pretty she was, telling her things such as “You look really pretty with your hair down.” Respondent also offered her and Child number 2 candy to sit on his lap. On several occasions, Respondent pulled Child number 1 so close to him that her buttock was sitting close to his genital area. She recalled once or twice he pulled her up to sit on his private area. She could feel that Respondent had an erection and that his penis was hard. Child number 1 had never mentioned this to anyone prior to her testimony at the hearing, because she felt weird, and she was shy. Respondent asked Child number 1 on two occasions if he could kiss her on the cheek, and she declined. He used to whisper to her that if she sat on his lap every day, he would give her candy. These comments made her feel “weird.” Child number 1 acknowledged that sometimes when she had physical contact with Respondent, she felt “fine,” but now that she is older, she feels really “weird” and “embarrassed.” She felt especially bad because she was afraid the other students were going to make fun of her, and it hurts her feelings. Child number 1 explained that after Respondent was removed from the classroom, the other students blamed her, saying that she got him fired. This made her feel sad. Even after Mendoza warned the other students not to tease her, the teasing continued. Child number 1 had a specific recollection of Child numbers 5 and 7 saying “it’s your fault that he left, why did you have to go snitching?” She now knows that it is inappropriate to sit on a teacher’s lap. Notably, Child number 1 recalled sitting on Respondent’s lap at least one or two times after Mendoza had entered the classroom.

24. Child number 1 also recalled seeing pictures of wrestlers and the band “RBD.” She did not recall seeing a girl in a bikini. She remembered that Respondent traded wrestling cards, and that he would tell the boys to bring in cards of their own. Respondent had cards

with female wrestlers dressed in sports bras and “booty” shorts, and he would give them to the boys. When Child number 1 saw the pictures of the female wrestlers, she felt “weird.” She remembered that Respondent allowed the students to play video games, and that he let the male students play on the computer.

25. Child number 17 testified at the hearing. She had Respondent as her third-grade teacher during the 2007-2008 school year. She recalled that Respondent treated the boys differently from the girls, in that the boys were allowed to play games, while the girls surrounded Respondent. Child number 17 witnessed female students sit on Respondent’s lap approximately two times per week. She saw Respondent put his arms around their waist and rub their legs while they were sitting on his lap. She also observed Respondent tell female students to give him a kiss on the cheek, and she saw the female students comply with his request, specifically Child number 10, among others. She also saw Respondent hugging female students. Child number 17 recalled that Respondent taught salsa dance every Friday. Respondent danced with the female students and held their hands. During one incident, Respondent told Child number 3 to open her legs, and they were not open far enough, so he told her to spread them open even more, and then Respondent went on the floor and passed in-between Child number 3’s legs. Respondent was on his back, with his face up toward Child number 3’s private parts. Child number 17 was “grossed out” that Respondent did that because they were little girls. She recalled the other female students questioning why Respondent would do something like that. Child number 17 remembered seeing Child numbers 13 and 14 looking at girls in bikinis on the internet. Overall, she felt that she did not learn anything in Respondent’s third grade class.

26. Child number 8 testified at the hearing. She was a student in Respondent’s class during the 2008-2009 school year. She remembered seeing Child numbers 1 and 2 sitting on Respondent’s lap almost every day. She heard Respondent ask other female students in the class; some said yes, and others said no. Respondent asked Child number 8 if she wanted to sit on his lap on two occasions. She declined because she did not feel comfortable sitting on a teacher’s lap. Afterward, Child number 8 did not want to ask Respondent any questions, because she feared that he might convince her to sit on his lap. She was less likely to ask questions because of her concern that he would put her on his lap. She recalled that Respondent put his arms around the waist and shoulders of the female students who sat on his lap. She saw Respondent kiss Child number 1 on the forehead. She saw Respondent kiss Child number 1 at least twice, and she saw Child number 1 kiss Respondent on at least five different occasions, on the cheek, forehead and chin. When asked how she felt about seeing female students sit on Respondent’s lap, Child number 8 explained that she felt “weird” because Respondent had a wife, and Child number 8 perceived Respondent’s actions as “cheating or flirting.”

27. Child number 8 recalled that Respondent had pictures of naked girls taped to the closet door in the classroom; some showed women covering their private parts with their hands and arms, others wore bikinis. She also remembered that Respondent gave trading cards of wrestlers to the boys. When asked if she remembered anything else about Respondent’s class, Child number 8 echoed the sentiments of many students before her: she

said they did not learn anything. She also described how Respondent taught salsa dancing in the classroom. Respondent stood on the table to show the students some moves, and then he got down and asked a female student to dance salsa with him. During the dance, Respondent put his hands on the students' shoulders and waist. When Respondent stood on the table, it made Child number 8 feel "awkward and weird" because his buttocks were shaking in the faces of the female students. Looking back, Child number 8 feels bad that she did not tell the principal or another adult about Respondent's inappropriate conduct in the classroom.

28. The ALJ spent significant time with each student establishing their ability to testify. Each student understood the difference between the truth and a lie, and all promised to tell the truth. The students ranged in age from 12 to 14 years old. All understood the oath they took, and were able to respond intelligently to all questions asked. Their testimony was remarkably consistent. They had appropriate recall, and no motive to lie. Although there were minor differences in their recollection, overall their testimony was consistent with each other, and with the testimony of the District administrators and investigators. The discrepancies in their testimony were not significant, and there were reasonable explanations offered by the District's expert testimony, as enumerated below. When the students testified at the instant hearing, they understood that they had sworn to tell the truth, and they affirmed that their testimony at the hearing was truthful. Accordingly, the testimony of all of the students was deemed credible.

Substantiation of Student Testimony

29. Viviana Barrondo Asencion (Asencion) testified at the hearing. She served as the permanent substitute after the District removed Respondent from the classroom. Her testimony corroborated the student testimony with regard to the risqué pictures that Respondent kept in his classroom. Asencion explained that she found a bookmark with pictures of actors from the popular Mexican soap opera, "Rebelde," about teenage rebels. The girls depicted on the bookmark were dressed "very sexy." (Ex. 53.) In fact, there are four separate images that show women scantily clad and some in compromising positions. For example, the first frame depicts a woman wearing a bikini bottom, which partially exposes her buttocks, bent over in a submissive position in front of a man who is holding a whip or other object. The man appears as though he is about to strike her on her backside. Asencion was surprised to find the bookmark in the classroom, because she thought it was improper to expose the children to this kind of material. Although she acknowledged that she did not know who the bookmark belonged to, she found it in a dictionary located in the front of the classroom with other teaching materials. The logical conclusion was that it belonged to Respondent.

30. Asencion recalled one of Respondent's students with a trading card of a female wrestler who was dressed very provocatively. The image depicted a woman in very short shorts and a small top. Asencion told the student to take the card home or she would take it away from him, to which the student replied that Respondent had given him the card. Again, Asencion was surprised to learn that Respondent had given such a seductive image to a child. She thought it was wrong because third-graders should not be exposed to such

images, and especially not at school. Ascension also remembered that when she allowed the same student to use the classroom computer, he printed out pictures of wrestlers wearing small clothing or bikinis that were not appropriate for third-grade students. The student told her that Respondent allowed them to print whatever they wanted. Ascension forbade the students to print any more images, and eventually stopped letting the students use the computer.

Subsequent Investigation

31. Mendoza thought that Respondent's actions were inappropriate, but she was uncertain at that time whether Respondent's conduct constituted child abuse. Mendoza spoke to Child Number 1 and 2, at the first available opportunity. Mendoza learned that Child Number 1 sat on Respondent's lap many times, and sometimes she gave Respondent "besitos," which is Spanish for "little kisses." Mendoza subsequently filed a "Suspected Child Abuse Report" (SCAR) with the San Fernando Police Department (SFPD).

32. As established by the testimony of multiple witnesses, the District conducted a thorough and timely investigation regarding Respondent's misconduct. Jane Sierra (Sierra), former District Staff Relations Field Director, testified at the hearing. She explained that the investigation went through various agencies, because San Fernando is a smaller community and was less familiar with the procedures for school abuse investigation practices. There was no evidence of undue delay. Although she did not initially agree with Respondent's removal from the classroom, at the conclusion of the investigation, she thought Respondent should be dismissed because of his inappropriate physical touching of students, among other factors.

33. Mercedes Velazquez (Velazquez), who was the District Director and Principal Leader in 2008, testified at the hearing. She explained that it is not appropriate for Respondent to have a female student sitting on his lap because it involves inappropriate contact in close proximity to the genital areas that does not involve instructional activity. There is no legitimate purpose to having students sit on a teacher's lap. When Velazquez first learned of the incident, she instructed Mendoza to investigate further. Mendoza had difficulty reaching the SFPD, and Velazquez personally spoke with a SFPD detective to determine who would conduct the investigation. The SFPD told Velazquez that the District should handle the matter administratively. The SFPD made this decision without interviewing any of the students. At Velazquez's instruction, Mendoza interviewed other children and discovered that five out of six female students had sat on Respondent's lap. Velazquez informed Mendoza to contact the school police. She explained that if she had this information sooner, she would have immediately removed Respondent from the classroom, instead of allowing him to remain for several days after Mendoza's initial observation.

34. Velazquez instructed Mendoza to secure Respondent's classroom computers. She and Mendoza viewed the history of those computers and discovered two inappropriate websites: hotgirls@ratemybody.com and tinyassxxx@porngirls.com. Although it was not established whether Respondent personally viewed those websites, or whether he allowed

students to view the websites, either conduct violates the District policies and is cause for discipline. Velaquez next instructed Respondent to return his District-issued laptop, which she properly secured. Velazquez kept the laptop until a representative of the Office of the Inspector General, George Tillman (Tillman), picked it up. Through Velazquez's and Tillman's testimony, the chain of custody for the laptop computer was established at the hearing. At a later point in time, Velaquez learned that explicit pornography, digital images of adults engaged in sexual acts, had been discovered on Respondent's laptop. This was an absolute violation of the District's acceptable use policy because it was explicit pornography. Subsequently, Velazquez participated in a personnel review meeting, where it was unanimously decided that Respondent should be dismissed from the District. Velaquez explained her reasons for recommending Respondent's dismissal were because his conduct was sexual and inappropriate in terms of modeling professional behavior with them. She lacked confidence that the conduct would not reoccur. Velaquez opined that Respondent had committed child abuse because he had inappropriate sexual conduct based on close proximity of the genital areas, for which there was no instructional purpose. Respondent's conduct was a clear violation of the District's Code of Conduct.

35. Earl Perkins (Perkins), Assistant Superintendent, School Operations, testified at the hearing. Perkins has been employed by the District since 1978. Perkins was a third-grade teacher during his tenure with the District, and he never had students sit on his lap. He is concerned with Respondent that it would happen again, and that the school would be exposed to great liability. Perkins unequivocally stated that the touching Respondent engaged in was not appropriate, not professional, and should not be tolerated. The District expects teachers to be role models, and Respondent's behavior did not live up to that expectation. Perkins explained that the Board of Education makes the final decision whether or not to initiate dismissal proceedings, and he was involved in the ultimate decision to dismiss Respondent from the District. Perkins considered all available information, including that some students did not see inappropriate touching, but that did not change his opinion that Respondent's touching of students was inappropriate and is cause for dismissal. Perkins also opined that Respondent's conduct violated the District's child abuse policies and codes of conduct. Perkins opined that Respondent exercised extremely poor judgment. Perkins explained that the students are affected by the conduct of their teachers, especially third-graders who are impressionable. Perkins thinks that young students have severe reactions to malevolent incidents; they fail to understand why it happened, and it can affect them for years.

36. Erin Robles (Robles), testified at the hearing. Robles is a Los Angeles School Police Department Officer. She was assigned to patrol in the San Fernando Valley, and was assigned to interview students regarding the incident on October 27, 2008. Robles had proper training and experience to conduct student interviews. There was no evidence that Robles engaged in suggestive questioning. Robles interviewed Child Numbers 1, 4 and 7, and discovered that Respondent frequently gestured for the children to sit on his lap. She opined that all of the children were truthful. Robles' recollection of what the children told her was consistent with the testimony of the children given at the hearing, further demonstrating the credibility of the children.

37. Tillman is an Inspector with the District Office of the Inspector General (OIG). He also worked in the District's Human Resources Employee Investigation Unit. Prior to joining the District, Tillman served as a Los Angeles County Sheriff. He has received formal training on how to interrogate children, and he has conducted hundreds of interviews of children and juveniles. He was called to San Fernando Elementary School, where he met with Mendoza and received Respondent's classroom computers and laptop. As noted earlier, a proper chain of custody for Respondent's laptop computer was established in part through Tillman's testimony. The laptop was locked in the evidence room and remained in the evidence room even during data analysis. Nick Lee (Lee) is the District data analyst who performed the analysis on Respondent's computer. Lee received computer forensic training from the Federal Bureau of Investigation. Lee found pornographic images and showed them to Tillman. Tillman reviewed the images on Lee's computer with Respondent's hard drive attached. He then asked Lee to print the images, and attached them to his investigation file. At the hearing, Tillman confirmed that the images produced at District's Exhibit 62 are the same images that he viewed from Respondent's computer. Exhibit 62 contains 55 pages, with most pages containing multiple graphic images of adult pornography. Because the classroom computers were not password protected, a forensic scan was not performed on them.

38. Tillman interviewed Respondent, with Respondent's union representative, Steve Klein (Klein), present. Respondent initially denied having any knowledge of the pornographic images found on his laptop. Tillman described Respondent's demeanor during the interrogation as "arrogant" and "overconfident." His observation was consistent with Respondent's behavior throughout the hearing, as described in greater detail below. After Respondent denied knowledge of the pornography on his laptop, Tillman showed the images from Exhibit 62 to Respondent. At that point, Klein requested a recess, where he and Respondent left the room for a brief period of time. When they returned, Respondent changed his story and said that he was aware of the pornographic images on his computer. Respondent blamed them on his son. He said that he observed his son viewing pornography on his laptop, and that he disciplined his son for it. Respondent also claimed that he tried to erase the images from the laptop. Tillman did not believe Respondent's story that his son had accessed the pornographic images, stating that "it seemed too convenient." Respondent was responsible for the images regardless of how they got on there, because it was a District-issued laptop, issued to Respondent. Among other violations, Tillman determined that Respondent had violated the acceptable use policy (Ex. 91) by removing his laptop from the school premises.

39. Tillman also interviewed some of the students. His testimony confirmed that there was no evidence of suggestive questioning by anyone involved in the investigation. Tillman acknowledged that there were some discrepancies in two of the student's statements. He attributed the differences to the fact that they may have felt responsible for Respondent's absence from the classroom. By the time that Tillman interviewed the students, Respondent had been removed, and the students likely felt that it was their fault. Another student likely changed his story because his parents were present. Although he considered all evidence, the

minor discrepancies in student statements did not affect Tillman's ultimate findings. Based on his investigation, Tillman concluded that female students in Respondent's class had been sitting on Respondent's lap without justification. He also determined that the student had viewed inappropriate materials.

40. Nicolas Arellano (Nicolas), Respondent's son, testified at the hearing. Nicolas lives with his father and their family, and currently attends college. He recalled that in 2007-2008, which was his senior year of high school, Respondent had a District-issued laptop at home. Nicolas used the laptop on occasion, primarily for school work, with his father's permission. He denied that he ever tried to access, purposely or inadvertently, any pornographic websites. At one time, Nicolas' friend "Willie P." lived with their family. Nicolas saw Willie looking at about five pornographic images on Respondent's computer. Nicolas testified that Respondent never saw Nicolas looking at the images, and he did not recall telling his father that he or Willie looked at pornographic images on Respondent's laptop. Nicolas was not aware that Respondent had told District officials that Respondent had seen Nicolas viewing pornography on the District-issued laptop. Notably, Nicolas said it was not true that Respondent saw Nicolas on his laptop. Nicolas denied that Respondent had disciplined him for viewing pornography on the laptop. Nicolas had no motive to lie when responding to those questions, and thus his testimony regarding whether Respondent saw him viewing pornography on the District laptop and whether Respondent disciplined him for it, is deemed credible.

41. Mendoza reviewed the District's policies (See Exhibits 80-86 and 88-91). Her testimony established that Respondent received thorough training on all relevant District policies. As established by her testimony and the testimony of the students, Respondent's conduct repeatedly violated the District's rules and policies.

Expert Testimony

42. In an attempt to show that the District improperly questioned students, Respondent called Joseph Bongiovanni (Bongiovanni), Ph.D., to testify at the hearing. Bongiovanni is an emergency response worker for Contra Costa County. Although he has some training and experience in child interviews, his opinions were given little weight for several reasons. He opined that "contamination" occurred during the questioning of the students, because there were several people present during the interviews, and some leading questions were asked. On cross-examination, Bongiovanni acknowledged that before his deposition, he had never previously been retained as an expert witness, has never held any faculty positions, does not belong to any professional organizations, and has never been published on the standards in interviewing student witnesses. He was also not familiar with teacher dismissals, and had never viewed the Accusation and Statement of Charges against Respondent. Significantly, Bongiovanni was not aware that there is no agreement among professionals on the standards on how to interview children witnesses, and he was not aware of the protocols which are endorsed by the National Prosecutor's Association. Thus, he could not opine on how the protocols differ concerning how to interview student witnesses. In his capacity as an emergency response worker, Bongiovanni is not the person who

conducts in-depth interviews. Rather, he conducts an initial interview, and if there is cause for concern, he refers to other professionals to conduct forensic interviews. Significantly, Bongiovanni had not reviewed the student testimony, or testimony from any of the witnesses at the hearing. He did not know what Mendoza or Robles had asked the students. He never saw the police report that Robles provided. He is not a licensed psychologist, and he has never examined Respondent. He never interviewed Mendoza, Robles, Tillman or any of the students. He could not speak to the accuracy of the student testimony. He was not familiar with any of the District policies regarding touching students. He acknowledged that sometimes leading questions are appropriate, and that just because an interviewer asked a leading question, that does not mean that the answer was inaccurate. He also acknowledged that it was appropriate for Mendoza to be present when the students were being interviewed by Robles. He agreed that there was no evidence that the students gave answers to please Mendoza or because they were afraid of her, and there was no evidence that Mendoza intimidated the students in order to evoke certain responses. He also agreed that statements can be inconsistent as to immaterial facts and still be true, and found no evidence that students had deliberately changed their testimony here. In short, Bongiovanni's testimony did not establish that the District conducted suggestive questioning or an improper investigation.

43. The District presented the testimony of Gail S. Goodman, Ph.D. (Goodman) as an expert in cognitive memory development, children's eyewitness memory and children witnesses. Goodman is a Distinguished Professor of Psychology at U.C. Davis, the Director of the Center for Public Policy Research at U.C. Davis, and also a Consultant for the Special Assault Forensic Evaluation Center for Sacramento County Child Protective Services. Goodman's Curriculum Vitae spans 54 pages, detailing her extensive education, professional experience, professional memberships, honors and awards, teaching and research grants, committee work, other professional contributions, hundreds of publications, amicus briefs, papers and presentations. She has been cited by the United States Supreme Court. Goodman is one of the first in her field to study children's roles in the legal system. She is highly qualified and her opinions were given great weight.

44. Goodman explained the factors that affect the accuracy of a child's reporting of an incident. These include the age of a child; for example, a child who is very young, from two to four years old, has a noticeable drop in their accuracy compared to testing the memory of a child even five or six, and certainly eight, nine and ten. Older children have a much more substantial and robust memory and are more resistant to suggestion. Their memories tend to last longer. Another factor is the time delay between when the event occurred and when the child is first interviewed; memory is strongest soon after an event. The timing of the first interview is important for completeness of recollection, and for the child's ability to resist suggestive influences. If you have an initial first interview soon after the event, it can help bolster the child's memory even over the longer term. A third factor is the centrality of the information that the child is being asked about; that is, central actions tend to be central information. And those memories are often recalled well and are more resistant to suggestion than more preferential details. Also, if it is distinctive information, if

it is consequential, and if it is taboo, those factors help support memory in both children and adults.

45. Specifically with regard to the memories of children who are eight and nine years old, as the students were in this case while in Respondent's class, Goodman opined, as supported by her research, that they can have very accurate memories, because the mental structure is in place and they gain more knowledge over the years, which can help to support their memory. With regard to the facts of this case, Goodman opined that "one would expect that a teacher's actions would be pretty central to a child. And if a teacher is doing something distinctive and unusual and possibly a little taboo, that that [*sic*] would obvious[ly] pique the children's interests, and they may remember that well."

46. Dr. Goodman explained that eight and nine year old children are quite resistant to suggestion, and that even if asked leading questions, it would not necessarily contaminate their memory. The fact that Mendoza first interviewed the students within days of the incident occurring indicates that their memory would still be strong for what occurred. Dr. Goodman further opined that older children; i.e., eight or nine years old, can hold onto memories for years. She explained that it's generally accepted that distinctive, consequential events are retained particularly well, and opined that here, where the students had their teacher removed from the classroom, it was a consequential event that affected their daily lives, and could bolster their memories.

47. Dr. Goodman gave several reasons why students who testified at the hearing provided new information that they had not previously revealed. Sometimes a child will not report something that is embarrassing, especially if the child feels self-implicated. For instance, a child who willingly got on someone's lap might feel self-implicated. The child might recall the information because of the feeling of implication, guilt and embarrassment. Goodman explained that a child will not necessarily disclose matters of importance at a younger age, because with age a child's memory is improving, and also their social awareness is improving. So they can start to realize some topics are taboo or embarrassing that they did not realize before, and that can have the opposite effect of dampening their reports. Research shows that multiple interviews are needed to get information from children, because children will recall more later that is accurate. In addition, the fact of repeated interviewing can help get more information and keep memory alive.

48. Dr. Goodman's testimony was well-supported by research and given her extensive credentials, was deemed credible. Her opinions and explanations further served to bolster the credibility of the students' testimony.

Aggravating Factors

49. Respondent's conduct throughout the proceeding, from depositions through the conclusion of the hearing, was disobedient, disrespectful, uncooperative and obnoxious. For example, the panel learned that Respondent had behaved in a juvenile manner during Nicolas' deposition. Specifically, Respondent placed the parking garage ticket on his

forehead and left it there during the remainder of the deposition. Nicolas thought that this behavior by his father was inappropriate.

50. Respondent had to be admonished on multiple occasions throughout the hearing for inappropriate behavior, and for violating specific rulings made by the administrative law judge. His repeated misbehavior was so severe that he would have been removed from the courtroom had it not been during his own testimony.

Evidence Offered in Mitigation

51. Respondent testified at the hearing. He denied the majority of the allegations against him. Specifically, he denied that Child numbers 1 and 2 were sitting on his lap when Mendoza walked in. He denied having pictures of scantily clad women in his closet or anywhere in his classroom. He denied trading cards of women. He admitted to teaching salsa dancing in the classroom, and to standing on the table to demonstrate the moves, but denied that he slid through the legs of his female student. He admitted that sometimes he complimented the students. He denied that students ever sat on his lap, that he rubbed their shoulders, and kissed them, and he agreed that it would be appropriate to terminate a teacher who committed this conduct. He denied letting students play games during instructional time, and denied that he let students view inappropriate websites. When asked on cross examination, how was it that 10 students testified during the hearing that they either sat on his lap, or saw other students sit on his lap, Respondent replied “I don’t believe that they are lying, they have a tainted memory.” He later said that all of the students were inaccurate. Significantly, he changed his story several times about whether he told Tillman that he saw his son viewing pornography on his computer. He blamed his son, and said that his son lied about having his privileges taken away. There were numerous inconsistencies throughout Respondent’s entire testimony. All of Respondent’s testimony was deemed not credible.

52. Respondent admitted to posting an interview of himself on “You Tube” regarding the allegations in this Accusation. The Administrative Law Judge viewed the video outside the presence of the panel, and noted that it contained information directly related to the instant proceeding. At the time this decision was rendered, the video remained accessible to the public and had received more than 50 “views.” Respondent also posted the video on an internet blog entitled “Per Daily.”

53. Respondent presented the testimony of two colleagues: Anna Acvez-Funes (Funes), and Victor Ponce (Ponce). Funes and Ponce taught third grade classes in the same building as Respondent. They testified that they had never observed students sitting on Respondent’s lap; however, they were teaching during the times when Respondent had students sit on his lap, and thus the fact that they never witnessed it holds little weight. Funes’ classroom adjoined Respondent’s and she often entered after lunch to ask Respondent to cover her class while she went to the bathroom, but her testimony indicated that her visits were predictable and brief, and thus would account for why she never observed students sitting on his lap.

54. Richard Casaletta, Jr. (Casaletta), testified at the hearing. He is a fifth-grade teacher at San Fernando Elementary School, and in 2008, he was Chapter Chair of the union. He attended the meeting with Mendoza and Respondent in October 2008. Casaletta taught third grade for several years. He testified that it would not be appropriate for a teacher to kiss or be kissed by students, or to have students sit on his lap. He acknowledged that if Respondent committed the acts as set forth in the Accusation, then he should be dismissed from employment with the District.

55. Except as set forth in this decision, all other allegations and contentions raised by the parties lack merit or constitute surplusage.

LEGAL CONCLUSIONS

Evident Unfitness for Service

1. Section 44932, subdivision (a)(5), permits dismissal of a permanent employee for “evident unfitness for service.” Evident unfitness for service under this provision is established by conduct demonstrating that the teacher is “clearly not fit, not adapted or suitable 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. If the teacher is found unfit for service, “the next step is to determine whether the ‘unfitness’ is ‘evident’; i.e., whether the offensive conduct is caused by a defect in temperament.” (*Id.* at p. 1445.)

As a threshold matter, Courts require evaluation of a teacher's alleged misconduct in terms of its impact on fitness for service utilizing the following criteria first enunciated by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*): the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; the proximity or remoteness in time of the conduct; the type of teaching certificate held by the party involved; the extenuating or aggravating circumstances, if any, surrounding the conduct; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood of the recurrence of the questioned conduct; and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. The determination of fitness for service required by *Morrison* is a factual one.

Respondent's conduct on October 27, 2008, and throughout the 2007-2008 and 2008-2009 school years indicates unfitness to teach under the *Morrison* factors. The conduct involved inappropriate touching of young third grade female students in his class during school hours. It also involved allowing male students to view and access inappropriate sexual images, and his own misuse of the District-issued laptop. The students were adversely affected and the degree of adversity was significant. A teacher's inappropriate touching of students and creation of a hostile environment adversely impacts a school's students, teachers, staff, parents, and the learning environment. Respondent's students were emotionally scarred. They

felt uncomfortable by his behavior and were subject to a hostile learning environment. District administrators who observed Respondent's conduct or heard about it, were also adversely impacted as the conduct could diminish regard for teachers at the school. There were no mitigating circumstances.

Recurrence of the misconduct is likely for several reasons. Respondent did not acknowledge his wrongdoing. Even after hearing the testimony of 10 students who either sat on his lap or saw other students sit on his lap, Respondent denied that he did anything wrong. He denied conduct which was credibly established through multiple witnesses. Given his lack of awareness, the conduct is likely to recur. Respondent's conduct and apparent lack of insight about the incidents reveal defects in temperament and character that evidence an unfitness to serve as a teacher. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429.)

Respondent's conduct adversely affected students and other District employees, and the degree of adversity is significant. Respondent has not expressed any remorse for his conduct, and has not acknowledged the extent of his misconduct and has not fully accepted responsibility for the incidents.

There was no showing that the imposition of discipline against Respondent would have an adverse impact or chilling effect upon Respondent's or other teachers' constitutional rights.

The analysis of the *Morrison* factors demonstrates Respondent's present unfitness for service. Respondent's unfitness is evident, and is caused by his temperament. Respondent's existing deficiencies are the result of "temperamental defects or inadequacies."

Accordingly, as set forth in factual finding number 6 through 41, cause for dismissal has been established pursuant to section 44932, subdivision (a)(5).

Immoral and Unprofessional Conduct

2. Section 44932, subdivision (a)(1), permits dismissal of a permanent employee for "immoral or unprofessional conduct." Section 44939 allows the District to immediately suspended a permanent employee for "immoral conduct." Unprofessional conduct has been defined as conduct, measured by the *Morrison* factors, which indicates unfitness to teach. *Board of Education v. Jack M.* (1970) 19 Cal.3d 691, 696-697 (*Jack M.*); *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1173-74. The term "immoral conduct" as a basis for dismissal of teachers has long been included in section 44932, subdivision (a)(1), in its predecessors, and in other provisions pertaining to teachers employed in community college districts. The term was first discussed in the context of teacher dismissal in *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808 (*Weiland*), and the court's definition in that case has often been cited by other courts. (See, e.g.: *Palo Verde v. Hensey* (1970) 9 Cal.App.3d 967 (*Hensey*).) The *Weiland* Court stated:

“The term ‘immoral’ has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as 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.” (*Weiland, supra*, 179 Cal.App.2d at p. 811.)

Further, whether conduct is immoral must also be analyzed in terms of the teacher's fitness for service under the *Morrison* factors. (*Jack M., supra*, 19 Cal.3d at pp. 696-697.)

Respondent engaged in immoral and unprofessional conduct in that his conduct involved inappropriate touching and showed an inconsiderate attitude toward good order and the public welfare. The students in Respondent's class were young (eight and nine years old). Respondent created an hostile and insecure learning environment in his classroom that could easily have been avoided. Respondent displayed an inconsiderate and disrespectful attitude toward the welfare of his students. Respondent's conduct was flagrant and shameless, showing moral indifference to the opinions of respectable members of the community.

The incidents which occurred throughout the 2007-2008 and 2008-2009 school year are serious. Respondent had sexual contact with an eight-year-old girl, and inappropriately touched many other female students. He allowed females to be objectified in his classroom. He failed to take responsibility for the conduct. Dismissal is warranted.

Accordingly, as set forth in factual finding numbers 6 through 41, cause exists to suspend and discharge Respondent for immoral and unprofessional conduct, pursuant to Education code sections 44939 and 44932, subdivision (a)(1).

Persistent Violation of Rules

3. Section 44932, subdivision (a)(7), permits dismissal of a permanent employee 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 or her.”

A violation of section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that Respondent's refusal to follow the laws or regulations was “persistent,” i.e., “stubborn and continuing.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183; *Governing Board of the Oakdale Union High School District v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Seaman*).) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (See, e.g.: *Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317; *Seaman, supra*).

Respondent's conduct occurred repeatedly throughout the course of two school years. He repeatedly violated established District policies of which he was well aware.

All evidence presented in mitigation and rehabilitation has been considered. The District's dismissal of Respondent is upheld in light of the allegations established.

ORDER

The determination of the Board of Education of the Los Angeles Unified School District to dismiss Respondent Francisco Arellano as a permanent employee of the District is affirmed.

Respondent Francisco Arellano is dismissed from his position as a certificated employee of the Los Angeles Unified School District.

DATED: _____

AMY YERKEY
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

MIRIAM CHAPA
Commission Member

DATED: _____

LUCIANO ORTIZ
Commission Member