

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SONOMA COUNTY OFFICE OF EDUCATION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

NANCY BAUM,

A Permanent Certificated Employee,

Respondent.

OAH No. 2012100413

DECISION

A Commission on Professional Competence, chaired by Administrative Law Judge Diane Schneider, Office of Administrative Hearings, State of California, convened to hear this matter on November 6, 7, and 8, 2012, in Santa Rosa, California. Other Commission members were Maureen Oesterle, appointed by the District, and Deborah Meyers, appointed by Respondent, both of whom were qualified to serve as panel members.

Patrick C. Wilson, Attorney at Law, School and College Legal Services of California, represented Complainant Sonoma County Office of Education.

Scott A. Lewis, Attorney at Law, Perry, Johnson, Anderson, Miller & Moskowitz, LLP, represented Respondent, who was present.

The record closed, and the matter was submitted for decision on November 8, 2012.

FACTUAL FINDINGS

Procedural Background

1. Respondent Nancy Baumhas been a certificated employee of the Sonoma County Office of Education (SCOE) since 2008, where she has served as a teacher of severely handicapped children.

2. On September 21, 2012, Sonoma County Superintendent of Schools, Steven Herrington, Ph.D., on behalf of SCOE, served Respondent with a Statement of Charges,

Accusation, and a Notice of Intent to Dismiss Respondent. Respondent filed a timely Notice of Defense and Request for Hearing, and this hearing followed.¹

3. The Accusation seeks Respondent's dismissal based upon dishonesty, evident unfitness for service and persistent violation of school laws, primarily stemming from her mistreatment of two severely handicapped students in April and May, 2012, and her dishonesty regarding her misconduct during an August 29, 2012 interview with SCOE attorney Patrick C. Wilson.² With the exception of Respondent, the testimony of the witnesses was forthright and credible in all respects. The pertinent facts are summarized below.

4. The events at issue occurred when Respondent was assigned to a kindergarten to second grade (K-2) class for severely handicapped children at Meadow Elementary School near Petaluma. Respondent had eight children in her class. Respondent's students had immense emotional, physical and cognitive challenges. Most of the students suffered from autism, and all were low functioning. Two aides, Joyce Kemp-Faulkner and Karla Santellan, assisted Respondent in the classroom. On March 26 or 27, 2012, Danielle Griffin, an aide from Anova, began working in Respondent's class.

SCOE Evidence

STUDENT L.

5. L. is a severely autistic student who exhibited extremely aggressive and violent behaviors in Respondent's classroom. L. had his own one-to-one aide. During the months of March, April and May 2012, L.'s one-on-one aide was Danielle Griffin, who worked for Anova as a behavioral assistant.

6. Respondent's classroom aides, Kemp-Faulkner, Santellan and Griffin, agreed that although Respondent is a good teacher, she had difficulty handling students with behavioral problems such as L. Their testimony established the following facts regarding Respondent's mistreatment of L.:

a. On April 5, 2012, Respondent engaged in a physical altercation with L. in which L. accidentally split his lip after Respondent forced him to the ground. Respondent remarked to Griffin that "pain will calm L." L. did calm down after this incident. Griffin

¹ SCOE's Statement of Charges, Accusation and Notice of Intent to Dismiss, and Respondent's Notice of Defense and Request for Hearing were not offered into evidence at hearing. They are included in this record, however, as OAH Exhibit 1.

² See Education Code sections 44932, subdivisions (a)(3)(dishonesty); (a)(5) (evident unfitness for service), and (a)(7) (persistent violations of school laws of the state).

asked Respondent if an accident report should be filed or whether L.'s parent should be notified, and Respondent replied, "no."

b. On April 9, 2012, during another altercation with L. in which L. refused to put some blocks away, Respondent asked L. in an agitated manner if he "wanted a Melvin." (The term "Melvin" is one that is used by Respondent's family to refer to what is commonly known as a "wedgie."³) Respondent proceeded to pick L. up by the top of the back of his pants and underwear. Respondent suspended L. in mid-air for four to five seconds, and shook him up and down. L. whimpered and winced and looked like he was in pain. It appeared to Griffin that Respondent had intentionally given L. a wedgie in order to inflict pain on him. Griffin reported this incident to her Anova supervisor, Mark Pieper, who did not take any action in response to this information.

c. On April 13, 2012, Respondent engaged in another altercation with L. during which Respondent lifted L. off of the ground with his arms crossed in such a manner that it raised concerns that L. might be at risk for dislocating his shoulder.

d. On April 20, 2012, Respondent put her body weight on top of L. and forced him to the ground, in order to restrain him from leaving circle time.

7. Mimi Carroll is the principal of Meadow Elementary School. Principal Carroll has extensive experience in working with severely disabled and violent students. School staff, including Respondent, completed Professional Assault Crisis Training (Pro-Act). Pro-Act training teaches school staff about how and when to use restraints on students. The goal of Pro-Act is to avoid physical altercations with students. It is a basic principle of Pro-Act that pain-inducing methods of restraint are ineffective, punitive and abusive. Principal Carroll opined, and it is found, that Respondent's use of a wedgie on L. constituted an ineffective, unacceptable and abusive use of a restraint on a student.

8. During an interview on August 29, 2012, conducted by SCOE attorney Patrick C. Wilson, and at hearing, Respondent denied giving L. a wedgie and engaging in the other conduct outlined in Factual Finding 6. In light of the credible and consistent testimony indicating otherwise, Respondent's statements were untrue and are found to be dishonest.

9. California Code of Regulations, title 5, section 3052, subdivision (l), prohibits teachers from using any intervention with a student that is designed to, or likely to, cause physical pain," or "denies the student physical comfort." (Cal. Code Regs., tit. 5, § 3052, subds. (l)(1) and (l)(3).). Respondent's use of a wedgie on L. violates this prohibition because it likely caused L. pain and denied him physical comfort.

³ According to Respondent, a wedgie occurs when "you pull on someone's underwear until it goes up between their cheeks or their bottom." She acknowledged that receiving a wedgie was uncomfortable and could be painful.

STUDENT Z.

10. Student Z. suffers from cerebral palsy and autism, and is severely disabled. His manual dexterity is limited, and he wears orthotics. When undressing he requires assistance with snaps and some buttons. Z. is able to urinate on his own in most instances, but sometimes he has accidents. His accidents increased in the Spring of 2012, after his parents split up. Z. is generally a cooperative student who communicates by using utterances, body movements, gestures and simple sentences to make his needs known. He sometimes has behavioral outbursts, however, that include yelling and head banging. Z. also has a sensory phobia that causes him to feel distressed when he touches wet or slimy surfaces. For example, Z. eats baby food, and if he spills it on himself, he screams.

11. The testimony of Griffin, Kemp-Faulkner and Santellan established the following facts regarding Respondent's mistreatment of Z.:

a. On May 7, 2012, between 10:15 and 10:30 a.m., Z. urinated on himself and soaked his pants and socks. Respondent escorted Z. to the bathroom to change into dry clothes.⁴ Respondent left Z. in the bathroom in his urine-soaked pants and socks, unsupervised and on the floor, for about one hour and one-half. The bathroom door was shut for most, if not all, of this time. At times the bathroom light was turned on, and other times, it was turned off.

b. When Griffin went into the bathroom with L. and said, "hi," to Z., Respondent directed her not to talk to him. Griffin and the other aides were concerned that Z. might hurt himself in the bathroom without supervision, particularly because of his history of head banging.

c. Respondent told her aides that in her view, Z. had urinated on himself in order to get attention. The aides disagreed with Respondent's view.

d. Z. was heard screaming for a portion of the time that he was in the bathroom. In response to L's screaming, Respondent donned a pair of headphones and instructed her aides to ignore Z.

e. While Z. was alone in the bathroom, Respondent was working with other students for most of the time. Respondent went into the bathroom about two times for about one or two minutes.

f. At about noon, Z. emerged from the bathroom with clean clothes and socks. Those who are familiar with Z.'s abilities, including his parent, agreed that Z. was incapable of taking off his wet pants, socks and underwear and changing into dry clothes on his own.

⁴ Z. had an extra set of dry clothes in his bin in the bathroom, which Respondent removed for him.

12. On the day of the incident Respondent wrote a note to Z.'s mother that Z. "had a horrible day. He spent most of the day on the floor and talking in a squeaky voice and screaming." (His mother wrote back: "I don't know what would make him so upset. I'm sorry.")

13. On the day of the incident, Principal Carroll happened to visit the classroom to investigate complaints made by Kemp-Faulkner and Santellan regarding Respondent's behavior towards them. Respondent told Principal Carroll that Z. had spent one hour and 45 minutes in the bathroom in wet pants and would not change.

14. In speaking further with Principal Carroll, Respondent recounted that after Z. soaked his pants at snack, she took him to the bathroom, put him on the floor, took off his ankle supports, undid the top button on his pants, and told him to change into the clean clothes that she gave him. Respondent further explained to Principal Carroll that she left the bathroom, went back to her work-station, and continued working with other students. Respondent went back to check on Z. and helped him start taking his pants off. He was screaming, so she put on headphones to cover her ears. She checked back one more time, and helped him put on dry underwear. Respondent maintained that the door was open and the lights were on when Z. was in the bathroom. She acknowledged to Principal Carroll, however, that she did not have visual contact with Z. during this time. She told Principal Carroll that when she returned, Z. had put his pants on. Later that day, Respondent was placed on administrative leave on May 7, 2012, pending investigation of the incident with Z. Respondent's statements to Principal Carroll that the door was open and the lights were on when Z. was in the bathroom, and that Z. had changed into his pants on his own, were untrue and found to be dishonest.

15. Principal Carroll opined, and it is found, that Respondent's conduct towards Z., described in Factual Finding 11, contravened Pro-Act's restraint guidelines, and constituted an ineffective, unacceptable and abusive use of a restraint on a student.

16. Mandy Hoffman is a Special Education Administrator at SCOE. She was asked to investigate the incident with Z. On May 14, 2012, she interviewed Respondent regarding the incident that had occurred one week earlier. During her interview with Hoffman, Respondent maintained that Z. wet his pants in order to get attention. She told Hoffman that she left Z. in the bathroom so that he would change his pants on his own.

17. Respondent's description of the events to Hoffman sharply contrasted with the accounts of the witnesses as well as Respondent's earlier statements to Principal Carroll in key respects: Respondent claimed that Z. was only in the bathroom for 35 or 45 minutes. She claimed that Z. was never left in the bathroom alone, and that she left him sitting on a chair with a pad and not on the floor. Respondent also denied to Hoffman that she wrote any notes home that day to parents because "there was nothing significant to report and that was a pretty typical day." It is found that Respondent's statements to Hoffman described above, were untrue and found to be dishonest.

18. In the course of the interview by SCOE attorney Wilson, on August 29, 2012, Respondent denied any mistreatment of Z. She explained that after she took Z. into the bathroom, she took off his shoes and ankle supports, undid the clasp on his pants, and had him sit on a pad on a chair. Respondent took out his clean clothes from a bin and told him to change. Respondent also asserted that except for a period of about 90 seconds, Z. was never in the bathroom alone with the door shut, and he was sitting a chair with a pad and not on the floor in his urine-soaked clothes. Respondent further claimed that the entire incident from when Z. wet his pants until he had changed into dry clothes lasted about 45 minutes. During this time Respondent claimed that she was either in the bathroom with Z. or that she was in close proximity to the bathroom so that she could see him. She also asserted that she did not instruct her staff not to talk to Z. while he was in the bathroom. In light of the credible and consistent testimony of multiple witnesses indicating otherwise, these statements were untrue and found to be dishonest.

19. During this interview, Respondent also stated that she allowed Z. to stay in his urine-soaked clothes because she wanted him to independently take his underwear and socks off, and then put on dry underwear, dry pants and dry socks.⁵ She claims that, ultimately, Z. was able to take off his wet pants, underpants and socks, and put on dry underwear on his own. Respondent also claimed that after he finished he said “I did it, I did it.” In light of the credible and consistent testimony of multiple witnesses indicating that Z. is incapable of performing these tasks on his own, Respondent’s claims are not believable.

20. At hearing, Respondent recounted the version of events in a fashion similar to her interview on August 29, 2012, except she acknowledged that Z. was in the bathroom for a total of about an hour and 45 minutes and she acknowledged directing Griffin not to talk to Z.

21. California Code of Regulations, title 5, section 3052, subdivision (l), prohibits teachers from using any intervention with a student that “denies the student physical comfort,” or that “precludes adequate supervision” of the student. (Cal. Code Regs., tit. 5, § 3052, subs. (l)(3) & (l)(7). Respondent’s mistreatment of Z., described in Factual Finding 11, violates this prohibition because it denied him physical comfort and precluded adequate supervision.

⁵ Respondent also stated her belief that Z. was “completely content” in his urine-soaked clothes.

OTHER EVIDENCE: MISTREATMENT OF STUDENTS AND AIDES

22. Beth Farrar was a substitute aide in Respondent's class on November 1, 2011, and observed that Respondent was physically aggressive and rough with her students. Farrar reported her concerns for the welfare and safety of Respondent's students to SCOE.

23. The testimony of Kemp-Faulkner, Santellan, Farrar, and Occupational Therapist Sarah W. Field established that, at times, Respondent was rude and harsh towards classroom aides, and others who worked in the classroom. In March and May 2012, Santellan and Kemp-Faulkner relayed their concerns about Respondent's negative behaviors to Principal Carroll.

24. Respondent intimidated Kemp-Faulkner and Santellan to the extent that they were afraid to defy her. The demeanor and testimony of Kemp-Faulkner at hearing, in particular, established that she was afraid that Respondent would retaliate against Kemp-Faulkner for her testimony against Respondent. Kemp-Faulkner also feels badly about not standing up to Respondent when she mistreated students such as Z. Kemp-Faulkner was so upset about the Respondent's mistreatment towards her that she sought help from a therapist.

Respondent's Evidence

25. Respondent was an instructional assistant for SCOE from 1997 to 2007. She began teaching special education in 2008, after becoming fully credentialed as a special education teacher. Respondent obtained her credential from Sonoma State University. Respondent came to teaching later in life, and she found that she loved it. From the time that Respondent worked as an instructional assistant, she received positive evaluations. Overall, her work was described as either meeting or exceeding standards.⁶ In April 2012, Principal Carroll described Respondent's work with L. as "heroic."

26. L.'s violent outbursts occurred on almost a daily basis and could last for 35 or 40 minutes. His violent presence in the classroom made the atmosphere very tense and unpredictable, as he regularly kicked, bit and scratched the aides, to the point of drawing blood and causing scars. L. also attacked Principal Carroll, who had bandages on her hands and face from the wounds inflicted by L.

27. Respondent, Kemp-Faulkner and Santellan agreed that Respondent's classroom was not a suitable placement for L. due to his violence towards staff and other students. Respondent relayed her concerns about L. to Principal Carroll. Principal Carroll did not provide her with sufficient support for managing L.'s violent outbursts.

⁶ In the 2008 to 2009 school year she was described as not meeting standards in three areas, but was noted to be "well on her way to a model program."

28. Respondent received training from Pro-Act, but she had concerns that the training was not well-suited to children. She felt that she did not have many options for responding to L.'s violent attacks. She testified that she would never purposely inflict pain on a student.

29. Respondent did not believe that she mistreated her aides. She believed that she had a good relationship with Kemp-Faulkner and Santellan.

30. Respondent denied mistreating L. or Z. With respect to her conduct towards Z., Respondent maintained that the incident with Z. was a positive one because he changed from urine-soaked clothes to dry ones on his own.⁷

31. Principal Carroll believes that Respondent "did a lot of nice things for kids." Principal Carroll was not the only one who recognized Respondent's strengths. Griffin, Kemp-Faulkner and Santellan acknowledged that Respondent possesses positive qualities as a teacher, and that she was often fair as a supervisor. Respondent also received very positive feedback from School Psychologist Vanessa Riggs. These favorable remarks are noted; they do not, however, mitigate the serious nature and extent of Respondent's misconduct.

Unfitness for Service

32. Before a decision can be made as to whether there is cause to dismiss Respondent, it must first be determined whether Respondent's conduct demonstrates that she is unfit to teach under the criteria set forth by the California Supreme Court in *Morrison v. State Board of Education* (1970) 1 Cal.3d 214. Those criteria are: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the incident; (4) the type of teaching certificate held by the teacher; (5) the extenuating or aggravating circumstances, if any, of the conduct in question; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of recurrence of the questioned conduct; and (8) the extent to which disciplinary action may have an adverse or chilling effect upon the constitutional rights of the teacher involved or other teachers. (At pp. 229-331.) Not all of the *Morrison* facts must be considered, only the more pertinent ones. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777.) And the *Morrison* factors may be applied to all the charges in the aggregate. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456-1457.)

33. An application of the most pertinent *Morrison* factors to Respondent's conduct demonstrates that Respondent is unfit to teach. Respondent recently mistreated two students who are extremely vulnerable by virtue of their severe handicaps. Respondent's conduct towards L. and Z. violated the state regulations and District policies regarding proper

⁷ Respondent did not provide a plausible explanation as to why she described Z.'s day as "horrible" in her note to his mother if Z. had achieved such a significant achievement.

physical interventions with students. Her conduct towards L. likely caused him physical pain. Her act of leaving Z., a student who feels extremely upset when touching wet surfaces, on the floor in his urine-soaked clothes and unsupervised for a period of an hour and one half, is particularly disturbing. Respondent was also rude and intimidating to her staff. Respondent's misconduct clearly adversely affected her students and those aides and other personnel who were present in her classroom. Moreover, Respondent was dishonest during her interviews with SCOE's attorney, Principal Carroll and Hoffman regarding her conduct. The totality of Respondent's conduct had a serious adverse impact on students, staff, and administrators.

34. In aggravation of her misconduct, Respondent's testimony at hearing lacked credibility and candor.

35. It is noted that Respondent faced a host of challenges in her class, particularly in regards to managing L.'s violent behaviors. It is also noted that Respondent informed Principal Carroll that L. was not an appropriate student for her classroom, yet L. remained in her classroom without adequate support. These circumstances make Respondent's frustration understandable, but do not mitigate Respondent's misconduct towards L. or her ensuing dishonesty to the district regarding her actions.

36. Respondent has received praise from her supervisors and colleagues regarding her commitment and ability to teach severely handicapped students. These positive qualities, however, do not mitigate the serious nature of Respondent's misconduct, particularly her mistreatment of L. and Z., and her dishonesty to the district regarding her actions.

37. Respondent did not accept responsibility for her misconduct, and she did not admit to making any mistakes. In the absence of an admission by Respondent of the seriousness of her misconduct, and in the absence of any efforts to alter her behavior, there exists a likelihood that her misconduct will reoccur.

38. Disciplinary action against Respondent would have no adverse or chilling effect on her or other teachers' constitutional rights.

LEGAL CONCLUSIONS

1. Education Code section 44932 provides that permanent employees, including teachers, may not be dismissed from employment unless one or more of the causes listed in its subdivisions are proven. The causes alleged in this matter are: evident unfitness for service, dishonesty, and persistent violation of the school laws of the state. The standard of proof applied in this proceeding is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.)

2. As interpreted by the Court of Appeal in *Woodland Joint Unified School Dist. v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th 1429, the term evident

unfitness for service as used in Education Code section 44932 “connotes a fixed character trait, presumably not remedial merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Woodland, supra*, at p. 1444.) In other words, conduct constituting evident unfitness for service must demonstrate that the “unfitness for service be attributable to a defect in temperament—a requirement not necessary for a finding of ‘unprofessional conduct.’” (*Woodland, supra*, at p. 1445.)

3. It was established by the preponderance of the evidence that Respondent committed acts constituting evident unfitness for service pursuant to Education Code section 44932, subdivision (a)(5), as that term is interpreted by the Court of Appeal in *Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra*, 2 Cal.App.4th 1429, by reason of her mistreatment of students, her rude and intimidating behavior towards aides and others who visited her classroom, and her dishonesty to the district regarding her misconduct. (Factual Findings 6, 8, 11, 18, 19, 22 and 23.)

It was established by the preponderance of the evidence that Respondent committed acts of dishonesty pursuant to Education Code section 44932, subdivision (a)(3), by reason of her denial of her mistreatment treatment of L. and Z. to school officials. (Factual Findings 8, 18 and 19.) Respondent’s dishonesty to the district regarding her misconduct was aggravated by her dishonest testimony at hearing.

4. It was not established by the preponderance of the evidence that Respondent committed acts demonstrating a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the governance of the public schools by the State Board of Education or by the governing board of the school district employing her, pursuant to Education Code section 44932, subdivision (a)(7). Although Respondent’s conduct was egregious, it was not demonstrated on this record that her violations were “persistent,” as that term is used in Education Code section 44932, subdivision (a)(7). (*See Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 82.)

5. All factual findings and legal conclusions have been considered in reaching the determination that Respondent is unfit to teach under the *Morrison* factors, and that dismissal of Respondent from her position as a certificated teacher with SCOE is warranted pursuant to Education Code section 44932, for evident unfitness for service (subd. (a)(5)) and dishonesty (subd. (a)(3)).

6. This is a unanimous decision of the Commission on Professional Competence. Commission members Meyers and Oesterle authorized Commission Chairperson Schneider to affix their names to the decision.

ORDER

Nancy Baum is dismissed from her position as a certificated employee of the Sonoma County Office of Education.

DATED: _____

DEBORAH MEYERS
Commission Member

DATED: _____

MAUREEN OESTERLE
Commission Member

DATED: _____

DIANE SCHNEIDER
Chair, Commission on Professional Competence
Administrative Law Judge