

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation for
Dismissal of:

STEVEN FRANK,

A Permanent Certificated Employee,

Respondent.

OAH No. 2013040939

DECISION

A Commission on Professional Competence (Commission) for the Sacramento City Unified School District convened to hear this matter in Sacramento, California, on the following dates: January 6, 7, 28, 29, 30 and 31, 2014; February 10 and 11, 2014; and March 24 and 27, 2014. The Commission members are Zack Schulz, Simone Simmons, and Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings and Commission Chairperson.

Gregory A. Wedner and Gabriela D. Flowers, Attorneys at Law, Lozano Smith, appeared on behalf of the Sacramento City Unified School District (District). Also present on the District's behalf were its Assistant Superintendent of Human Resources and Employee Compensation Cancy McArn, or its Human Resources Director Christina Villegas.

Leslie Beth Curtis and Lindsay Gold, Attorneys at Law, Langenkamp, Curtis & Price, appeared on behalf of Steven Frank (respondent) who was present.

The District's Closing Brief and Reply Brief were marked for identification as Exhibits 69 and 70. Respondent's Amended Closing Brief was marked for identification as Exhibit AAAA. The Commission met in executive session for deliberations on June 9, 10, and 24, 2014. By stipulation of the parties, the matter was submitted for decision at the conclusion of the Commission's deliberations on June 24, 2014.

ISSUE

Did the District prove by a preponderance of the evidence that respondent should be dismissed from his position as an elementary school teacher based upon unprofessional

conduct, unsatisfactory performance, evident unfitness for service, and/or “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” (hereafter, persistent failure to obey laws and regulations), within the meaning of Education Code section 44932, subdivision (a) (1), (4), (5), and/or (7) as alleged in the Accusation?¹

FACTUAL FINDINGS

Overview

1. Respondent received his Bachelor of Arts degree in liberal studies from California State University, Sacramento (CSUS), in 1992. The following year, he completed a teaching program at CSUS and received a multiple subject teaching credential. In May 2012, respondent received a Master of Education from Lesley University in Cambridge, Massachusetts, in a program that emphasized using art throughout the curriculum.

Respondent has been teaching since 1994. He was hired by the District in 1998. He took a one-year break to teach for the Department of Corrections (1999-2000). He then resumed teaching for the District in 2000, and became a permanent certificated employee. Respondent is a member of the Sacramento City Teachers Association (SCTA).

2. The relevant time period for this dismissal action extends from March 7, 2009, through March 7, 2013.² During this period, respondent taught different grade levels at three different elementary schools within the District: Oak Ridge Elementary School (Oak Ridge) for the 2009-2010 school year (third grade); Golden Empire Elementary School (Golden Empire) for the 2010-2011 and 2011-2012 school years (kindergarten); and Leonardo da Vinci Elementary School (LDV) (first grade) from the beginning of the 2012-2013 school year, until he was placed on paid administrative leave on March 7, 2013.

During the relevant period, respondent was supervised by three different principals, each of whom placed him on a Teacher Improvement Plan (Improvement Plan) designed to ameliorate performance deficiencies in four of the six California Standards for the Teaching Profession (CSTP). The Improvement Plans gave respondent detailed recommendations for improving his performance in these areas, and identified types of assistance that would be provided him to do so. Respondent elected to “self-surplus” from both Oak Ridge and

¹ Unless otherwise indicated, all undesignated statutory references are to the Education Code.

² Section 44944, subdivision (a)(5), limits the evidence that can be considered by the Commission to dismiss or suspend a certificated employee to that which occurred no more than more than four years prior to the date of the filing of the notice of intent to dismiss. In making the findings and conclusions set forth in this Decision, only evidence of conduct (acts or omissions) occurring during the relevant period was considered.

Golden Empire. The evidence was persuasive that respondent did so in the hope that the Improvement Plans would not follow him to his new school sites.³ During the relevant period, respondent was consistently deficient in the follow four CSTP standards:

1. Engages and supports all students in learning by using a variety of instructional strategies to respond to students' diverse needs (hereafter, *Instructional Strategies*);
2. Creates and maintains effective environments for student learning by planning and implementing classroom procedures and routines that support student learning and positive behaviors (hereafter, *Classroom Environment and Management*);
3. Plans instruction and designs learning experiences for all students by sequencing instructional activities and materials for student learning (hereafter, *Instructional Planning for Learning*);
4. Assesses and evaluates student learning to guide instruction, and communicates progress with students, families, and appropriate staff (hereafter, *Assessment and Communication*).

The first of respondent's Improvement Plans was issued on May 4, 2010, by Oak Ridge Principal Steven Lewis. During the 2010-2011 school year, Golden Empire Principal Dr. Irene Eister implemented this plan. Dr. Eister also formally evaluated respondent's performance and, in the Formative/Summary Evaluation signed March 28, 2011, rated him as "does not meet performance standards" in these same four CSTP areas. Dr. Eister then prepared Improvement Plans to address these areas of deficiency on June 10, 2011, and again on June 14, 2012. Although Dr. Eister testified that she prepared another formal evaluation of respondent, with similar ratings, for the 2011-2012 year, this performance evaluation was not in evidence. During the 2012-2013 school year, LDV Principal Devon Davis implemented the most recent Improvement Plan and, on October 15, 2012, she prepared a new Improvement Plan with input from respondent and his union representative.

On November 5, 2012, the District issued a "Notice of Unprofessional Conduct and Unsatisfactory Performance" to respondent. Principal Davis formally observed respondent in preparation for his annual performance evaluation; however, this evaluation was not completed before respondent was removed from the classroom on March 7, 2013. Respondent is currently on paid administrative leave.

3. *Statement of Charges:* On March 7, 2013, District Chief Human Resources Officer Jess Serna signed the Notice of Intent to Dismiss/Statement of Charges (Statement of

³ When a school loses teaching positions, an employee with more seniority may volunteer to leave his assigned school site (i.e., self-surplus), rather than requiring that a less senior employee be transferred out of that school.

Charges), and informed respondent of his recommendation to the District's Governing Board (Board) that respondent be dismissed from his position as a certificated employee of the District.

The 32-page Statement of Charges is divided into two categories of allegations during the relevant period: "Specific Instances of Misconduct," and "Performance Deficiencies." Each of these allegations was incorporated into and alleged as a distinct factual basis for dismissal under section 44932, subdivision (a) (1), (4), (5), and/or (7), respectively, for unprofessional conduct, unsatisfactory performance, evident unfitness for service, and/or persistent failure to obey laws and regulations. The Board approved the Statement of Charges, which was served on respondent on March 15, 2013.

4. On March 19, 2013, respondent signed his Demand for Hearing.

5. *Accusation:* On April 3, 2013, Mr. Serna signed and the District issued the Accusation, which incorporated the facts and violations identified in the Statement of Charges as independent grounds for his dismissal.⁴

6. On April 8, 2013, respondent filed his Notice of Defense and Objections to the Accusation.

7. *Hearing:* A 10-day evidentiary hearing convened before the Commission. Respondent made a standing objection to the use of hearsay statements under Government Code section 11513, subdivision (d), which was joined in by the District.⁵

The District called the following witnesses: principals Devon Davis and Irene Eister; administrators Mary Hardin Young, Cancy McArn and Carol Mignone Stephen; teacher Renee Mondzak; and the mothers of Children Numbers 2, 3, 4, 5, and 6, who were in respondent's class at LDV.⁶

Respondent testified on his own behalf and called the following witnesses: District teachers or former teachers Eric Malme, Jeannie Katherine Tedesco, Kimberly Rae Healey,

⁴ In this Decision, specific allegations are designated by reference to the paragraph in the Statement of Charges (SOC ¶ _) as incorporated into the Accusation.

⁵ In pertinent part, Government Code section 11513, subdivision (d), provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions..."

⁶ To protect privacy, the names of respondent's students, as well as those of their family members, have been deleted and replaced with designated child numbers (C#), as set forth in the Amended Confidential Names List. "MOC#" refers to Mother of Child Number #, and "FOC#" refers to Father of Child Number #.

and Linda Rae Cochran; SCTA officers Robert Lynch and Garald Scott Smith; the mothers of Children Numbers 15, 59, 61, 62, 63; and the fathers of Children Numbers 52, 15 and 61.

The testimony of these witnesses is paraphrased as relevant below.

I. 2009 – 2010 School Year: Oak Ridge

8. Stephen Lewis was the principal of Oak Ridge during the 2009-2010 school year and respondent's supervisor. He did not testify.

9. *May 4, 2010 Improvement Plan (SOC 2 ¶ (a))*: On May 10, 2010, Mr. Lewis and respondent met and developed an Improvement Plan for respondent. The plan notified respondent of the four areas (Finding 2) in which his performance needed improvement and broadly recommended that he "study/review the California Standards for the Teaching Profession" for each area. It provided other specific recommendations for improvement; and identified the assistance that would be provided.

A. *Instructional Strategies*: It was recommended that respondent:

- (1) Attend training and visit successful classrooms to acquire strategies to engage and monitor student learning;
- (2) Maintain a neat, organized and engaging classroom environment;
- (3) Complete and follow a curriculum schedule that allots the state-mandated instructional time in each area;
- (4) Use curriculum guides to plan, pace and deliver lessons;
- (5) Attend training on classroom management, classroom organization, and active participation in order to provide an effective and orderly environment for students;
- (6) Include active participation strategies in weekly lesson plans; and,
- (7) Refine procedures and processes for the classroom that provide clear expectations for student learning.

Assistance to respondent entailed: on-site coaching to model effective engagement strategies; release time during the school day to observe other classrooms; and meeting time with Principal to prepare curriculum schedule. In addition, formal and informal observations would be conducted of respondent's teaching, with post-conferences to analyze instruction and set improvement targets.

B. *Classroom Environment and Management:* It was recommended that respondent: (1) observe classroom arrangement of effective teachers; (2) create classroom procedures and routines that are understood by all students; and (3) establish and consistently maintain standards for student behavior.

Assistance to respondent entailed: arranging for meeting time with Principal to discuss classroom setup to ensure that a strong classroom environment is established; working with site mentor and/or Principal to create effective environment; and visiting classrooms to observe effective use of classroom procedures and routines.

C. *Instructional Planning for Learning:* It was recommended that respondent:

(1) Prepare and follow clear and complete lesson plans that include the specific time allotments, lesson objectives and instructional strategies/program components;

(2) Use formal and informal assessment data to diagnose student learning needs and plan daily individual/small group instruction (preteach/reteach/extend) to increase the achievement of students scoring below grade level and include specific goals in weekly lesson plans;

(3) Work closely with grade level colleagues and administration to ensure strong planning;

(4) Turn in weekly lesson plans to Principal each week; and

(5) Design instructional activities so that all students participate in setting and achieving learning goals.

Assistance to respondent entailed: arranging meeting time with Principal for support on lesson planning; providing opportunities to analyze data and plan instruction at grade level conferences and monthly grade level meetings throughout the school year; and reviewing lesson plans and providing feedback.

D. *Assessment and Communication:* It was recommended that respondent:

(1) Complete all forms, records and reports (report cards, progress notes, cumulative file recording, cumulative assessments, instructional schedules and plans, lesson plans, etc.) and submit to principal when requested.

(2) Use formal and informal assessment data to diagnose student learning needs and plan daily individual/small group

instruction (preteach/reteach/extend) to increase the achievement of students scoring below grade level and include specific goals in weekly lesson plans;

(3) Participate in grade level meetings; and

(4) Participate in Academic Conferences.

Assistance to respondent entailed having the Principal: conduct observations and provide feedback regarding classroom environment; provide collaboration time with grade level peers to analyze data; and review lesson plans and provide feedback on most recent assessment data.

10. Respondent and Mr. Lewis signed the Improvement Plan on May 10, 2010. Respondent was advised that the Improvement Plan would be implemented in the 2010-2011 school year, that he would be formally evaluated that year and that the Improvement Plan would be placed into his personnel file after 14 days. He did not submit any written response.

11. Respondent elected to self-surplus from Oak Ridge at the end of the 2009-2010 school year.

II. 2010 – 2011 School Year: Golden Empire

12. Dr. Eister is the principal of Golden Empire, where respondent worked as a kindergarten teacher for the 2010-2011, and the 2011-2012 school years.

Several weeks before the 2010-2011 school year began, Human Resources Director Carol Mignone Stephen informed Dr. Eister that respondent was assigned to be Golden Empire's new kindergarten teacher. Dr. Eister met with respondent to discuss the position and learned that he had been on an Improvement Plan at Oak Ridge the previous year. Dr. Eister discussed her expectations for the job and told respondent that, in addition to her support, he should use the site's three other kindergarten teachers for assistance. Dr. Eister called Mr. Lewis and requested a copy of respondent's Improvement Plan.

13. Before the school year began, Dr. Eister met with respondent and reviewed his Improvement Plan, section by section. During this discussion, respondent was professional, but expressed frustration that he was still on the plan because he believed he had progressed. Dr. Eister recalled that respondent told her he wondered if the plan would actually follow him to another school site. Dr. Eister told respondent she would do whatever she could to support him and to get him off the plan.

14. Overview of Significant Actions during the 2010-2011 school year: Dr. Eister implemented the May 10, 2010 Improvement Plan. She met frequently with respondent to discuss teaching, to review lesson plans and to provide feedback. She instructed respondent

about the requirement to maintain the confidentiality of student records and about District policy in that regard. She observed him teaching in his classroom on both an informal and a formal basis. She issued a Letter of Concern based on her February 12, 2011 formal observation. She prepared a Formal Evaluation of respondent, finding his performance to be unsatisfactory in the four CSTP areas covered by his Improvement Plan. She prepared a new Improvement Plan with respondent to be implemented the following school year.

15. Respondent was notified that he could submit a written response to each of the documents described in Findings 18, 20, 21 and 25, but he did not file any response with the District.

16. Once the 2010-2011 school year began, Dr. Eister immediately started implementing the Improvement Plan. To help respondent address the issues identified in it, Dr. Eister assigned him to teach in the kindergarten classroom of Rene Mondzak, who she characterized as an “exemplary” teacher. Ms. Mondzak taught her class in the mornings. Respondent would teach his students the same lesson in the afternoon, after having watched Ms. Mondzak deliver the same curriculum to her students.⁷ In this way, respondent routinely “had at his disposal another teacher that he could actually witness and view and follow for guidance.” In addition, respondent was to submit his weekly lesson plans to Dr. Eister for review. Dr. Eister arranged to personally meet with respondent on a weekly or biweekly basis to discuss his lesson plans and to review readings from the book, *Tools for Teaching*, by Fred Jones.

17. *Pre-evaluation Conference:* On September 27, 2010, Dr. Eister and respondent met and signed documents for a pre-evaluation conference to discuss the manner in which respondent’s 2010-2011 teacher performance evaluation would be conducted. Respondent selected Option One for his evaluation, which required two formal observations in the six CSTP areas, using “criteria that are observable, measurable, and applicable in all segments, kindergarten through adult education.”

18. *Specific Misconduct: Confidentiality/Progress Notes (SOC ¶ 1(a)):* Respondent compromised the confidentiality of student information during the 2010-2011 school year.

On November 1, 2010, Dr. Eister met with respondent to discuss his progress note procedures. As memorialized in her November 2, 2010, memorandum, Dr. Eister identified two concerns based on respondent’s reports to her. First, respondent’s progress notes for two students were reported to be “similar, if not identical.” Respondent told Dr. Eister that two parents had expressed concerns to him after they compared their children’s progress notes and saw that his comments were not specific to each child’s individual learning needs. Second, respondent’s progress notes were not maintained in a confidential manner. Respondent informed Dr. Eister that the parents had been able to read other students’ progress

⁷ Because there was an overlap in the morning and afternoon kindergarten, respondent was not able to watch all of Ms. Mondzak’s lessons.

notes because he had placed them in the students' folders, without putting them in individual envelopes to ensure their confidentiality. Respondent was advised that this was a breach of student confidentiality.

"Effective immediately," respondent was directed to understand the need to individualize his comments in progress notes to each student's specific learning needs and to understand that progress notes, report cards, and other individualized student documents are of a confidential nature and must be treated as such. He was directed to place student documents in sealed envelopes prior to distribution and to personally distribute these documents, rather than allowing other adults to do so.

19. Respondent never provided the District with a written response to this memo. At hearing, respondent provided a three-page typewritten "to whom it may concern" letter, dated November 12, 2010, expressing his concern that this write-up was unnecessary because he had proactively sought professional advice from Dr. Eister about these parents' concerns. Respondent wrote that this memo seemed to be a familiar "stacking of the deck" against him and a "gotcha," reminiscent of what he had experienced at Oak Ridge. Respondent expressed his belief that "this is effective immediately creating a hostile work environment in which it is negatively impacting my status, performance, and self-esteem as a member of this site's staff." In his testimony, respondent acknowledged that there was no evidence he had ever provided this letter to Dr. Eister or to anyone else in the District.

20. *February 2011: Formal Observation and Letter of Concern (SOC ¶ 2(b))*: In preparation for respondent's performance evaluation, Dr. Eister conducted a formal lesson observation in respondent's class on February 2, 2011, and then met with him on February 10, 2011, for a post-observation debriefing.

In her February 22, 2011, Letter of Concern, Dr. Eister itemized 14 "instructional and management components" she had observed and noted as concerning during her formal observation of respondent's teaching, as follows:

- (1) Respondent's lesson pacing was "off." He spent too much time on the anticipatory set, with the result in sections of the lesson not being finished in the allotted time.
- (2) Respondent was observed to use too many management strategies, which confused and overwhelmed the students and created a chaotic classroom atmosphere. Dr. Eister suggested that respondent use fewer management strategies, but not all at one time.
- (3) Respondent's students engaged in "pseudo-compliance" during instruction, by giving a false appearance that they were on-task, when they were not engaged and attentive. Dr. Eister noted that "student behavior must be monitored at all times."

(4) Respondent did not demonstrate discipline and management before beginning instruction. Dr. Eister noted that “students must be compliant and ready to receive content” and that “discipline must always come before instruction.”

(5) Respondent did not consistently monitor student engagement and compliance throughout the lesson. Instruction should not begin until students are attentive and focused.

(6) Respondent engaged in “too much ‘teacher talk’ and verbal redirection.” Dr. Eister suggested that respondent learn to use gestures and silent cues, which must be taught.

(7) Respondent did not monitor student’s active participation and compliance with his directives throughout the lesson.

(8) Respondent’s lessons lacked fluidity because he interrupted them with continuous redirection. Dr. Eister noted that “the teacher must plan instruction and learning experiences by maintaining the fluidity of the lesson to ensure maximum student achievement.”

(9) Respondent needed to implement frequent “checking for understanding” strategies throughout the lesson to help him gauge whether additional input, directives and/or reteaching is necessary.

(10) Respondent needed to maintain appropriate classroom management throughout the lesson and create an environment in which students will be successful (for example, by only bringing out materials when they are ready). Dr. Eister suggested respondent “review procedures so students are clear what is expected” in his class and then hold them accountable at all times.

(11) In order to maintain an effective environment for learning, respondent needed to watch for “lesson incongruence,” i.e., between what he as teacher states and what students actually do.

(12) Respondent needed to minimize transition time, by clearly defining expectations, reviewing procedures and holding students accountable.

(13) Respondent needed to “review and implement all steps of the 8-step lesson plan,” which “should be followed while delivering each lesson: stating the objective, anticipatory set, input, modeling, checking for understanding, guided practice/monitoring, closure,

independent practice.” Dr. Eister advised that all components are crucial to ensuring that students can master the stated objective.

(14) Respondent needed to follow the lesson plan that is prepared for the principal. Dr. Eister noted that during the observation, “there was confusion with the presented lesson plan. Much of what was shared during the pre-observation was not delivered. There is a need to review lesson planning to ensure the 8-step lesson plan is being followed and presented to students to ensure increased student achievement and mastery of the objective.”

In summary, Dr. Eister emphasized that these were “great concerns as you and I have been working on these components since September [2010], meeting weekly and/or every other week to further improve your classroom management, instructional planning, lesson design, and lesson delivery. In addition, you and I met the morning of the lesson observation to review your lesson plan. The lesson plan that was provided to me did not match what you actually delivered to the students.”

Respondent was instructed to continue his weekly meetings with Dr. Eister to review his lesson plans and to discuss *Tools for Teaching*; to visit other teacher’s classrooms and observe classroom management and instructional strategies during non-instructional time; to work closely with his kindergarten team to implement effective teaching and management strategies; and to “spend additional time in preparing lessons to implement effective teaching and management strategies” and “in preparing lessons that follow the 8-step lesson cycle.” In addition to their meetings, Dr. Eister would “continue to provide written and oral feedback during classroom walk-throughs.”

21. *March 28, 2011 Formative/Summary Evaluation (SOC ¶ 2(c))*: The District’s Formative/Summary Evaluation form for certificated teachers has four possible ratings in each of the six CSTP areas. These are: “exceeds performance,” “consistent with performance standards,” “working to meet performance standards,” and “does not meet performance standards” (unsatisfactory).

Dr. Eister prepared a formal evaluation of respondent’s performance as a certificated employee for the 2010-2011 school year, and reviewed his performance as a teacher in the six CSTP areas. Respondent was rated as unsatisfactory in the four areas identified as needing improvement in his May 4, 2010 Improvement Plan (Findings 2 and 9), and as “working to meet standards” and “consistent with performance standards” in two other areas. On March 28, 2011, respondent signed this evaluation to indicate he had received it and understood his right to provide any written statement in response.

A. Respondent’s performance was unsatisfactory in *Instructional Strategies*. Dr. Eister commented that, while respondent did demonstrate “some knowledge of subject matter content,” he must implement all components of the 8-step lesson plan. Respondent needed to consistently use active engagement strategies to keep students focused during the lesson;

increase student accountability; vary methods of instruction to promote students' achievement levels and address their varied learning styles; monitor lesson pacing to ensure adequate time can be devoted to all aspects of the lesson; and "implement strategies and resources that have been provided to him this past year to better improve student engagement and achievement."

B. Respondent's performance was unsatisfactory in *Classroom Environment and Management*. While respondent "demonstrated some positive interaction/relationships with students," Dr. Eister commented that he needed to "continue to create, teach, model, assess, and monitor classroom routines and procedures consistently and constantly." Respondent needed to work "proactively to prevent and respond quickly to minimize behavioral issues; [and] help students take responsibility for their own behavior and actions" on a daily basis. Respondent needed to secure and maintain students' attention and participation; to implement management strategies to redirect students that would not continuously interrupt the fluidity of a lesson. To minimize continuous oral redirection, respondent should increase the amount of non-verbal redirection (wait time, gestures, etc.). Respondent needed "to move about the room and use proximity to assist with off task behavior." He needed to "implement strategies and resources that have been provided to him this past year to better improve student engagement and achievement."

C. Respondent's performance was unsatisfactory in *Instructional Planning for Learning*. Respondent needed: to "vary his teaching strategies in order to motivate and hold students accountable for their learning"; to better design his lesson plans and devise methods to motivate and encourage all students to actively participate; to "adjust lessons to provide additional content/input or further check for understanding to ensure all students (high and low) are grasping the content"; to continually check for understanding to ensure students are mastering the lesson's content; to implement all eight steps of the lesson plan while delivering the lesson; to review and practice lesson transitions; to hold students accountable for completing tasks quickly and quietly; and to "implement strategies and resources that have been provided to him this past year to better improve student engagement and achievement."

D. Respondent's performance was unsatisfactory in *Assessment and Communication*. Respondent needed: to "understand the need to administer district-wide and curriculum-embedded assessments and how to use these assessments to gauge his teaching and student learning" and to review the types of assessments and how/when to give them to students. Dr. Eister noted that it was "critical" to use these data in an ongoing manner to inform his instruction and to share with families. She encouraged respondent "to continually collaborate with other teachers to inform his instruction and to model lessons and instructional strategies as well as glean techniques from others as to how best improve academic achievement, especially in adjusting instruction based on student data."

E. Respondent was "working to meet performance standards" in the CSTP standard, "*understands and organizes subject matter by using district provided curriculum/ materials and/or standards aligned resources to make subject matter accessible to all*"

students.” Dr. Eister noted that respondent: “understands subject matter material and often utilizes educational resources and district/state standard to meet the educational needs of his students;” and that “some of his lessons demonstrate evidence of planning and preparation.” She encouraged him to use supplemental aids to stimulate student interest and engagement, to differentiate instruction to meet his students’ diverse needs, and to hold students accountable for their learning and lesson participation.

F. Respondent was “consistent with the CSTP standard for “*contributes to the teaching and learning environment by fulfilling extra duties as assigned, attending required meetings, maintaining resources and equipment, and assisting in maintaining acceptable student behavior outside of classroom.*” In this regard, Dr. Eister noted that respondent “fulfills the required duties, as assigned as a classroom teacher.” Respondent volunteers and assists in extracurricular activities and facilitates at some Family Nights. He was also “willing to meet with administration to improve his skills and is open to constructive feedback and suggestions.”

Based on this evaluation, a new Improvement Plan was to be developed. Dr. Eister provided recommendations for respondent’s professional goals, with an emphasis on professional development in direct instruction, student engagement and classroom management. Dr. Eister commended respondent for his “caring and concern for his students’ progress.” She noted he was “respectful of students and their families,” “respects the cultural diversity and unique needs of each of his students,” and “has a good working relationship with colleagues and staff . . .”

Testimony of Rene Mondzak

22. Ms. Mondzak has been an elementary school teacher with the District for approximately 25 years. During the 2010-2011 school year, she was one of Golden Empire’s four kindergarten teachers and she shared a classroom with respondent. Ms. Mondzak met respondent in late August 2010, just before the school year began. She gave him a tour of their classroom, and divided up the space so respondent would have room to display things for his class.

Because the kindergarten teachers taught the same curriculum at the same pace, they met and worked as a team by preparing and sharing materials for lessons on a monthly basis. After working with respondent for several weeks, Ms. Mondzak became concerned that respondent acted as if he had not been given information to carry out his duties, after she and the other kindergarten teachers had given him information and materials. She requested a meeting with Dr. Eister and respondent. Following this meeting, Ms. Mondzak confirmed everything given to respondent in writing, with a copy to Dr. Eister, to verify that he had been given necessary information. Even after this, Ms. Mondzak noticed that respondent did not use many of the materials prepared by the kindergarten team for monthly lessons.

Ms. Mondzak taught the morning kindergarten class from 8:00 a.m. until 11:20 a.m. Respondent’s class came in at 10:20 a.m. During the overlap time, respondent took his class

to another room until Ms. Mondzak's students were dismissed. After her class was dismissed, Ms. Mondzak typically remained in the class another two hours each day to prepare her class. During this time, Ms. Mondzak observed respondent teach.

23. Based on her observations, Ms. Mondzak was concerned that respondent's students were not receiving the proper amount of foundational skills that they should have been taught or the proper structure. The class was very often chaotic. She observed that some students tried to be on task, but that many of them were not on task. Instead, they were out of their chairs wandering around and did not appear to know what the expectations were. While typically students were assigned a seat with nametags, there were periods when there were no nametags on the desks during respondent's class.⁸ It appeared that, at some point, respondent's students had assigned seats with nametags, but the tags would be torn or removed and not replaced. The children were free to sit "wherever." Rather than directing the students and creating the structure, respondent would ask the students where they sat.

During the 2010-2011 school year, Ms. Mondzak observed respondent: assign students homework for concepts that had not yet been covered in class; demonstrate how to form letters in a manner inconsistent with the California standard; and throw away bags of student work and materials. She heard respondent use a negative buzzer-sounding noise when students gave incorrect answers, instead of giving the positive responses that are especially important for kindergarten students. Ms. Mondzak also:

a. Observed that, instead of the typical practice of using counting manipulatives (like squares or bears) to further a math lesson, respondent would "just dump out a whole bin" so all the counters "would be scattered around and the kids would be crawling all over." Instead of having a real point to the math lesson, respondent would simply allow the students to "just explore now."

b. Noticed that respondent would allow students to take "an inordinate amount of time" (i.e., 20 minutes) to pass out manipulatives or whatever materials were needed for the lesson during circle time. After this was finished, "there would hardly be any time left" for the lesson. In her experience, it should have taken only "a very, very few minutes" to accomplish this task. Respondent's practice was an unnecessary waste of time that left little teaching time.

c. Observed that respondent placed crayons on the students' desks in baskets that were not shallow. As a result, the children could not see into the baskets and would climb onto the tables, and push and shove each other while trying to get the colors they needed.

d. Observed respondent wait until shortly before events (e.g., Open House) to have his students begin complicated projects that the other kindergarten students had

⁸ The nametags for Ms. Mondzak's students were removed after her morning class, so respondent could add his own.

prepared over several weeks, resulting in unfinished work (e.g., "All About Me" book; Rainbow Cloud.)

e. Observed that respondent's preparation of lesson materials, as part of the kindergarten teaching team, was not reliable, so the other teachers would have to count each of the pieces he had prepared to make sure there were enough and supplement them to have sufficient pieces ready for the classes. Respondent drew lines and cut papers individually so that the students had pieces that were not uniform. When respondent was absent, on a number of occasions, his substitute teacher would have instructions for lessons but would not have enough materials to complete the lesson.

24. Based on her experience with and observation of respondent, Ms. Mondzak became wary of his assessment skills and practices. For example, the kindergarten team developed a system where the afternoon teacher would pull students out from the morning kindergarten class to assess them on certain skills and vice versa. Ms. Mondzak initially teamed with respondent, but stopped after she found that the results he was giving her did not match with what she knew her students were or were not capable of. Ms. Mondzak met with Dr. Eister and told her that she did not feel she could depend on the test results respondent was giving her.

In the spring of 2010, Ms. Mondzak also observed respondent give his students a math standards practice test on measurements as agreed by the team. To administer this test, the teachers were required to read the questions posed in the teacher manual out loud to the students. The students had answer sheets with pictures and/or numbers next to question numbers and bubbles to fill in to select the correct answer. There were no questions written on the answer sheet. Ms. Mondzak observed that, when respondent gave this test, he did not read the questions from the manual. Instead, respondent just looked at the test paper and "bizarrely stated" questions he thought were appropriate. As a result, the "way the children were answering could have been completely wrong but there was no way for parents or anyone to know what the expectation was for the right answer." Ms. Mondzak so strongly believed that this was an inappropriate way to administer the test that she remembered the questions respondent asked. That same day, she checked them against those in the manual. This caused her to realize that respondent was "making up his questions." For example, whereas the manual asked students to "find the [pictured] object that holds more," respondent asked students to "find the [pictured] thing you would not drink out of."⁹

25. *June 10, 2011 Improvement Plan (SOC ¶ 2(d))*: As required by the performance evaluation, Dr. Eister and respondent prepared an Improvement Plan which was

⁹ In approximately the fall of 2013, Ms. Mondzak reconstructed this for District counsel on a blank test answer sheet taken from Chapter 7 of the Standards Practice Manual. Next to these question numbers, Ms. Mondzak wrote: (1) the questions she remembered respondent asking his students, and (2) the gist of the questions actually posed by the manual's Test Directions for Teachers.

to be implemented beginning in September 2011. Respondent signed this Improvement Plan on June 13, 2011.

This plan focused on the four CSTP areas determined to be unsatisfactory in the March 28, 2011 formal evaluation. This Improvement Plan continued and expanded on previous recommendations for improvement in these areas, and added a recommendation that he “study/review Fred Jones’ *Tools for Teaching* Program and other teaching/management resources.” It offered respondent substantially similar assistance as that detailed in the May 4, 2010 Improvement Plan (Finding 9), including that he “continue with Principal conferencing and feedback opportunities.”

A. *Instructional Strategies*: Dr. Eister additionally recommended that respondent use the guides and strategies previously outlined “on a daily basis” (i.e., curriculum guides, active participation strategies); that he “observe and work with colleagues who are exemplary in lesson delivery”; and that he “incorporate these strategies in your lesson delivery and design.”

B. *Classroom Environment and Management*: Dr. Eister also recommended that respondent: not only observe classroom arrangement of effective teachers, but that he “incorporate these strategies in your classroom; and attend training on classroom management and classroom organization in order to provide an effective and orderly environment for students.”

C. *Instructional Planning for Learning*: Dr. Eister further recommended that respondent: use curriculum guides on a daily basis to plan, pace and deliver lessons; that he review, refine, and utilize the eight-step lesson plan; and that he follow the eight-step lesson plan in his daily lessons. Assistance to respondent in this area remained the same.

D. *Assessment and Communication*: Recommendations for improvement in this area remained the same, with the additional assistance that respondent would be provided time to observe grade-level teacher(s) administering assessments.

III. 2011 – 2012 School Year: Golden Empire

26. Respondent returned to Golden Empire to teach kindergarten during the 2011-2012 school year. Ms. Mondzak began teaching a full-day kindergarten class. Respondent shared a classroom with teacher Carla Randazzo.

27. Overview of Significant Actions during the 2011-2012 school year: During this school year, Dr. Eister continued providing respondent the assistance outlined in the June 10, 2011 Improvement Plan. She issued two “Letters of Deficiency” to respondent (October and December 2011), a Letter of Concern (February 2012) and two Letters of Reprimand (May and June 2012). In addition, Dr. Eister testified that she prepared another formal evaluation of respondent toward the end of this school year and forwarded it to the District’s Human Resources Department. This evaluation was not in evidence and

respondent denied having received it. In June 2012, Dr. Eister prepared a new Improvement Plan for respondent, to be implemented during the 2012-2013 school year.

28. During this school year, respondent was advised that each of the documents described in Findings 29, 30, 31, 33, 34, and 36 would be placed in his personnel file. Respondent provided no written response to any of these documents.

29. *October 19, 2011 Letter of Deficiency (SOC ¶ 2(e))*: In preparation for respondent's evaluation, Dr. Eister conducted a formal observation of his teaching on October 13, 2011, which she and respondent discussed in detail on October 19, 2011. Dr. Eister then prepared a letter of deficiency documenting her concerns about his performance as follows:

- (1) Respondent's lesson pacing was off, with too much time (30 to 35 minutes) being spent on activities that should take five to 10 minutes. As a result, teaching time was lost and students lost interest.
- (2) Respondent failed to consistently monitor student engagement and compliance and was admonished not to begin instruction until the students are attentive and focused.
- (3) Respondent failed to implement a variety of questioning strategies. Instead, he asked questions to the entire class without providing expectations or guidelines as to how students should respond; as a result, students shouted out answers.
- (4) Respondent did not frequently implement "check for understanding" strategies to help determine whether students accessed the lesson's content or whether additional input, directives or re-teaching was necessary.
- (5) Respondent needed to clearly state the lesson's objective at the beginning of the class, make sure students understood the objective and monitor whether they are meeting the objective.
- (6) Respondent failed to provide accurate delivery of content. Students were provided inaccurate content (tracking letter "P" following respondent's model, which was backward to them).
- (7) Respondent needed to consistently monitor for compliance in light of students' false appearance to him that they were on task (pseudo compliance).

(8) Respondent did not provide discipline and management before beginning instruction. This was necessary for students to be compliant and ready to receive content.

(9) Respondent interrupted his lesson continuously with redirection. This impeded lesson fluidity needed to ensure maximum student achievement.

(10) Respondent needed to minimize transition time by clearing defining expectations, reviewing procedures and holding students accountable.

(11) Respondent needed to review and implement all steps of the eight-step lesson plan.

(12) Respondent needed to review and to follow the lesson plan that he prepared for Dr. Eister with his class. Some of the content discussed during pre-observation was not delivered to students.

Dr. Eister emphasized her “great concern” because she and respondent had been working on these components consistently since September 2010, and because the lesson plan respondent provided to her at the pre-observation meeting “had components that did not match what you actually delivered to the students.”

Respondent was directed to continue his weekly meetings with Dr. Eister to review lesson plans; to continue weekly book talk on *Tools for Teaching*; to visit other teachers to observe effective teaching and management strategies and to work closely with the kindergarten team to implement them; to review curricular teacher’s editions/guides to assist with suggested lesson pacing; and to spend additional time preparing lessons that follow the eight-step lesson cycle. Dr. Eister would continue to provide written and oral feedback to respondent during her classroom walk-throughs.

30. *December 21, 2011 Letter of Deficiency (SOC ¶ 2(f))*: Dr. Eister conducted a formal observation of respondent’s teaching on December 14, 2011, which she and respondent then discussed on December 21, 2011. On December 21, 2011, Dr. Eister prepared a letter of deficiency documenting concerns about respondent’s performance.

The concerns outlined were substantially similar to those addressed in the previous letter of deficiency (Finding 29): i.e., communicating lesson expectations; classroom management (“student off-task behavior becomes the norm,” not conducive to learning); enforcing classroom rules/procedures (“class was disorderly throughout the lesson”); ongoing redirection and fluidity of instruction (redirection “used continuously” interrupted instructional flow and created a chaotic environment); overuse of oral redirection/nagging (nagging/negative reinforcement becomes detrimental and students “tune-out”); crucial to monitor student progress throughout lesson; need to provide appropriately assigned

instructional materials to students who are excelling and those who need more time; classroom instructional time is underutilized; transitions are lengthy and encroach on instructional minutes; need to consistently monitor classroom routines, procedures and expectations; need to review and implement all steps of eight-step lesson plan; and need lesson closure to allow sufficient time for processing of acquired information. Dr. Eister noted that respondent's "observed instructional skills are deficient. Address skill deficiencies [sic] outlined here and in previous conferences, walk-throughs, and meetings to remedy..."

Respondent was directed to review and implement the suggestions provided to him in this observation debriefing and to continue complying with the directives outlined above.

31. *February 21, 2012 Letter of Concern (SOC ¶ 2(g):* Respondent's Improvement Plan required him to submit lesson plans to Dr. Eister at the beginning of each week. Respondent's lesson plans for the week of February 13, 2012, did not include any activities for Valentine's Day (2/14), or for the 100th Day of School (2/16). Dr. Eister observed respondent's class on both February 14th and 16th, and saw students involved in Valentine's and 100th Day activities that were not noted on respondent's lesson plans. At their February 17, 2012 meeting, respondent admitted that he had forgotten about these two events. In her letter of concern, Dr. Eister emphasized that these are "two very important days in the kindergarten curriculum." Respondent's failure to include these events on his lesson plans indicated that respondent was not thoroughly planning his lessons, was not consulting the school calendar, and was not planning with his kindergarten colleagues as directed. Respondent was admonished that:

You have a multiple subjects teaching credential. The importance of planning for the instructional program is a basic component of your training. When you fail to plan adequately, the instructional program, as well as student learning, is negatively impacted. Your students were negatively impacted by your lack of planning and your forgetfulness of two very important and festive events in a kindergarten student's instructional program. While your colleague provided you with some basic activities at the last minute, the activities were rushed and were not implemented effectively.

Respondent was directed to continue providing his weekly lesson plans to Dr. Eister. In addition, he was directed to alert her if he needed to modify these plans. All lesson plans "shall have stated learning objectives for each subject with identified learning activities to support these objectives." Dr. Eister suggested that respondent consult the California Standard for the Teaching Profession, that he follow the suggested pacing outlined in his teachers' manuals, and that he must frequently collaborate with other teachers in preparing his lessons.

32. *Missing Formal Evaluation:* Education Code section 44664, subdivision (b), requires that a school district annually evaluate any certificated employee who has received

an unsatisfactory performance evaluation “until the employee achieves a positive evaluation or is separated from the district.” Based upon respondent’s previous unsatisfactory performance evaluation, another formal evaluation was due by late March 2012.

Throughout the 2011-2012 school year, Dr. Eister worked with respondent to improve his performance. She observed respondent in preparation for his upcoming formal performance evaluation, and debriefed him following her observations. These meetings and observations occurred over extended periods of time. Dr. Eister testified persuasively that she completed this formal evaluation and had again rated respondent as unsatisfactory in the four CSTP areas found deficient in the previous evaluation. When completed, Dr. Eister forwarded respondent’s formal evaluation to the District’s Human Resources Department. The District did not produce any such evaluation document at hearing and respondent denied having received it. The District failed to prove that it complied with section 44664, subdivision (b).

33. *May 30, 2012 Letter of Reprimand (SOC ¶ 1(c))*: On May 24, 2012, respondent took some of his students to the computer lab and left other students in the classroom with two parents. Dr. Eister observed these students and parents in the classroom, and then spoke to respondent in the computer lab. In this letter of reprimand, Dr. Eister wrote:

... I asked you why you left the students in the classroom unsupervised by a credentialed teacher. You stated that the parents were in the room. I reminded you that the parents are not credentialed and that you must provide supervision to all students. You returned to your classroom while the computer teacher supervised your other students. Later that day, you shared with me that there must have been some miscommunication, as you had asked the other kindergarten teacher to supervise your students you left in the room. Upon verifying this information with the other kindergarten teacher, she stated that you never asked her to supervise the students you left in the room.

Dr. Eister notified respondent that his conduct regarding this lack of student supervision violated various rules and regulations, including Standard 2.1 of the California Standards for the Teaching Profession (make classroom environment safe and accessible); Board Policy 4219.1 (maintain highest ethical standards) and District Administrative Regulation 1240 (Volunteer-Under Direct Supervision).¹⁰ By his changing story, respondent intentionally misrepresented to Dr. Eister the facts about the students’ supervision.

¹⁰ District Administrative Regulation 1240 (Volunteer-Under Direct Supervision) provides that: “These volunteers may help supervise students during lunch and/or breakfast periods or may serve as nonteaching assistants under the immediate supervision and direction of certificated personnel, performing noninstructional work which assists certificated

Dr. Eister indicated that respondent's conduct of leaving seven students in the classroom with two parents who had not been fingerprinted was a direct violation of District policy that negatively impacted the instructional program, and that exposed the District to possible liability for injuries. Respondent was directed to remain in his classroom as required by District regulations, to review the status of his parent volunteers' background check and fingerprint status. Those parents without proper status are forbidden from volunteering in his classroom. Respondent was advised to review the CSTP and administrative regulations regarding volunteers.

34. *June 11, 2012 Letter of Reprimand (SOC ¶ 2(h))*: This letter of reprimand was based on another incident Dr. Eister had observed in respondent's class at 8:14 a.m. on May 24, 2012.

...I observed your students sitting on the carpet singing along to songs that were being played on the record player. I observed you at the back of the room talking to a parent. Four other parents were in the room standing and watching some of the students singing to the songs (five students were not engaged and were sitting doing nothing). The next song played, and all but four students got up to move. The next song played, and students began running in place, loudly. Six students remained sitting on the carpet, not engaged at all. The remaining students became highly energized and loud, to the point where I was concerned about interrupting in learning occurring in the neighboring classroom. During the five minutes I was in your room, you did not engage, instruct, nor speak to the students once.

Dr. Eister advised respondent that his conduct violated his Improvement Plan for the 2011-2012 school year in numerous ways. His class was not conducted in conformance with his lesson plan for that date (e.g., 19 minutes into the class, the students still had not said the Pledge of Allegiance and had lost 19 minutes of instruction). His conduct also violated the February 21, 2012 letter of concern where respondent was directed to alert Dr. Eister to any changes in lesson plan; this had not been forthcoming for his May 24, 2012 class. Dr. Eister informed respondent that:

Your conduct adversely impacted the instructional program by wasting valuable instructional time and not creating an environment conducive to learning. The morning practice and expectation of welcoming and setting the stage for learning is crucial. Nineteen minutes into the instructional day and the majority of students are still singing, without any teacher direction or input, is a concern. Some students were sitting on the carpet, not engaged in any learning activity. This is not an

personnel in the performance of teaching and administrative responsibilities. (Educ. Code 35021, 44814, 44815.) These volunteers are not to be left alone with students nor are they allowed to supervise students outside the presence (visibility) of a certificated employee."

effective use of instructional time. Further, the fact that four parents were observing this lack of teacher-directed instruction is a concern and does not accurately represent the learning program implemented here at Golden Empire.

Respondent was directed to post daily learning objectives in his classroom, to follow previous directives regarding submitting lesson plans and modifications thereto, and implementing lesson as reflected in his lesson plans. He was again reminded to review the tenets of lesson planning, as well as the CSTP, teacher manuals and his Improvement Plan for appropriate strategies.

35. During the 2011-2012 school year, Associate Superintendent Mary Hardin Young had more than 10 conversations with Dr. Eister about respondent's performance. Dr. Eister expressed increasing concern about respondent's teaching skills and interactions with students, due to his lack of improvement, despite multiple Improvement Plans, letters of concern and of reprimand. At some point, Ms. Hardin Young and Dr. Eister discussed issuing a Notice of Unsatisfactory Performance and Unprofessional Conduct (hereafter, 45/90 Day Notice) to respondent.

36. *June 14, 2012 Improvement Plan (SOC ¶ 2(i))*: Dr. Eister and respondent met on June 14, 2012, to prepare an Improvement Plan that was to be implemented beginning September 2012 and throughout the 2012-2013 school year. The June 2012 Improvement Plan highlighted deficiencies in the same four CSTP areas addressed in the June 10, 2011, Improvement Plan (Finding 25). It made the same recommendations for improvement and offered respondent the same assistance as those previously outlined, with the following additions:

A. *Instructional Strategies*: To ameliorate deficiencies in this area, Dr. Eister additionally recommended that respondent: refine his instructional procedures and processes that will assist with lesson fluidity and diminish ongoing student redirection; actively monitor student progress and lesson acquisition throughout each lesson, and provide individual and/or group assistance when needed via pre/re-teaching opportunities; and administer/assign appropriate and relevant lesson materials based on the lesson's objectives.

B. *Classroom Environment and Management*: To ameliorate deficiencies in this area, Dr. Eister recommended that respondent: maintain a neat, organized and engaging classroom environment; enforce classroom rules and procedures consistently and provide consistent reinforcement opportunities for students who do not follow classroom rules/procedures; develop consistent strategies to resolve student conflicts; implement strategies and/or signals that will redirect students instead of the overuse of verbal redirection; and implement routines/procedures that will shorten lesson transition times. In addition, Harry Wong's *First Days of School* was added to the recommended book study/review/incorporate list, and respondent was advised to consistently implement, monitor and maintain consistency with classroom routines and to reinforce on-task behaviors.

C. *Instructional Planning for Learning:* To ameliorate deficiencies in this area, Dr. Eister also recommended that respondent: complete and follow a curriculum schedule that allots the state-mandated instructional time in each area; “use formal and informal assessment data to diagnose student learning needs and plan daily individual/small group instruction (preteach/reteach/extend) to increase the achievement of students scoring above and below grade level; implement the “Must Do and May Do” strategy to assist with small group instruction; and include specific goals in weekly lesson plans.” Respondent was reminded to use the eight-step lesson plan “in the delivery of all lessons” and to review Harry Wong’s *First Days of School* in this area.

D. *Assessment and Communication:* To ameliorate deficiencies in this area, Dr. Eister also recommended that respondent: (1) provide ongoing corrective feedback (oral and written) to students on a consistent basis; and (2) “maintain ongoing communication with students’ parents/guardians concerning student progress (informal/formal, written/verbal, etc.) Utilize a communication log to assist with documentation.” In addition, in participating in meetings and conferences previously recommended, respondent was to “bring required data/materials to each meeting.”

37. Respondent took the Improvement Plan home to review. He signed it on July 11, 2012.

In mid-to late August 2012, respondent elected to self-surplus from Golden Empire.

IV. 2012 - 2013 School Year: Leonardo Da Vinci

38. Devon Davis is the principal of LDV, where respondent was assigned to teach first grade for the 2012-2013 school year. Respondent joined Ms. Nim and Ms. Maroldy as one of LDV’s three first grade teachers. LDV’s grade-level teams were expected to teach the same curriculum at the same pace. This meant giving students instruction on specific lessons, as well as tests and formal assessments, as outlined in the curriculum for subjects such as math and English language arts.

On August 31, 2012, the Friday before the 2012-2013 school year began, Ms. Davis learned that respondent, along with four other teachers, was being assigned to LDV. She found a phone number and called respondent to notify him of his assignment.¹¹ At the time, Ms. Davis had not seen any of respondent’s improvement plans or his formal evaluation, and she had not spoken to any District administrators about him.

Respondent met Ms. Davis at her office later that day. During their one-hour meeting, Ms. Davis told respondent about LDV’s curriculum and her expectations for teachers. Respondent told Ms. Davis that he had been on an improvement plan at his last

¹¹ According to Ms. Davis, attempts by the District’s Human Resources to reach respondent at his home phone were not successful. Respondent denied any change in his contact numbers or address.

two school sites. He also told her: about his understanding that his improvement plan would not follow him from Oak Ridge to Golden Empire; that “Dr. Eister had been a good mentor” to him; and that he believed he had improved so much he no longer needed an improvement plan.

Based on his history of having been on three improvement plans at his past two school sites, Ms. Davis was very concerned about respondent. In her experience, such plans are typically reserved for teachers with serious deficiencies, including in instruction, curriculum, and class management. She spoke briefly to Dr. Eister, who mentioned respondent’s difficulties with pacing, class management, and his inability to follow teacher manuals.¹² She contacted Human Resources Director Ms. McArn to obtain respondent’s Improvement Plans and any letters of concern or reprimand, and she later met with Ms. McArn on several occasion. At some point, there was a discussion about issuing a 45/90 Day Notice to respondent. A 45/90 Day Notice was issued to respondent on September 20, 2012, but it was then retracted.

39. *LDV’s Program:* LDV is an open enrollment, lottery-based school program that differs from the District’s traditional neighborhood schools (like Oak Ridge and Golden Empire) in two ways. First, LDV has adopted Integrated Thematic Instruction (ITI) methodology, under which a common theme is interwoven throughout the curriculum. “Habitat” was the ITI theme for the 2012-2013 school year. Second, parents whose children attend LDV must agree to volunteer with the class for at least 40 hours during the academic year to support their children’s learning. Due to the parent participation component, LDV teachers sent weekly newsletters home to students’ parents on Mondays, which informed families of homework, projects, significant dates, and/or needed materials. Respondent referred to his newsletters as WAAGS (week at a glance).

Centers: Like teachers in neighborhood schools, LDV’s first grade teachers prepare “centers,” at which students receive small group instruction in various subjects (e.g., math, art, crafts) set up at different locations around the classroom. In keeping with LDV’s curriculum, the centers sometimes had an ITI theme. Teachers divide their students into small groups, and the groups rotate to each of the centers every 15 or 20 minutes. The centers are generally led by parent volunteers, who follow instructions provided by the teacher and use those instructions to help students complete the designated center activity. The teacher also leads a center.

40. Overview of Significant Actions during the 2012-2013 school year: During this school year, Ms. Davis worked with respondent to implement his existing Improvement Plan, and she drafted a new Improvement Plan with input from respondent and his union representative. Beginning early in, and continuing throughout, this school year, Ms. Davis

¹² Ms. Davis testified that an ability to follow teacher manuals is important to ensure that a teacher “is not winging it...[but has] actually read through what the overriding objective is, what the students should be learning....and that they are then able to express that in a meaningful manner to a classroom of 6-year-olds.”

was made aware of numerous parent complaints about respondent's conduct and performance in the classroom. Throughout the year, Ms. Davis met with respondent on a weekly to biweekly basis, to review lesson plans and to discuss teaching and classroom management strategies, including those raised by parent complaints; she delivered several lessons to respondent's class while he observed; she arranged for release time for him to observe other teachers, and for a teacher to assist him frequently in the classroom; she observed him informally and formally in preparation for his annual evaluation; she provided him detailed feedback from her lesson observations; she assisted him prepare for teacher-parent conferences, and she arranged for him to participate in several all-day trainings.

In late October, 2012, Ms. Davis issued respondent a Letter of Concern. In early November 2012, the District issued a revised 45/90 Day Notice to him. Ms. Davis issued a Letter of Reprimand (December 19, 2012) and a Notice of Deficiency of Performance (December 21, 2012). On March 7, 2013, respondent was removed from the classroom and placed on administrative leave pending dismissal proceedings. At the time of respondent's removal from the classroom, his 2012-2013 annual performance evaluation was not due.

41. During this school year, respondent was advised that each of the documents described in Findings 50, 51, 52, 61, 63 would be placed in his personnel file. Respondent's counsel filed a written response to the 45/90 Day Notice (November 15, 2012; Finding 52), and a response to an October 26, 2012, lesson observation (December 14, 2012; Finding 54), attaching respondent's response. With these exceptions, respondent provided no written responses to the District to these disciplinary letters or observations.

42. Ms. Davis first observed respondent teach class for approximately 15 minutes on September 4, 2012. This was the first day of school, when Ms. Davis spends time observing each of LDV's teachers in their classrooms. Concerns about respondent's classroom were apparent on walking into the room. The desks were not arranged so that every six-year-old student could see the board or easily see the teacher at the front of the room. Respondent's classroom management was concerning because he listed gender on the board, and was marking on it when the boys were being "bad" and when the girls were being "bad." The class was in general disarray and there seemed to be no agenda or pacing in the class.

43. To assist respondent and to implement his Improvement Plans, Ms. Davis offered him the following support:

a. Weekly Meetings: Ms. Davis set up weekly meetings with respondent and asked him to submit weekly lesson plans to her for review. This was designed to give respondent collaborative time with her, to review his instructional outline for the upcoming week, to see his knowledge of what he intended to teach, to review transitions and check pacing of curriculum, and see if he needed extra help. During these meetings, Ms. Davis would go over the notes she took during her observations of lessons respondent delivered to the class and she would try to engage him in a dialogue. Ms. Davis testified that, at many of

these meetings, she would discuss with respondent parent complaints she had received about his class and she would review written complaints, including Uniform Complaints, with him.

Beginning in early October, 2012, Ms. Davis requested that a union representative be present at her meetings with respondent. Ms. Davis made this request based on her consistent concerns about respondent after frequent classroom walk-through observations, as well as respondent's attendance issues subsequent to their meetings. Because these concerns could lead to disciplinary action, the observations had to be "validated" with a union representative present.¹³ The SCTA union representatives who came to subsequent meetings between Ms. Davis and respondent were Nikki Milevsky, Robert Lynch, and/or Scott Smith. Ms. Davis prepared detailed agendas for these meetings, which occurred less frequently due to scheduling issues.

b. Release Time: Ms. Davis arranged release time for respondent to observe the lessons taught by his grade-level teammates, by providing substitute teachers for his class. She and respondent met each week to work out a release schedule for this purpose and Ms. Davis would then send out a support schedule to let respondent know when he would have release time or class support. Ms. Davis would have respondent observe another first grade teacher give a lesson in a particular subject, such as language arts or math, and then have respondent teach the same curriculum and implement the same lessons a day after his observation.

c. Support of In-Class Teacher: Ms. Davis hired Julie Boettner and another teacher as substitutes to help support respondent and two other new teachers while they became familiar with LDV and the ITI curriculum. Ms. Boettner taught second grade at LDV during the 2011-2012 school year, but had been laid off due to her lack of seniority. After respondent was placed on administrative leave, Ms. Boettner was hired to teach his class.

During the first trimester (i.e., through November 30, 2012), Ms. Boettner was on-site three to four days a week and eventually focused her time in respondent's classroom. Ms. Davis arranged for Ms. Boettner to be in respondent's classroom during core academic times, to support him stay with the first grade curriculum pacing. Ms. Boettner also provided respondent support regarding centers, class set up, and preparation for parent-teacher conferences. In addition, Ms. Boettner taught respondent's class during his observational release time, or when he was absent. On fewer than six occasions, Ms. Boettner provided information to Ms. Davis about "what was going on" in respondent's classroom. Ms. Davis then clarified with Ms. Boettner that: (1) her role with respondent was "not of an evaluation nature whatsoever" and that, except during respondent's absences, parent questions should be directed to respondent as teacher. While Ms. Davis initially envisioned this to be a short-term support, she determined that respondent needed on-going support. As a result, Ms.

¹³ A validation meeting with a union representative is required to validate concerns about conduct or performance that may lead to disciplinary action, as reflected in letters of concern, reprimand and/or deficiency.

Boettner was in respondent's class on a majority of the school days through mid-December 2012, to assist him.

d. Lesson Observations and Feedback: Ms. Davis observed respondent's delivery of lesson plans after weekly meetings where she had reviewed those plans. Frequently (more than half the time), Ms. Davis observed that respondent did not deliver lessons that were consistent with his corresponding lesson plans. On some occasions, the timing of the lesson was off (i.e., math instead of spelling). On other occasions, the lesson plan identified the objective of the lesson but, when respondent delivered the lesson, the objective was unclear. As a result, respondent's students were not at the same pacing as the other first grade classes; the same support materials were not going home; formal assessments were not given at the same time; and there were stacks of ungraded work in the classroom so the students were not getting the same level of frequent feedback as in the other classes.

Ms. Davis gave respondent handwritten notes about her observations during her walk-through class observations, either after the observation or at their weekly meetings. In these notes, she often gently tried to focus him to address various issues, including by asking him questions; for example, "how will you demonstrate more focus during instructional time that indicates you have pre-read teacher texts, prepared materials, and constructed eight-step lesson plans for each objective?" (October 26, 2012, lesson not reflective of teacher manual objectives.) Ms. Davis also attempted to provide positive feedback to respondent's class.¹⁴

Ms. Davis also created and gave respondent detailed typed feedback charts with her personal observations of his lessons, feedback, and suggested next steps for each segment of a lesson. Ms. Davis explained that after she observed respondent teach a lesson, she would typically ask him how he thought the lesson went. Respondent would typically say he felt "that the lesson went pretty well," and he seemed unable to articulate what the students were doing while he taught. Ms. Davis believed these more specific feedback chart comments would help support respondent by showing, for example, what the students were actually doing in the class while he was teaching, and how he could improve his preparation to more effectively engage students (e.g., by pre-writing sentences on the board before the lesson so students did not have to wait while he did so during the lesson). On reviewing these charts, respondent seemed surprised to learn that students were not actually participating during his lessons. Respondent did not disagree with Ms. Davis's feedback and would often express his intention to act differently in the future (e.g., by pre-writing sentences on board); however, he often did not follow through on his stated intention.

¹⁴ For example, on October 5, 2012, Ms. Davis praised the "creativity" demonstrated by respondent's students during their "pet panel" presentations. She explained that, unlike the students in the other first grade classes, respondent's students did not have an established rubric to follow so student-presenters knew exactly what to share, and so the other students understood how to give feedback to the presenters.

e. Lesson Modeling: In an effort to help with his classroom delivery, Ms. Davis also presented at least three lessons to respondent's students while respondent observed. Ms. Davis tried to model how to intertwine classroom management into the lesson, instead of interrupting the lesson's flow with various methods of classroom management techniques. Respondent told Ms. Davis that he found her lesson modeling to be helpful.¹⁵

44. Complaints from LDV Parents: Throughout the school year, Ms. Davis received numerous complaints from parents of students in respondent's first grade class, via emails and in conversations at her office. Ms. Davis did not discuss respondent with the parents; rather, she simply listened to or read the complaints and let the parents know that she appreciated their concerns. Ms. Davis testified that she typically encourages parents to talk directly to the teacher before coming to her; however, she did not do this with complaints about respondent. In some cases, she assumed the parents had already spoken to respondent. Most of the complaints were about problems that Ms. Davis was already working on with respondent through the Improvement Plan, the substance of which they discussed in their weekly meetings. For these reasons, she did not feel it was "supportive" to respondent to continually tell him about the complaints. Ms. Davis was not aware that any of the complaining parents had made previous complaints about other LDV teachers. Some of these complaints are summarized below.

45. Back-to-School (BTS) Night: The 2012-2013 BTS Night at LDV was held approximately two weeks into the first trimester. It began with each of the three first grade teachers presenting information to the students' parents. The parents then went to their students' assigned classroom for further meeting with the assigned classroom teacher.

Parents complained that respondent seemed nervous, confused and repetitive (MOC4); that he did not explain well and "jumped sporadically" from one topic to another (MOC3); and that he appeared very different, a bit unprepared and "scattered." (MOC2). Respondent's handout syllabus had grammatical errors. (MOC5.) Much of what respondent said was in unfinished (half) sentences. MOC2 was confused by this and observed that other parents appeared confused. Based on respondent's inability to communicate complete thoughts, MOC2 was concerned about his ability to teach the students.¹⁶ Respondent's

¹⁵ In addition to modeling lessons, Ms. Davis gave respondent concrete examples of how his classroom management affected his lesson delivery; for example: "Observation: Teacher trying to write a sentence on board (I want one muffin) but interrupts the writing with many questions and class management issues. I want (teacher then say what do you think, Seth? Seth, no not end – what's next? Brian what's in your mouth? Come up here." Feedback: "More verbal focus is given to off-task low engaged students than on the actual lesson. Therefore, 100% of students lose all focus on objective and what direct instruction should be. This took 10 minutes – 2 sentences."

¹⁶ MOC2 found that respondent's confusion and class disorganization persisted throughout the 2012-2013 school year, although there was some improvement in his class

agenda referenced dividing students into genders for earning points, but he did not explain. MOC4 was "a bit shocked" by respondent's presentation and his demeanor. She recalled that respondent kept repeating that he had experience, that he loved LDV, and stated that LDV "was not like those schools in Oak Park." MOC4 observed shock on the faces of other parents and an "audible hush... [as] when someone says something inappropriate." Other parents also complained about this comment. (MOC1, MOC3.) At the end of respondent's presentation, MOC5 did not know what respondent's expectations were and he did not clearly communicate his ideas, philosophy or style.

46. Desk Configuration: There were also parent complaints about respondent's practice of frequently moving the students' desks. (MOC2, MOC4.) Ms. Davis was personally aware of this issue based on her frequent visits to respondent's classroom. After she saw him change the desks' configuration six times, Ms. Davis gave respondent a written instruction not to change them again. She believed this constant change "gave students a feeling of discomfort, kind of scary for them to walk into the room day after day and not to know where their desk was, where their seatmate was."

47. Centers: In October 2012, the LDV first grade classes began using centers run by parent volunteers, as instructed by the classroom teacher. There were four centers run by parents and respondent ran the fifth center. There were a number of consistent complaints about how respondent prepared for, organized and directed centers.

For example, MOC5 found that, as the leader of the centers, respondent's direction to parents was not always clear. There was a clipboard with some written instruction about the day's activity at the particular center; and materials for the activity (either on a clipboard or on table). There were no meetings with respondent about the activity. Instead, according to MOC5, the parents just came in, grabbed a clipboard and "made the best sense we possibly could about what was expected from whatever direction was given on that clipboard. That was it." She testified that parents had to infer from what was written on the clipboard what the activity was and how to run it. The materials provided were often stacked and parents had to figure out the sequence of using them during the activity. Oftentimes, the tables did not have boxes of crayons or markers laid out and parents had to search for the tools kids needed. Throughout the year, MOC5 felt that respondent did not give clear direction about the parents' role in the class, or about what his expectations were to either the students or the parents during class. These concerns persisted throughout the 2012-13 school year.

MOC6 worked at respondent's centers on a weekly basis. In her experience, respondent's centers were very confusing. There did not seem to be any flow to how they went. The children "always seemed very confused," and there were times when the children were crying because they were lost or did not know where they were going. MOC6, as a parent, was also confused. MOC6 was also the class party coordinator. In this regard, she

disorganization. For these reasons, MOC2 wanted respondent removed from the classroom, and expressed to Ms. Davis her "gut feeling" that respondent did not belong at LDV.

had to communicate directly with respondent about upcoming events. Based on her prior experience in this role, for this grade level, class parties are centers “so kids aren’t just running around the room.” Respondent never offered any suggestions for party centers and often was absent.

Ms. Davis received similar complaints about respondent’s centers from MOC4 and MOC3.

48. Communication/WAAGS: As reflected in the testimony of MOC 2, 3, 4, 5 and 6, respondent’s written parent communications in the weekly WAAGS were also seen as unintelligible and were frequently not received on Mondays. For example, in November, MOC6 noted that respondent’s “classroom communications parents receive come across as fragmented and scattered leading me to believe Mr. Frank has not fully planned through his message or lesson plans. I worry if I cannot follow his thought process, how can my child?” When WAAGs were late, MOC4, who was the class manager, had to ask respondent for it. Although the class manager was not responsible for the newsletters, MOC4 would post her copy of the WAAG on the classroom’s Shutterfly page to ensure that other parents could see it right away.

49. Grading Homework: MOC6 testified that, in early October 2012, she began correcting the homework of respondent’s students. Except for one week, she did so consistently for the next two full months. Every week, MOC6 took all of the students’ work for the entire week from the homework basket, and spent a good three hours on the task every weekend. MOC6 stopped doing this after learning from another parent that her corrected homework was filed directly into the student folders, without respondent ever seeing it. Parents complained that it took respondent several weeks to return graded work, including spelling tests. (MOC6, MOC4, MOC5.)

50. October 15, 2012 Improvement Plan (SOC ¶ 2(k)): On several occasions prior to October 15, 2012, Principal Davis, respondent and SCTA representative Nikki Milevsky met to review the June 14, 2012 Improvement Plan. Both respondent and Ms. Milevsky gave Ms. Davis feedback about the plan. Ms. Davis then finalized a new Improvement Plan for the 2012-2013 school year on October 15, 2012, which she and respondent signed that day. The new Improvement Plan eliminated some of the redundant language in the prior plan. It was tailored to respondent’s teaching at LDV and Ms. Davis testified that it included what respondent believed to be reasonable, attainable goals.¹⁷

¹⁷ Some portions of the Improvement Plan were in template form, taken from the teacher evaluation tool which is part of the Collective Bargaining Agreement between the District and SCTA. Within each CSTP standard on the template, the individual bullet points were customized to respondent. In response to Ms. Milevsky’s feedback, Ms. Davis removed some of the language in the previous plan that appears duplicative, to make it shorter and more cohesive for respondent.

The October 2015 Improvement Plan made the same recommendations for improvement and offered respondent the same assistance as those itemized the June 2012 Improvement Plan (Finding 36), with the following additions:

A. *Instructional Strategies*: To ameliorate deficiencies in this area, Ms. Davis recommended that respondent: “take notes and incorporate training into instructional methods” in order to provide effective instruction; and “take notes and apply notes and learning to lessons, pacing, delivery, and classroom management.” Respondent was to “develop self-sufficient practices of aligning calendar with actual pacing in the classroom. Develop awareness of when high student engagement is aligned to appropriate pacing and rigor.”

B. *Classroom Environment and Management*: To ameliorate deficiencies in this area, Ms. Davis reminded respondent that: positive behavior expectations need to be consistent; seating charts and class seating needs to be consistent; and “pacing of lessons cannot be driven by teacher use of a variety of class management techniques. Find two-three effective methods and quickly use them to keep 100% of the learners engaged.” He was reminded to “develop self-sufficient practices of learning when class management strategies are interrupting teaching, pacing and learning.” Other assistance in this area was the same as in the prior plan.

C. *Instructional Planning for Learning*: To ameliorate deficiencies in this area, Ms. Davis added the following new recommendations for respondent to:

- * Use pacing of first grade team to guide instruction. Keep instruction focused.

- * Communication system with students needs to be clear.

- (1) Agenda and objectives need to be posted.

- (2) Consistent class management routine should be posted.

- (3) Lesson objective and purpose need to be clearly stated by teacher and teacher needs to check for understanding.

- (4) Students should be in “doing” learning activities with minimal time spent on transitions that do not support learning, daily schedule, or teacher off-task time.

- * Communication with parents needs to be professional, clear, and thought out before being delivered verbally or in writing.

- (1) Voice messages should be succinct, answer questions and parents should be given a concrete reliable means of reaching you.

(2) Any writing (beyond a paragraph) to parents needs to be sent to Principal first. Writing that includes lengthy paragraphs without punctuation, grammatical choices (use of italics, capitalization, or quotations), and confusing statements needs to be corrected.

(3) The more clear you are with parents, the more they will support the classroom of their child.

* Lessons in class need to be aligned to lessons submitted to principal and aligned to agenda posted on board.

Assistance to be provided to respondent in this area was augmented to include that the “principal will support pacing and instructional plans with walk-throughs, observations, and feedback (timely feedback and concrete examples)” and “District may be able to secure an instructional coach for one hour, per week, to support lesson plan development and delivery.” Other assistance remained the same as in the prior plan.

D. *Assessment and Communication:* Ms. Davis added a new recommendation to improve deficiencies in this area. Respondent was also to “continue to self-evaluate what students are doing to demonstrate learning during direct instruction.”

51. *October 2, 2012 Validation Meeting (SOC ¶ 2(j)); October 23, 2012, Letter of Concern (SOC ¶ 2(l)):* During the October 2, 2012, validation meeting, Ms. Davis discussed concerns about respondent’s instructional practices and class management, based on her observations of his teaching on three dates in September, 2012. This meeting and Ms. Davis’s concerns were later memorialized in the October 23, 2012 Letter of Concern.

Ms. Davis included specific examples based on her observations of respondent’s science lesson, a spelling test, and an English Language Arts (ELA) phonics lesson. Each of these lessons lacked focus on pacing, timing, transitions and instructional objective or purpose. Respondent’s lessons exemplified “how loss of purpose, objective, and class management drove lesson as opposed to rigor, demonstration of student learning, and students understanding purpose.” She testified that respondent had “great difficulty in aligning his objective to what I would call like a [sic] lesson cohesion, so the objective for students would often be very unclear.” After a lesson, respondent’s students “would often tell you something that was completely different than what they should have been learning about.”¹⁸

¹⁸ For example, on September 14, 2012, Ms. Davis instructed respondent to focus on the specific purpose or objective of his lessons. Ms. Davis noted that she had watched respondent’s science lesson in which his students were to use the scientific method to observe a “rock,” which was made of chocolate, with their five senses. Ms. Davis noted that respondent’s students had eaten their rocks before writing down their observations. When asked what they had learned, respondent’s students told Ms. Davis that they “ate chocolate.”

Ms. Davis noted that “on a consistent basis, walk-throughs demonstrate that the lesson agenda and lessons submitted to the principal are not being adhered to with functional and appropriate lesson pacing.” Respondent’s practices were not aligned with the California Standards for Teaching Profession, particularly Standard Four (Planning Instruction and Designing Learning). She further noted that, based on respondent’s “current instructional practices, students are left without lesson cohesion, purpose and understanding.” While respondent had some professional growth with class management, “due to the distraction of your style of class management, students lose engagement and therefore are not attentive during direct instruction.” Respondent was advised that it was “imperative” that he incorporate skills and training into teaching in a way that students are able to learn and that “the students need a classroom environment, daily, that is free from confusion and low expectations.”

Respondent was directed to focus, among other things, on lesson planning and delivery (“purpose, objective-what you want students to learn and how they prove to you that they are learning”), pacing, checking for understanding (“when you are clear about what and why you are teaching a core content standard-students would be able to accurately verbalize and write what they have learned”).

52. 45/90 Day Notice (SOC ¶ 2(n)): On November 5, 2012, District’s Area Assistant Superintendent Sara Noguchi, Ed.D., issued to respondent a revised 45/90 Day Notice, pursuant to Education Code sections 44938 and 44932, for unprofessional conduct and unsatisfactory performance.

A. Respondent’s asserted unprofessional conduct was based on: (1) breach of confidentiality in violation of Board Policy 4219.23,¹⁹ as described in the November 2, 2010 Summary of Conference re: Progress Notes (Finding 18); (2) concerns regarding instructional and management components following formal classroom observations as

By allowing the students to eat the rock before completing the lesson, the lesson’s objective, of writing down their scientific observations, became unclear. Ms. Davis urged respondent to focus on how the objective is specified, reiterated and reinforced by “checking for understanding strategies.”

¹⁹ Board Policy 4219.23 Unauthorized Release of Confidential/Privileged Information provides, in pertinent part, that District “staff shall maintain the confidentiality of all confidential records until such time as laws, state regulations and/or bylaws of this district permit disclosure... Any employee who willfully releases confidential/privileged information about students. . . shall be subject to disciplinary action up to and including dismissal from district service.... Any action by an employee which inadvertently or carelessly results in release of confidential/privileged information shall be recorded, and the record shall be placed in the employee’s personnel file. Depending on the circumstances, the Superintendent or designee may deny the employee further access to any privileged information and shall take any steps necessary to prevent any further unauthorized release of such information.”

detailed in the February 22, 2011 Letter of Concern (Finding 20), and in the October 19, and December 21, 2011 Letters of Deficiency (Findings 29, 30); (3) failure to include important activities in lesson plans and failure to follow lesson plans as described in the February 21, 2012 Letter of Concern (Finding 31); (4) conduct of leaving students with volunteers who were not fingerprinted and cleared as detailed in the May 30, 2012 Letter of Reprimand (Finding 33); and (5) violating his improvement plan as detailed in the June 11, 2012 Letter of Reprimand (Finding 34). Respondent was also advised that his conduct violated Board Policy 4119:21, Code of Ethics.²⁰

Respondent was instructed to improve his unprofessional conduct over the next 45 days and directed to: create an atmosphere of professionalism in his classroom; observe other teachers' classroom management strategies during non-instructional time; work closely with his grade-level team to implement effective teaching and management strategies; review curricular teacher's editions/guides to assist with suggested lesson pacing; spend additional time in preparing lessons that follow the eight-step lesson cycle; and follow his established Improvement Plan.

B. Respondent's asserted unsatisfactory performance was based upon the incidents described above and: (1) his May 4, 2010 Improvement Plan (Finding 9); (2) his March 28, 2011 Formative/Summary Evaluation for the 2010-2011 school year (Finding 21); and (3) his June 13, 2011 Improvement Plan (Finding 25).

Respondent was instructed to eliminate his unsatisfactory performance over the next 90 days. He was directed to immediately improve in the following areas by: providing all necessary curricula and materials in order to fully implement all programs; reviewing the lesson "prior to delivery to ensure that all information provided is accurate, understood by you, and follows the processes and procedures delineated in the teacher's edition;" maintaining appropriate standards of behavior in the classroom using positive reinforcement; having lesson plans available on a daily basis for review; and working collaboratively with administrative staff members to meet student needs and all members of the special education team.

53. Section 44938 governs the written notice of charges of unprofessional conduct and/or unsatisfactory performance. It provides in pertinent part:

(a) The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom

²⁰ Board Policy 4119.21 provides: "The Governing Board expects district employees to maintain the highest standards, to follow district policies and regulations and to abide by state and national laws. Employee conduct should enhance the integrity of the district and the goals of the educational program."

the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(b) The governing board of any school district shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

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

The 45/90 Day Notice issued to respondent attached copies of each of the referenced policies and documents, including respondent's March 28, 2011 Formative/Summary Evaluation. No other formal evaluations were attached.

54. *October 30/November 14, 2012 Weekly Meeting Agenda and Feedback Notes, (SOC ¶ 2(m))*: Based on respondent's lack of improvement and some worsening issues that might result in discipline, Ms. Davis began combining the weekly meeting agenda with her observation feedback notes. She believed a validation meeting was required with "cabinet level" representatives from SCTA. Originally scheduled for October 30, 2012, this validation meeting was continued twice (November 14, 2012) due to scheduling issues, and ultimately convened on November 26, 2012. (Finding 57.)

This validation meeting agenda included Ms. Davis's feedback notes for her lesson observations of respondent's teaching performance during a formal observation on October 26, 2012, and in a walk-through on October 29, 2012. Regarding the first observation, Ms. Davis reported that respondent "was utterly not prepared and left students bewildered and confused," even though he had been aware of and had agreed on the time for this formal observation. Specifically, respondent gave a lesson about the sound of "s" and had students complete a worksheet that did not correlate to the lesson, lesson objectives, or the teacher's Manual. The objective was how to use the apostrophe-s ('s) to show the possessive case. Respondent's explanation about his failure to teach this concept during his November 6, 2012 observation debriefing caused Ms. Davis to question his honesty and professionalism.

Detailed feedback was provided for this observation.²¹ The second observation involved an ITI lesson about trees. Respondent had “allocated one hour to have students write three sentences about deciduous trees and then draw a picture.” Ms. Davis found there was “not enough direct instruction to make a meaningful lesson.”

Based on these observations, Ms. Davis concluded that respondent’s teaching evidenced: “a *tremendous lack of growth and follow-through* with the goals established on your improvement plan and the [sic] from our meetings.” (Italics added.) She identified the following concerns about respondent’s teaching: unclear objectives; class management interrupts learning; teacher did not prepare lesson or follow manual (failure to read manual and follow very basic instructions); lesson had no cohesion; expectations low; pacing not appropriate to skills and resulted in off-task behavior. Ms. Davis further noted that the goals and objectives established in respondent’s 45/90 Day Notice were not being met with any changes in work performance, that he was not meeting his Improvement Plan goals; and that a “grave need for a full time co-teacher in the room persists due to lack of development and growth with the [sic] Mr. Frank.” She concluded by noting that “legal and HR are being advised of 45/90 Day Notice concerns and the negative impact on the children.”

55. *November 8 and 9, 2012 Training (SOC ¶ 1(f))*: Ms. Davis arranged release time for respondent to attend an on-campus curriculum training led by Ms. Boettner on the McMillan Math and Open Court ELA curriculum. Although respondent had previously been trained in these areas, Ms. Davis provided him this training opportunity based on her observations that he “was having a difficult time following teacher manuals...” Her goal was to ensure respondent had “thinking and processing time about the curriculum” to put it into practice. The training occurred on November 8 and 9, 2012, and was attended by respondent and two other teachers who were newly assigned to LDV, Eric Malme and Elaine Tedesco.

²¹ At the November 26, 2012 Validation Meeting, Ms. Davis noted that, when she spoke to respondent about this on November 6, 2012, he told her he was “going to have the students come in after recess and add the apostrophe-s. This is not true or accurate. You failed to properly prepare for the lesson, you failed to read through the teachers’ Manuel [sic]...” Ms. Davis indicated that the teachers’ manual had pictures and writing which indicated the lesson’s objective was the use of the apostrophe, but that “...when questioned about your reasoning, you were unprofessional and dishonest. I am troubled by the frequency in which you openly are dishonest and thus preventing genuine accountability and an opportunity to improve in many critical areas outlined in your 45/90 day notice, prior disciplinary letters, improvement plan, and in other meetings.” Ms. Davis ended the November 6, 2012 meeting and prepared for a validation meeting based on respondent’s inaccurate instructions to students, dishonesty and lack of growth. She testified that the entire lesson was about possessives and that respondent’s lesson was incoherent because he never talked about possessives during her observation. Students adding an apostrophe after lunch would have no deeper understanding of why they were doing that.

56. *November 16, 2012: Stone Soup Day and Parent-Teacher Conferences:* Ms. Davis described Stone Soup Day (SSD) as a culminating event in which students complete an activity to support a book they had read. Respondent's centers for SSD activities were poorly prepared. The activity called for making a soup and having students bring different ingredients from home. Due to poor communication with parents, ingredients were scarce, the project took too long and the soup was not cooked. Ms. Davis recalled that MOC4 was extremely upset at the end of the activity.

MOC4 testified that respondent had prepared four centers for SSD, for a one-hour period (9:30 – 10:30) during which all the children would rotate through all the centers. Respondent did not rotate the students through the center in the one hour. Instead, the centers went on for an additional hour (until 11:30) and the students missed their recess time. Respondent then lined them up for lunch at 11:45, took them out of the class and then brought them back in to sit down minutes later because they were being too loud. This shortened the student's lunch break. MOC4 called respondent "ridiculous" in front of parents and students in class. MOC4 admitted she was "completely frustrated" because the children had not had their recess break and needed lunch. She agreed it was not a professional way to express her frustration. MOC4 went directly to Ms. Davis who was not available. She wrote down her concerns and spoke to several parent-volunteers in the hallway.

Parent-Teacher Conference: In the late afternoon of November 16, 2012, MOC4 and FOC4 returned to school to discuss options for removing their son from respondent's class with Ms. Davis.²² At the time, Ms. Davis was meeting with respondent, who was upset and crying about MOC4's comments to him in front of the class. Later, with Ms. Davis in attendance, the parent-teacher conference between MOC4, FOC4 and respondent took place. Ms. Davis left the conference after 30 minutes. The conference continued for another half hour, during which MOC4 told respondent she did not trust him and that she "tolerated him" because she believed in the school.

As reflected in MOC4's Uniform Complaint, respondent told MOC4 that her son was doing well in all subjects, based on the San Diego Quick Assessment (SDQA). When MOC4 asked respondent what the purpose of the SDQA was, he was not able to provide a clear explanation. MOC4 did not believe her son was doing well. Unlike the previous year, C4 was very resistant to reading at home. Several weeks later, Ms. Boettner told MOC4 that her son was not reading at grade level and was resisting reading in the classroom. MOC4 never went to respondent to clarify this discrepancy, because respondent "appeared to lie to cover himself" and did not give her useful information. MOC4 had "lost confidence" in what respondent was saying.

²² MOC4 and Ms. Davis discussed whether there were options to remove C4 from respondent's class, while keeping him at LDV. Ultimately, after Thanksgiving break, MOC4 kept her son home for three days (November 25-28), but never removed him from class.

Respondent detailed his dismay about MOC4's comments in a writing entitled "Documentation of Hostile Work Environment for November 16, 2012." There was no evidence this was ever provided to the District.

57. *November 26, 2012 Validation Meeting (SOC ¶ 2(o))*: During the November 26, 2012 meeting, SCTA representatives Lynch and Smith were present with respondent. Ms. Davis expressed various concerns about respondent's performance, including his preparation for and implementation of the Parakeet Headband project;²³ giving out the wrong dates for Duck Pond Field Trip to parents and cafeteria staff; his honesty regarding spelling test grading and communication; and his accountability for monitoring student progress and following the school's assessment procedures.²⁴

Regarding respondent's honesty, Ms. Davis noted that, after a parent discussed respondent's comment on her child's work, respondent replied that it must be someone else's writing. Ms. Davis noted that the comment was respondent's writing and that "there is an increasing issue of honesty that impacts your professionalism and professional reputation (this has surfaced many times and we have discussed many issues)." (*SOC ¶ 1(d)*.) In addition, respondent told Ms. Davis that he was getting his spelling tests graded and returned to students in a few days. Ms. Davis initially thought this was reasonable, but she then learned that two-to-three "weeks were going by in which work, including spelling tests, were not being graded." (*SOC ¶ 1(f)*.)²⁵

Ms. Davis reported that respondent had only completed "50 percent of the ELA assessments that should be calculated on the report card. As a result, you did not have the same level of progress monitoring information as your grade level colleagues and your

²³ This project had been planned by the first grade team a week and a half before the project, with the understanding that the teachers would provide the supplies. Respondent made last minute efforts to gather supplies from parents and Ms. Davis found that his failure to allow sufficient time to organize and complete the project resulted in a scattered project and a "lost opportunity for students to shine."

²⁴ Formal assessments of students are given to students every six weeks. After Ms. Davis and other teachers told respondent not to have parents give formal assessments to students, he assigned a parent to do so during a center. The centers were rearranged to make sure this did not occur.

²⁵ MOC4 found that it took respondent "several weeks" to return spelling tests to the students. On one occasion, she felt his comments on her son's spelling test were inappropriate. Respondent wrote in large red letters that her son had done well but that he needed to improve his handwriting. Even though he had done well in spelling, her son was confused by this comment. She and her son met with respondent and asked for clarification. During this in-person meeting, respondent told MOC4 that those were not really the words he intended to write. According to respondent, a parent volunteer had put a "to be corrected" stamp on the top of the test. The handwriting was respondent's.

students do not have consistent report card grade reports as you did not include the benchmark comprehension results.”

Based on the recent curriculum training, Ms. Davis raised an additional concern that respondent had failed to be properly prepared, to take any notes and to engage in active participation with the other new teachers. This observation was based on reports from Ms. Boettner and the other teacher attendees. Respondent told Ms. Davis that he was on the floor because the chair was uncomfortable and that he did not take notes because he was not instructed to do so. Ms. Davis noted that, “in previous letters you were reprimanded for not being physically and mentally available to learn during trainings and meetings.”

Ms. Davis prepared a detailed written summary of the Validation meeting and later forwarded a copy to Mr. Smith at SCTA. She emphasized that it was “critical” for respondent to take notes during grade level meetings, to follow-through with commitments and agreements, and to demonstrate an improvement in practices. Following a chaotic art project, respondent was admonished not to request supplies from parents and advised that the inconvenience of getting materials for projects rests with teachers not with parents. Regarding respondent’s conduct of sending out the wrong date for the Duck Pond field trip, Ms. Davis noted that “when posed with a concern, you immediately and repeatedly deny responsibility and are not honest. I find this to be unprofessional.”²⁶

58. *Uniform Complaints:* Through the first trimester, Ms. Davis had received numerous verbal and written informal complaints about respondent’s teaching and professional conduct from many parents. By early December, 2012, the District received “Uniform Complaints” about respondent from MOC3, MOC4, MOC5 and MOC6. These included:

a. *MOC6’s Uniform Complaint (SOC ¶ 1(b)):* On December 14, 2012, MOC6 filed a Uniform Complaint expressing concern that respondent left a voicemail on her parents’ telephone (i.e., the grandparents of C6 [GPOC6]), chastising his behavior in front of the whole class. MOC6 believed this violated her confidentiality and reinforced her son’s feeling of being “bad.” A transcription of the voice mail was attached to the complaint.²⁷

²⁶ The Duck Pond field trip was cancelled once due to weather then rescheduled. Ms. Davis testified respondent caused unnecessary anxiety for the parents and school staff by sending out two different permission slips without being clear on the correct date he was taking his students on the trip.

²⁷ In the voice mail, respondent identified himself and said: “I was calling because [C6] thinks it’s funny to shake his head and say no apparently and not to do what I said. So I just wanted to let you know. If you wish to talk to me of course I will be here after school or you may call through the office to talk to me during class. Thank you very much.” MOC6 testified that, when respondent saw her pick up her son after school that day, he never mentioned this voice mail.

Ms. Devon indicated that the GPOC6 were listed as an emergency contact if C6 was ill and needed to be picked up, but that they did not have educational rights.

b. *MOC5's Uniform Complaint:* MOC5 was in respondent's class as a volunteer three to four days a month for up to two hours each. She was assigned to run a center in respondent's class. She wrote a letter of concern about respondent, spoke with Ms. Davis, and ultimately filed a Uniform Complaint about respondent with the District. Concerns raised were respondent's ability to manage the classroom, communicating incorrect field trip dates and his inconsistent grading system. Regarding the latter, respondent used "checks vs. numbers vs. stamps," with no indication of what it meant, and whether, if it was a number, there was a reason to have a concern or to be working on something, or if the student was progressing. She testified that her experience when volunteering in class was that "there was a lack of control over the children, over the flow of moving from one activity to the next and being able to kind of move everybody in a somewhat fluid way." The class seemed very chaotic and broken up, and respondent seemed to rely on the opinions of parents "about where to go from here."

c. *MOC4's Uniform Complaint:* On December 13, 2012, MOC4 filed a follow up to her previous Uniform Complaint regarding: respondent's inability to clearly explain the purpose of the SDQA during the November 16, 2012 parent-teacher conference; her perception of her son's stagnant academic progress; respondent's poor preparation for and performance during SSD; his failure to use his own center time for small-group reading or math instruction or any activity with a direct instructional objective; respondent's continuous rearranging of desks, which affected center rotation and confused children and parents; and respondent's failure to communicate with her as class manager.

59. *December 14, 2012 Validation Meeting:* On December 14, 2012, Ms. Davis, respondent and SCTA President Scott Smith attended a lengthy Validation Meeting (90 minutes to two hours) to discuss a variety of issues regarding respondent's behavior and performance, including his attendance, and his adherence to student confidentiality and instruction and curriculum, as documented in the agenda. Respondent's failure to report his absences from school during the month of September was included under attendance concerns. (SOC ¶ 1(e)).

At this meeting Ms. Davis provided four packets of documents, totaling 47 pages, to respondent and Mr. Smith, which included a packet of parent concerns/complaints.

60. *Training with Scott Smith:* During the December 14, 2012 meeting, Ms. Davis and Mr. Smith discussed ways to further support respondent. Mr. Smith was interested in providing respondent with some training. At Mr. Smith's request, they also discussed reducing the amount of time Ms. Boettner would be in respondent's classroom.

That afternoon, after the meeting, Ms. Davis notified respondent in writing that she had arranged for him to have release time to participate in a one-day training with Mr. Smith on December 18, 2012. Ms. Davis urged respondent to take advantage of this opportunity by

“being open-minded, prepared to take notes, and mentally/physically present.” She also informed him that Ms. Boettner’s time in his classroom from December 19 through the 21, 2012, would be “very limited. This is a great opportunity for you to make some positive advancement in independently managing the classroom, curriculum, parent participation workshop times, pacing, and keeping communication professional.”²⁸

61. *December 19, 2012 Letter of Reprimand (SOC ¶ 2(p))*: On December 19, 2012, Ms. Davis issued a Letter of Reprimand to respondent based on the topics discussed at the December 14, 2012 validation meeting. The seven-page letter provided a detailed summary of the concerns about respondent’s conduct and performance, including in the areas of failure to report attendance, failure to maintain student confidentiality, and instruction and curriculum (failure to timely distribute graded student work, failure to prepare for special projects). Respondent was advised, *inter alia*, that his practices were not aligned with the California Standards of Teaching Profession, specifically in Standard Four (Planning Instruction and Designing Learning for all Students). Ms. Davis indicated that, based on respondent’s current instructional practices, “students are left without lesson cohesion, purpose and understanding. Due to the distraction of your style of class management, students lose engagement and therefore are not attentive to direct instruction.” Respondent’s conduct violated the District’s Code of Ethics, Board Policy 4119.21 (footnote 20).

Respondent was reminded that “students need a classroom environment, daily, that is free from confusion and low expectations.” Respondent was directed to immediately implement a series of directives designed to ameliorate the identified problems. The supports to be provided respondent continued as before, with the addition of release time for training from SCTA representatives Mr. Smith and Mr. Lynch.

The Letter of Reprimand included numerous documents as attachments, including four document packets that had been shared with respondent and Mr. Smith at the December 14, 2012, validation meeting. One of these packets contained a non-comprehensive selection of parent letters and Uniform Complaints “that indicate egregious issues or issues that have continued since September.” Attendance Form 12 for reporting employee absences was also attached to the Letter of Reprimand with a notation to: “turn in ASAP [as soon as possible] regarding September absences.”

62. *Respondent’s Failure to Report Absences (SOC ¶ 1(e))*: Respondent had serious attendance issues at the beginning of the fall 2012 trimester. Ms. Davis was aware of respondent’s absences, but during the first month of school, she did not realize respondent was not reporting his absence time to the office. In September 2012, on at least three occasions, respondent told Ms. Boettner that he was “not feeling well” and he left for the day. Respondent failed to complete the District’s required Form 12 attendance form. Respondent was directed to do so at the December 14, 2012 validation meeting and he was

²⁸ Prior to this training, Mr. Smith asked Ms. Davis for permission to rearrange the desks in respondent’s classroom one more time to neaten up the classroom.

provided the form. Form 12 was again attached to the Letter of Reprimand with an instruction to turn it in ASAP. As of the date she testified in 2014, Ms. Davis had never received the completed absence forms from respondent for those dates.

63. *December 21, 2012 Notice of Deficiency of Performance (SOC ¶ 2(q))*: On December 21, 2012, Ms. Davis issued respondent a Notice of Deficiency of Performance, in the area of “establishment and maintenance of a suitable learning environment,” based on her classroom observations on December 19, 2012. Respondent’s students had worked on a calendar gift project, which incorporated the students’ individual art pictures for each calendar month. Respondent had obtained a sample 2012 calendar from Ms. Nim but, despite repeated reminders, had not changed the calendar dates to 2013. Ms. Davis observed Ms. Boettner and a parent working on stacks of paper, correcting the dates on the calendars the students had been given. This was necessary to preserve the students’ art work. Ms. Davis also observed a parent volunteer “grading and providing date book input for two weeks’ worth of student work. Respondent’s “lack of professionalism and preparedness led to a chaotic learning environment not suitable for learning.”

Ms. Davis’s recommendations included that respondent take notes in meetings with team teachers, follow through with grade level expectations and that, “if you make an error, you are responsible for correcting it (the calendars and grading student work).” Additional supports included providing extra time for Ms. Boettner to work in the class to help grade papers and correct the calendars. According to Ms. Davis, having a parent input grades into the grade book affected student confidentiality.

64. In January 2013, Ms. Davis observed respondent incorrectly teach Haiku poetry to 90 first grade students during Bubble Day, a day of special bubble-related activities for LDV’s combined first grade students. In her February 1, 2013 email to respondent to set up a meeting, Ms. Davis emphasized the need to re-teach Haiku poetry to the students and she inquired about respondent’s plan to address this issue. In reply, respondent advised Ms. Davis to contact his attorney for any further meetings. No remedial action was taken.

65. After respondent was placed on administrative leave, Ms. Davis advised the parents that their children’s report cards would be delayed about one month, until April 5, 2013. Ms. Davis testified that “there were boxes and boxes of completed student work that was not graded, yet the grading sheets that Mr. Frank had appeared to show that the work had been graded.” When this work was graded, “there was no correspondence between the student work and what he had put down in his grade book. And so that required that all the report cards be completed and be completed accurately.” There was a “big issue going on with non-graded work or a grade book that was not reflective of the actual student work in the classroom.”

Respondent’s Evidence

66. Two SCTA representatives testified on respondent’s behalf.

A. *Robert Lynch*: Mr. Lynch is a 27-year District employee who was SCTA's second vice-president during the 2010-2011 and 2011-2012 school years. He has been its treasurer since 2012-2013. He currently teaches kindergarten. Mr. Lynch observed respondent teach approximately three times at Golden Empire, but he did not recall if this was in the 2010-2011, or the 2011-2012 school years. He observed him on three-to-four occasions at LDV, one of which included attending a validation meeting. His observations lasted two to three hours each. He did not recall who at SCTA had asked him to observe respondent.²⁹ Mr. Lynch knew respondent was on Improvement Plans, but had not seen these plans before his first observations at either site. Ms. Boettner was in respondent's LDV classroom during one of his observations. Mr. Lynch never asked anyone at LDV to remove Ms. Boettner from respondent's classroom.³⁰

Mr. Lynch did not see his role as an observer to change anything a teacher is doing. After watching respondent teach kindergarten at Golden Empire, Mr. Lynch thought he had some strengths and some areas he wanted to discuss with respondent to see about improvement or why he was doing something a certain way. Respondent seemed "tentative and a little nervous with the children." Potential areas of improvement were that, at times, the children did not transition as well as they could have and "seemed as though maybe they weren't paying as close attention or they weren't seated in the right place..." Respondent listened to his feedback.

Mr. Lynch believed respondent seemed "more comfortable teaching" at LDV. His lessons at Golden Empire "were good but he did seem a little on edge with the transitions..." At LDV, Mr. Lynch thought "everything went really smoothly and the children were paying attention to him so he was able to move from one lesson to the next fairly smoothly..." The one time he reviewed respondent's lesson plans, they "seemed fine." In Mr. Lynch's opinion, respondent taught "pretty well" at Golden Empire and was doing "an excellent job" at LDV.

B. *Garald Scott Smith*: Mr. Smith was SCTA's president in the 2011-2012, and 2012-2013 school years, and he is currently its first vice-president. He has been employed by the District for 23 years, teaching for all but the three years in which he has been released to perform union duties. Mr. Smith first met respondent in late 2012 at LDV, after Mr. Lynch expressed concerns about Ms. Boettner's presence in the classroom. Mr. Smith testified that he observed respondent on 22 occasions between December 2012 and February

²⁹ In his deposition, Mr. Lynch testified that he wanted to keep the union president informed about what was happening because the president had asked him to check out the situation. He did not recall if Mr. Smith was president or a vice president at the time.

³⁰ Because both Ms. Boettner and respondent are SCTA members and respondent did not want her to remain in the classroom, Mr. Lynch testified that union officials took care to treat each member equally and fairly. Mr. Smith denied ever discussing SCTA's potential member conflict with Mr. Lynch.

2013, in two- to three-hour blocks of time, and that he saw himself as respondent's unofficial mentor. On at least two of these visits, Mr. Smith and respondent observed Ms. Maroldy's first grade class. Mr. Smith also worked with respondent for several hours over the Winter Break to reorganize his classroom, and he fixed the bulletin board to display art items. When Mr. Smith observed respondent in January 2013, Mr. Smith thought his classroom looked great.

Mr. Smith was not looking for specific things in his observations and thought "things went well" in respondent's classroom. After reviewing his deposition, Mr. Smith agreed that, after his first visit, he thought there were things he could help respondent improve; specifically in the organization of the room. Mr. Smith took notes during his observations, either by hand or, more frequently, by using his iPad. He provided three pages of notes printed out from his iPad, for two of his 22 observations: on January 7, 2013 (two pages) and on January 30, 2013.³¹ Mr. Smith shared some of his observations with respondent but never gave him the notes. Typically, he would share something positive and make a suggestion of something that might be helpful to respondent. Mr. Smith thought respondent's lesson plans were "very well done" and almost too thorough. He thought respondent's pacing went well, that he monitored the centers by checking in with the parents, seemed to have good conversations with parents, and his students seemed happy and engaged. Mr. Smith thought respondent did a good job, and had "all of the ingredients" to be a good teacher, but needed the right support to improve. He suggested respondent provide more detailed, step-by-step instructions for the parents working at the centers and respondent complied. Mr. Smith cautioned respondent to be "[c]areful of Ms. Boettner, she has nothing but negative things to say," and he suggested that respondent "should probably not share much with her."

After the December 14, 2012 validation meeting, Mr. Smith told Ms. Davis that respondent's authority was being weakened by Ms. Boettner's presence in the classroom, and that he felt she should be pulled from the class to allow respondent an opportunity to be the teacher.

Mr. Smith acknowledged that Ms. Davis gave him some documents at the December 14, 2012 validation meeting; however, he disputed Ms. Davis's testimony that she had given him the 47 pages of documents that were later attached to the December 19, 2012 Letter of Reprimand (Finding 61). According to Mr. Smith, Ms. Davis had many documents in front of her at the December 14, 2012 meeting, but she only gave him approximately five pages. Mr. Smith also testified that he told Ms. Davis he would immediately grieve the matter and have the documents removed from respondent's file. As a result, Ms. Davis "pulled it back," i.e., she retracted the Letter of Reprimand. For this reason, Mr. Smith never submitted anything in writing as rebuttal. Mr. Smith agreed that, as SCTA's president, he had an obligation to protect SCTA's members, and that one of the best ways to do so is to keep members employed.

³¹ Mr. Smith believed the January 7, 2013 date in the middle of the second page of his notes applied to the observations both above and below that date.

67. Respondent called the following District teachers as witnesses:

A. *Kimberly Rae Healey*: Ms. Healy was a special education teacher who taught a special day/learning handicapped class of fourth through sixth grade students at Golden Empire. Ms. Healy was placed on an improvement plan during the 2010-2011 school year. She is now retired.

Ms. Healy knew respondent as a colleague during the 2010-2011, and 2011-2012 school years. For three or four months during the 2010-2011 school year, she and respondent collaborated by having their students meet for joint activities one hour, twice a week. Initially, their combined classes met on the playground and then respondent brought his students into her classroom. During this time, respondent and Ms. Healey supervised, but did not teach. Instead, Ms. Healy's older students would read to respondent's students or they would work on joint art projects. In the spring 2011, Dr. Eister reduced this joint endeavor to once a week, so the students would receive direct in-class instruction. These joint activities continued every other week during the 2011-2012 school year. Ms. Healy observed that respondent interacted well with children, and seemed organized and "fun."

B. *Jeannie Tedesco and Eric Malme*: Both Ms. Tedesco and Mr. Malme have worked for the District as certificated employees for many years, in positions that did not involve teaching in self-contained classrooms. Before being assigned to teach in self-contained classrooms for the 2012-2013 school year, Ms. Tedesco had been out of the classroom for nearly 18 years while she worked as a librarian, and Mr. Malme had been an orchestra prep teacher for several decades.

For the 2012-2013 school year, Ms. Tedesco was assigned to teach second grade and Mr. Malme was assigned to teach third grade at LDV. Ms. Davis assigned support teachers to help both Ms. Tedesco and Mr. Malme in their return to teaching curriculum, and Ms. Boettner worked in both of their classrooms. Neither witness observed respondent in his classroom. Ms. Tedesco and Mr. Malme attended the November 2012 training with respondent. They testified, consistently, that the training was given in a very cold room furnished with small chairs and that respondent participated in the training. Mr. Malme recalled that respondent complained of back spasm, lay down on the floor for about 20 minutes to relieve pain, but remained completely conscious the whole time. (SOC ¶ 1(f).) Ms. Tedesco and Mr. Malme found their experiences at LDV to be unpleasant and stressful. By late December 2012, both had requested to be reassigned out of LDV and the District accommodated their requests.

C. *Linda Rae Cochran*: Ms. Cochran is a third grade teacher who has taught at LDV since 1988. She has previously held positions with SCTA. Ms. Cochran met respondent frequently outside of his classroom during the 2012-2013 school year, typically after class while they were each engaged in class preparations. Respondent frequently asked Ms. Cochran's advice about LDV practices and culture. Ms. Cochran never observed respondent teach, but she thought the lesson plans he showed her were thorough. Her

practice was to allow parents help grade fairly objective homework as part of their participation hours. Ms. Cochran was aware that respondent was on an Improvement Plan and noted that he seemed concerned about doing a good job and meeting expectations. She was aware Mr. Smith was working with respondent to implement his improvement plan but she was not involved with that effort.

68. *Parents:* Respondent called as witnesses: three parents of students in his Golden Empire class during the 2010-2011 school year (FOC 52, MOC59, and MOC14 by Declaration); three parents of students in his Golden Empire class during the 2011-2012 school year (MOC61, FOC61, MOC62); and three parents of students in his LDV class during the 2012-2013 school year (MOC15, FOC15, MOC63). Each of these parents had positive impressions of respondent as a teacher, believed their children liked him; and believed he communicated with them in a courteous and professional manner.

69. *Respondent's Testimony:* In his testimony, respondent reviewed copies of his lesson plans, his WAAGS, photographs of his LDV classroom and centers, and copies of letters and cards he received from students in his classes at each site during the relevant period, which expressed positive sentiments about him. He described his classroom teaching practices, his interactions with Dr. Eister, Ms. Mondzak, Ms. Davis and Ms. Boettner, and his efforts to comply with the Improvement Plans at Golden Empire and LDV.

Respondent did not believe he needed an Improvement Plan in May 2010, and he told Mr. Lewis so. He and Mr. Lewis simply professionally disagreed on this and he complied. Respondent thought that, like anyone else in the profession, there was a need to continually "improve the craft." Although expressing respect for Mr. Lewis, respondent considered Oak Ridge to have been a hostile working environment. He left when a new principal told him he would never allow respondent to teach kindergarten.³² During the 2010-2011 school year, respondent believed that Ms. Mondzak only stayed in his classroom for 15 to 20 minutes at a time after teaching her class. Respondent disputed the accuracy of Ms. Mondzak's observations, and explained his teaching practices and how he led students through longer projects.

Respondent conceded that he is "not a superior teacher by any means." Still, respondent explained his belief that, at all times within the relevant period at all three school sites, he was performing within the District's evaluation category of "working to meet performance standards"; i.e., that he was performing below the rating "consistent with performance standards," but above the unsatisfactory rating of "does not meet performance standards."³³ He did not recall submitting a written response to his March 28, 2011 formal evaluation, because he did not think it would affect the outcome. Respondent respected Dr.

³² The self-surplus process does not allow a teacher to select which grade he will teach.

³³ Respondent also testified that he thought his performance was "satisfactory" when the 45/90 Day Notice was issued in early November 2012.

Eister, thought she tried to help him, but he was intimidated by her “professional zeal.” He did not file any written response to any of his Improvement Plans, and did not believe he needed to be on any of the Improvement Plans issued after the formal evaluation. While respondent professed to respect and work professionally with both Mr. Lewis and Dr. Eister, he believed that both sites had elements of a hostile workplace. He believed LDV was a hostile workplace in connection with the statement made to him by MOC4 in November 2012, but he never asked to have MOC4 removed from the classroom and he agreed that her subsequent communications with him were professional and not threatening.

Respondent testified repeatedly that he did not recall “one way or the other” receiving numerous disciplinary letters at or near the time they were issued, and that he did not recall one way or the other submitting a written response to factual assertions contained in these letters. Nevertheless, respondent was able to recount factual responses to events referenced in these documents with surprising detail. At hearing, respondent offered three written responses he authored, regarding: confidentiality (November 12, 2010 [Findings 18, 19]); teaching lesson objectives (November 26, 2012 [Findings 54 and 57])³⁴; and his concern about MOC4’s comments to him (Finding 56). Respondent acknowledged that there was no evidence that he had ever directly provided these written responses to anyone in the District, and he did not specifically recall whether he had done so. Respondent believed his practice would have been to type up his thoughts and give the documents to someone at SCTA to review and discuss with him, but he had no clear recollection of having done so.

Respondent generally denied or explained his conduct in the majority of the incidents addressed in the documents and testimony discussed above. Respondent categorically denied making negative comments about other District schools at BTS Night. He testified that it was not helpful to have Ms. Boettner in his classroom during the 2012-2013 school year because there were many interruptions during instruction time. He took notes at the November 2012 training, but he did not refute Ms. Davis’s statement that he said he was “not told to take notes.” Respondent did not believe Ms. Davis was providing him support on his Improvement Plan, but he never told her that. Respondent testified that Ms. Davis told him to allow parent volunteers to grade student homework. He reviewed homework graded by parent-volunteers to determine whether students were achieving their general objectives. He conceded that he did not put any grade or notation on the homework he reviewed, even if his review indicated that the student was not meeting objectives. He denied allowing a parent to file graded student papers and recalled that this occurred when a parent misunderstood his instructions and filed confidential papers that were in a different pile than the one he had meant her to file. He never denied that his handwriting was on a student’s paper, but told the parent questioning him that another person had put a stamp on it. He denied leaving students

³⁴ In a document dated October 26, 2012, respondent indicated that his lesson was not finished by recess time and that he returned after recess “to focus on that portion of the lesson and provided my students enough time (with thorough explanation and dialogue about possessive nouns and their relation to using apostrophe s) to verbalize, write about and reflect upon these concepts...” (Underline in original.) This response was attached to his attorney’s December 14, 2012 letter to the District.

unsupervised in classroom. Ms. Boettner provided him with the incorrect calendar for the student art project and he and his family spent time making corrections. Although never previously mentioned in response to the Letter of Reprimand, respondent testified that he was consoling a “distraught” parent at the back of the classroom on May 24, 2012, when Dr. Eister observed him not teaching or engaging with his students. (Finding 34.)

At the December 14, 2012 validation meeting, respondent discussed not receiving any absence forms to fill out. When asked if he had ever turned in the attendance forms (Form 12) for his September 2012 absences, respondent had no recollection either way and could only say that he turned in whatever forms he had received in his box. He denied that Ms. Davis ever asked him to complete these forms.

DISCUSSION

Unprofessional Conduct and Unsatisfactory Performance

70. The overwhelming weight of the evidence establishes that respondent’s performance in the classroom during the 2010-2011 through the 2012-2013 school years was unsatisfactory and constituted unprofessional conduct.

71. Dr. Eister was uniquely qualified to assist respondent and to observe and evaluate his performance as a teacher during his two years at Golden Empire. Dr. Eister obtained her Bachelor’s and Master’s degrees from CSUS. In 2004, she obtained a Doctorate in Educational Administration from the University of LaVerne. She has a general education elementary credential (1987), a clear cross-language credential and an administrative credential (approximately 1999). She has broad experience as a teacher in various capacities with the District. Before becoming an administrator, Dr. Eister taught elementary school (4th-5th combination) for nine years. She served briefly as a reading coach. For the next four years, Dr. Eister was a Student Achievement Specialist for the District, assigned to at-risk schools, which had fewer than two out of ten students performing at grade level. Dr. Eister then became the District’s Coordinator of Professional Education. During her five years in this role, she coordinated and provided professional development, learning scenarios and trainings for “anyone” in the District. This included classified, certificated and administrative employees. Dr. Eister then became the principal at Golden Empire, a neighborhood school, where she has served for the past 10 years. Based on her training, experience and the amount of time she spent observing and working with respondent on his Improvement Plans and evaluations, Dr. Eister’s testimony about respondent’s consistent deficiencies and failure to demonstrate appreciable improvement was very persuasive.

72. Dr. Eister’s testimony regarding respondent’s performance in both the 2010-2011, and 2011-2012 school years was more persuasive than that of respondent. Dr. Eister’s testimony regarding the 2010-2011 school years was strongly supported by that of Ms. Mondzak, who she described as an “exemplary” kindergarten teacher. Ms. Mondzak had an

extensive opportunity to observe respondent's teaching and classroom management abilities. (Findings 22 – 24.) She testified that she had never complained about another teacher before, but felt she had a "certain duty to students" to make her concerns about respondent known. Ms. Mondzak's testimony was very credible, and much more persuasive than that of respondent. The testimony of Dr. Eister and Ms. Mondzak was also more persuasive than that of: (a) Ms. Healy, who was on an improvement plan herself and did not observe respondent teach; (b) Mr. Lynch, who saw respondent on only two to three occasions; and (c) parents who testified regarding their interactions with respondent at Golden Empire.

73. Similarly, Ms. Davis was well-qualified to assist respondent and to observe and evaluate his performance as a teacher. Ms. Davis has been the principal of LDV for six years. She holds Master's Degrees in English (1995) and in Educational Administration (2000), with an undergraduate degree in Theatre Arts. She has an adult education teaching credential which authorizes her to teach grades K-8 in English and Math. While completing her teaching degree, Ms. Davis worked for the Very Special Arts Program in 1990, and taught writing, visual and performing arts to students as a push-in specialist teacher. She taught English language arts and theatre arts at a private school from 1994 to 2000, and then taught as a classroom teacher at a public school for one year. Ms. Davis has worked at the District since 2001, when she became a full-time administrator. She worked at two high schools, before becoming LDV's principal. During her tenure as LDV's principal, Ms. Davis has had substantial experience in assisting, observing and evaluating teachers and providing them with appropriate feedback and support.

74. Ms. Davis's testimony about respondent's performance in the 2012-2013 school year was more persuasive than that of respondent and other witnesses.

Mr. Smith's testimony was less persuasive for several reasons. First, as reflected in his observation notes, even in January 2013, respondent needed to be reminded of very basic teaching and classroom management strategies.³⁵ Second, the absence of notes from the vast majority of Mr. Smith's observations strongly suggests either that there were fewer than 22 observations, or that there was a culling of observation notes that might be detrimental to respondent.³⁶ Third, Mr. Smith did not recall the substance of much of the discussion at the

³⁵ For example, Mr. Smith queried: "Is agenda up to date?" and "what's the point of the groups? What are they to learn?" He asked respondent whether there was anything he "could show the students that they could touch that would relate to the lesson?" Mr. Smith noted that respondent was "interrupted 5 times in 7 minutes – perhaps remind them each day in the morning your expectations for them and have them repeat it back to you in their own words." He suggested that respondent "come up with a new class rules sheet written in their own language," noting that "show your appreciation = say when you like something..." He suggested that respondent engage high functioning bored students by giving them additional materials and using them as student tutors.

³⁶ Mr. Smith was not required to sign in with the District for his observations of respondent's class. Ms. Cochran's classroom was in close proximity to respondent's

December 14, 2012, validation meeting. His testimony that he did not receive certain documents from Ms. Davis at that meeting and that Ms. Davis “pulled back” the related Letter of Reprimand is viewed in light of his poor recollection in general and Ms. Davis’s testimony that he was preoccupied with his iPad during much of the meeting. Further, the full procedural record suggests that the action “pulled back” or withdrawn by the District was more likely the September 20, 2012, 45/90 Day Notice, which it reissued in November. (Findings 38, 52.) Fourth, in his testimony, Mr. Smith provided helpful information about respondent that conflicted in a number of ways from his earlier statements during his two-day deposition.

Mr. Malme, Ms. Tedesko and Ms. Cochran did not observe respondent teaching his LDV class. Mr. Lynch’s opinion that respondent was doing “an excellent job” at LDV, was much less persuasive than that of Ms. Davis, based on her consistent and highly-engaged interaction with respondent during the 2012-2013 school year.

75. Respondent’s testimony about his subjective belief that he was not an unsatisfactory teacher but was at least “working to meet performance standards,” at all times during the relevant period, was not objectively reasonable and is not credible. Respondent’s consistently poor memory about significant employment events and his failure to provide any contemporaneous response to disciplinary letters contrasted sharply with his memory about specific events at hearing and made his testimony less credible than that of Dr. Eister, Ms. Mondzak, and Ms. Davis. In his testimony, respondent denied that he blamed others for his acts or omissions, but this denial was not consistent with other portions of his testimony, or the testimony of these witnesses. When confronted by Dr. Eister and Ms. Davis about specific statements he made or his conduct, respondent frequently replied by making statements which deflected responsibility and raised questions about his honesty, which further eroded their confidence in him. (Findings 33, 54, 57.)

76. During the relevant period, respondent was provided with more than adequate assistance to meet the District’s standards. He was given a sufficient opportunity both before and during the 45/90 Day Notice period to correct his deficiencies. The record demonstrates that, at Golden Empire, respondent was provided with intensive support and feedback from Dr. Eister, including by pairing him with Ms. Mondzak for a full year. It also demonstrates that respondent was provided with intensive support and feedback from Ms. Davis at LDV, including by assigning him near-daily support from Ms. Boettner through mid-December 2012. Despite these supports, neither Dr. Eister nor Ms. Davis saw respondent demonstrate any significant improvement in his deficient areas.

In this regard, respondent’s argument that the District had an obligation to provide him a Peer Assistance and Review (“PAR”) mentor under Article 20 the District’s Collective

classroom. Ms. Cochran knew Mr. Smith, and had conversations with him before and after times Mr. Smith was observing respondent’s classroom. Ms. Cochran testified she believed Mr. Smith dedicated five or six days to his efforts to help respondent. Respondent testified that Mr. Smith was in his classroom on “10 to up to 20” occasions.

Bargaining Agreement (CBA) with SCTA is not persuasive.³⁷ Section 44664, subdivision (c), requires “the placement of a teacher with an unsatisfactory evaluation into a PAR program by any district that has such a program.” While the CBA had a provision for such a program, the CBA required creation of a joint committee that was never established. Any related funds received by the District were discretionary funds that were not dedicated to this program. Consequently, there was no PAR program implemented in the District during the relevant period from which PAR mentors for respondent could have been drawn.

77. Respondent’s theory that the District, in effect, set him up for failure by assigning him to LDV for the 2012-2013 school year, rather than allowing him to select two sites for assignment after he elected to self-surplus from Golden Empire in August of 2012, is not persuasive. Respondent did not decide to self-surplus until late August 2012, approximately one-to-two weeks before the start of the new school year. Although respondent had experience with the District’s typical self-surplus process, when he did not hear from the District, he made no efforts to contact Human Resources about his late need for reassignment. In addition, respondent’s experience was not unique. Mr. Malme testified that he was assigned to LDV without being given any choices as part of the surplus process.

78. Respondent’s theory that he was the victim of a cabal of elitist parents, who held him to standards that were too high, and effectively helped the District to place him on administrative leave pending discharge proceedings is also unpersuasive. The testimony of Mothers of Children 2, 3, 4, 5, and 6 about their individual experiences and observations of respondent were highly consistent with deficiencies observed by Ms. Davis. None of the parent witnesses called by either party are credentialed teachers; however, the testimony of these parent witnesses is more persuasive than that of MOC15, FOC15 and MOC63, who had less of an opportunity to observe and interact with respondent at LDV. Moreover, the complaints by the LDV parents were not unique, but were in areas that had been the focus of concern about respondent’s performance throughout his two years at Golden Empire, as credibly detailed by Dr. Eister and Ms. Mondzak.

Similarly, respondent’s theory that Ms. Boettner participated in his removal from the classroom, to her personal benefit, is not persuasive. The evidence established that Ms. Davis initially assigned Ms. Boettner along with other substitutes to assist several new teachers. Shortly thereafter, Ms. Boettner was assigned to respondent’s classroom based on Ms. Davis’s assessment that he required ongoing support, as well as to ensure consistency for respondent’s students given his many absences. Ms. Boettner was specifically instructed by Ms. Davis that her role in respondent’s class was not as an evaluator.

79. The weight of the evidence establishes that respondent did not improve his performance or his professional conduct in any meaningful way by March 7, 2013, four months after the 45/90 Day Notice was issued.

³⁷ The parties stipulated that provisions for a “PAR” program existed in Article 6 and Appendix H of the CBA), and that the District did not place respondent or any other teacher in a PAR program in the school years extending from 2009-2010 through 2012 -2013.

While witnesses agreed that some improvements were seen in early 2013, these were not substantial or sufficient to ameliorate the conduct addressed in the 45/90 Day Notice.³⁸ Some improvements, particularly in respondent's classroom set up, were attributable to the infusion of support provided by Mr. Smith beginning in late December 2012. In addition, respondent's conduct and performance after the 45/90 Day Notice largely reinforced the reasons for its issuance, in areas of parental communication,³⁹ in his teaching coherence and accuracy (Bubble Day Haiku poetry lesson), and by his violation of confidentiality (allowing parents to input grades into grade book [Finding 63]). The evidence persuasively established that respondent has been consistently unable to make, incorporate and sustain meaningful changes in his classroom teaching, management and communication style. He was unable to do so in spite of significant resources offered to assist him over many years and during the four months after his revised 45/90 Day Notice was issued.

80. *Compliance with Education Sections 44938 and 44664:* The District did not produce evidence that respondent was formally evaluated on or after March 28, 2012, as required by section 44664, subdivision (b), in light of his unsatisfactory evaluation the prior year. (Finding 32.) When the District issued its 45/90 Day Notice, it attached the March 28, 2011 Formative Evaluation. Section 44938 requires that the written notice of unsatisfactory performance and/or unprofessional conduct "shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee." (Finding 53.)

Respondent argues that the District's failure to perform a formal performance evaluation in or after March 2012, and its failure to attach that evaluation to the 45/90 Day Notice, deprives the Commission of subject matter jurisdiction to consider charges of dismissal based on either unsatisfactory performance or unprofessional conduct. As reflected

³⁸ For example, while MOC5 noted some improvements in respondent's instructions to parent volunteers for centers and in his WAAGS, she testified that "the meat of it was missing. The actual teaching and handing down of knowledge and passing it on and explaining and helping the kids to understand the different lessons, that was still missing."

³⁹ For example, on December 12, 2012, respondent sent the following mass email to the parents of students in his class, with a copy to Ms. Milevsky at SCTA:

A parent asked me if I had sent out this week's school newsletter and I said I hadn't received a set in my box. What happened was that another staff member must of accidentally taken my set because I found it in my box later. I apologize for the inconvenience but sometimes life happens to us all. I don't know who accidentally took the set but they did return it. So, at least I was able to put it in your student's cubby to take home tomorrow. Late but mystery solved."

Respondent's handwritten note on this email provides: "Principal recommends: 'Just get 30 more newsletters & send them out' & NO email."

in the April 25, 2014 Ruling on Respondent's Motion to Dismiss on these grounds, the Commission has subject matter jurisdiction, including over the related factual issues of substantial compliance with the Education Code and whether any legal errors by the District in pursuing respondent's dismissal were prejudicial or non-substantive.

81. *Nonsubstantive Procedural Errors:* Education Code section 44944, subdivision (c)(2), provides that: "[t]he decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors."

Deciphering this somewhat awkward statutory language, a procedural error becomes a substantive error when it is prejudicial to the teacher subject to the dismissal action. In this case, the crucial issue is whether, after receiving his unsatisfactory March 28, 2011 formal evaluation, respondent could reasonably have believed that the District no longer deemed his performance to be unsatisfactory, and that he was thereby prejudiced by not knowing that he needed to take steps to meet those standards and to improve his performance.

82. *Substantial Compliance:* A review of the record demonstrates that the four CSTP areas in which respondent needed improvement in the May 4, 2010, Improvement Plan were the precise focus of the March 28, 2011 Evaluation, and that respondent was rated unsatisfactory ("does not meet performance standards") in each of these areas. Three months later, based on his unsatisfactory performance, a new Improvement Plan in the same areas was developed. The same subject areas were covered in the Improvement Plans dated June 10, 2012, and October 15, 2012. Respondent signed each of the Improvement Plans directly under an "Employee's Acknowledgement," which stated in pertinent part: "This improvement plan is required for teachers whose summary rating is less than (Working to meet performance standards)..." The only lower rating is "does not meet performance standards." In the three post-evaluation Letters of Deficiency issued to respondent (in October and December 2011, and in December 2012), the District clearly communicated its concern that respondent was not meeting performance standards in teaching, based on the formal classroom observations conducted on October 19, and December 14, 2011, and on December 19, 2012. In addition, after his next evaluation was due (March 28, 2012), similar serious concerns about respondent's performance were repeatedly detailed in numerous letters of concern, letters of reprimand, and performance observations, each of which underscored respondent's continuing failure to meet performance standards. Respondent was clearly on notice that his performance was below minimum standards, and that he needed to improve his performance. Respondent's subjective belief that he was "working to meet performance standards" is simply not reasonable.

83. Based on the overwhelming record of disciplinary letters and Improvement Plans in this matter, it cannot be said that respondent was the victim of prejudicial error.

A. *Unsatisfactory Performance:* The record supports a finding that respondent is appropriately subject to dismissal based on unsatisfactory performance in the 2010-2011

school year, and for unsatisfactory performance through March 28, 2012 of the 2011- 2012 school year. Because the District failed to produce a formal evaluation of respondent on or after March 28, 2011, it violated the annual evaluation mandate of section 44644, subdivision (b). Respondent cannot be dismissed based on unsatisfactory performance from March 28, 2012, through the time he was placed on administrative leave, approximately 11 months later.

At all at times subsequent to March 28, 2012, however, respondent was repeatedly notified by the District, in great and consistent detail, that his performance was unsatisfactory and that he needed to remediate and improve his performance. Respondent's performance did not significantly improve in the 11 months following the time at which the annual evaluation was due, or in nearly four months after issuance of the 45/90 Day Notice.

B. Unprofessional Conduct: The District's failure to attach a more current evaluation to its 45/90 Day Notice does not prohibit it from seeking to dismiss respondent for unprofessional conduct during the relevant period. The failure to include a more current evaluation is not a jurisdictional defect; rather, it is an "evidentiary consideration" to be considered in light of the evidentiary record as a whole. (*Crowl v. Commission on Professional Competence (Crowl)* (1990) 225 Cal.App.3d 334, 349.) As set forth in Finding 82, the record establishes that the District substantially complied with section 44938 by providing respondent ample notice over many years of the need to improve his professional conduct.

Fitness to Teach

84. Whether respondent is appropriately subject to dismissal for unprofessional conduct or based on evident unfitness for service under Education Code section 44932, subdivision (a) (1) and (5), turns on an analysis of his fitness to teach.⁴⁰

In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230, the State Board of Education revoked a teacher's teaching certificates based upon conduct alleged to be "immoral" or "unprofessional" under the Education Code. On review, the California Supreme Court held that conduct cannot be determined to be "immoral" or "unprofessional" unless it first indicates a teacher's "unfitness to teach." The Court identified the following factors to be considered in determining whether a teacher's conduct indicates unfitness to teach: (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 conduct; (4) the type of teaching certificate held by the party involved; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the

⁴⁰ When reviewing a school district's dismissal action against a certificated employee based solely upon unsatisfactory performance under Education Code section 44932, subdivision (a)(4), there is no need to apply the standards of fitness to teach set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1175-1176.)

praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) 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. Similarly, the Court of Appeals in *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560, stated:

Our high court in *Board of Education v. Jack M.* (1977) 19 Cal.3d 691, delineates the process to be considered in determining fitness. This opinion upheld the standard established in *Morrison* that a discharged teacher is entitled to a fitness hearing in which not only his conduct but also these factors are analyzed: (1) likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teachers and students relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct.

Courts have suggested that "fitness to teach" is a question of ultimate fact. (*Board of Education v. Commission on Professional Competence, supra*, 102 Cal.App.3d at 560-561, citing *Board v. Jack M., supra*, 19 Cal.3d 691, 698, fn. 3.) Similar requirements are imposed on charges of "evident unfitness for service." (*Board of Education v. Jack M., supra*, 19 Cal.3d at 698.) The fitness criteria are applied to the facts of this case, as set forth below.

85. *Likelihood and Degree of Adverse Impact of Conduct on Students or Teachers:* Respondent's conduct over the relevant period adversely affected both his students and his fellow teachers. It is not unusual for young children to like their teachers. Even assuming the accuracy of respondent's hearsay evidence that his students liked him, missed him, or considered him to be a great "goofball" of a teacher, this does not mean that respondent's performance and conduct did not have a detrimental impact on them. Kindergarten and first grade students are at a particularly vulnerable educational stage. Respondent's students required an effective learning environment with procedures and routines that supported their learning and fostered positive behaviors. They needed instruction that was designed, sequenced and delivered coherently with clear objectives. They needed instructional strategies that were tailored to their diverse needs, and they needed to be accurately assessed so that teaching or re-teaching could occur and give them an educational foundation to sustain them in the future. As repeatedly documented in the observations of Dr. Eister and Ms. Davis, respondent's students were adversely affected by not receiving appropriate instruction in a well-regulated classroom. As the credentialed teacher responsible for organizing, conveying and instilling knowledge through the curriculum, respondent fell far short of the mark. While it is not possible to quantify the degree of adverse impact on respondents' students, it can reasonably be inferred that the effect of exposure to respondent's consistent deficiencies in instruction, class management, and assessment will have some lasting impact.

Respondent's grade-level teaching teams at Golden Empire and LDV were also affected by his conduct. As reflected in the testimony of Dr. Eister, Ms. Davis and Ms. Mondzak, these teachers were not able to rely on respondent to follow the agreed upon pacing or to disseminate correct information to parents. They were not able to rely on the content of his assessments. Respondent's conduct caused additional work for the teachers on his grade-level teams.

86. *Disruption of Educational Process:* As detailed above, respondent's deficiencies resulted in the expenditure of a tremendous amount of educational resources (e.g., by requiring an additional teacher in the classroom on almost a daily basis; by requiring time and resources to address complaints). Respondent's deficiencies resulted in a disruption of students' educational process manifested by reduced instructional time and unclear objectives.

87. *Praiseworthiness or Blameworthiness of Respondent's Motives:* Respondent's conduct and performance is blameworthy because of his failure to accept responsibility and his pattern of shifting blame to others for his deficiencies.

88. *Proximity or Remoteness in Time and Likelihood of Recurrence of the Questioned Conduct:* Respondent's conduct has persisted and been consistent throughout the relevant period. While Dr. Eister saw some improvements in lesson plans and some minor improvements were seen in early 2013, respondent's conduct and performance has not significantly improved. The likelihood that respondent's conduct will continue in a similar vein if he is returned to the classroom is high.

89. *Extenuating or Aggravating Circumstances:* As extenuating factors, respondent was consistently described as a nice, professional and courteous man. Some parents at Golden Empire and LDV liked him. Respondent seemed to like his students, he remained in the classroom after the school day to prepare, and he sought out professional collaboration with Ms. Healy and advice from Ms. Cochran.

In aggravation, respondent lacked insight and the ability to incorporate meaningful changes in his performance and conduct. According to both Dr. Eister and Ms. Davis, respondent would often articulate a willingness to follow through with suggestions for change, but then failed to actually follow through (e.g., by prewriting sentences on the board to avoid losing both student interest and teaching time). This inability to follow through with a recommendation, or to consistently do so, was reflected in Improvement Plan amendments that added the word "daily" to preexisting recommendations. In addition, respondent seemed unable to accept responsibility for his actions, and he frequently placed the blame on others for his shortcomings, causing Dr. Eister and Ms. Davis to have concerns about his honesty. This pattern occurred over multiple years at multiple schools.

90. *Other Factors:* Respondent holds a multiple subject credential which authorizes him to teach in self-contained classes in the elementary grades. His particular

teaching certificate is a neutral factor. Respondent's conduct does not implicate the exercise of constitutional rights. The evidence did not establish that notoriety or publicity was a significant factor in this case.

91. *Conclusion:* After considering the *Morrison* factors outlined above, the evidence established that respondent is unfit to teach.

Evident Unfitness

92. In *Woodland Joint Unified School District v. Commission on Professional Competence (Woodland)* (1992) 2 Cal.App.4th 1429, 1444, the Third District Court of Appeal defined the term "evident unfitness for service," as used in Education Code section 44932, subdivision (a)(5), to mean "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." The court found that the term "connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*) The court held that the *Morrison* factors "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service." (*Id.* p. 1445.) As the court in *Woodland* explained, "[i]f the *Morrison* criteria are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Ibid.*)

The weight of the evidence persuasively established that respondent has "temperamental defects or inadequacies" that constitute a "fixed" (non-remediable) trait, which are manifested in two ways. First, respondent has a tremendous lack of insight into his performance deficiencies and has been persistently unable to incorporate meaningful changes despite years of supportive efforts. Second, respondent has a pattern of not taking responsibility for his actions and/or of deflecting responsibility for his conduct to others, which has been perceived by his supervising principals as intentional misrepresentation or dishonesty. (Findings 33, 54, 57; *SOC 1(c), 1(d), 1(f).*)

93. *Persistent Violation of or Refusal to Obey Laws and Regulations:* A charge of persistent violation of or refusal to obey requires a showing of insubordination. (*Midway School District of Kern County v. Griffeath (Midway)* (1946) 29 Cal.2d 13, 18-19.) Furthermore, "persistence" requires a showing of "continuing or constant" behavior. (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 27 Cal.App.3d 77, 82.) As indicated in *Midway*, "[p]ersistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent." (*Midway, supra*, 29 Cal.2d at p. 18.)

Respondent has repeatedly violated the District's confidentiality policy. (*SOC ¶¶ 1(a), 1(b)*; Findings 18, 58, 63.) He violated the District's policy on leaving students alone with parent volunteers, without supervision by a credentialed teacher. (*SOC ¶ 1(c)*; Finding 33.) Respondent has repeatedly failed to complete his September 2012 absence forms, even

after having been specifically directed to do so and provided the forms on two separate occasions. (SOC ¶ 1(e); Finding 62.) Respondent's continuing failure to respond to the directives of his supervising principal from December 19, 2012 through March 7, 2013, constitutes insubordination.

LEGAL CONCLUSIONS

1. Pursuant to Education Code section 44932, subdivision (a) (1), (4), (5) and (7), respectively, a permanent certificated teacher may be dismissed for any of the following causes: "unprofessional conduct," "unsatisfactory performance," "evident unfitness for service," and/or "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." Section 44932 makes each of these causes for dismissal distinct and independent.

2. The burden of proof is on a school district to show by a preponderance of evidence that a teacher should be dismissed. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

3. *Unproven Allegations*: The following alleged Specific Acts of Misconduct in the Accusation/Statement of Charges were not proven by a preponderance of evidence:

1. SOC ¶ 1(b): Allegation that respondent shared the wrong student's evaluation report with a parent in the fall of 2012;

2. SOC ¶ 1(f): Allegations: (a) that respondent was told by Ms. Nim and Ms. Boettner, who did not testify, about certain assessment practices; and (b) about respondent's conduct at, and alleged lying about, the November 15-16, 2012, training; and,

3. SOC ¶ 1(g): Allegation that respondent had engaged in "inappropriate discussion in the workplace" in March 2009.

4. *Unsatisfactory Performance*: As set forth in Factual Findings and Legal Conclusions as a whole and, particularly, in Findings 82 and 83, the District did not comply with Education Code section 44664, subdivision (b), because it failed to produce evidence that it conducted a formal performance evaluation of respondent on March 28, 2012, or thereafter. The District did not meet its burden of establishing that respondent may be dismissed based on his alleged unsatisfactory performance from March 28, 2012 through March 7, 2013, when he was placed on administrative leave.

Because respondent was properly evaluated through March 28, 2012, and was then repeatedly given notice by the District that his performance was unsatisfactory and required remediation, respondent is properly subject to dismissal for his unsatisfactory performance during the 2010-2011 school year and through March 28, 2012 of the 2011-2012 school year.

5. *Unprofessional Conduct*: “Unprofessional conduct” in a certificated employee is defined as “the unprofessional conduct particularly specified as a cause for dismissal or suspension in Sections 44932 and 44933. . .” (§ 44938, subd. (c).) As set forth in Factual Finding No. 52, the District served a Notice of Unprofessional Conduct on respondent and satisfied the jurisdictional prerequisites to pursuing this charge. (§ 44938, subd. (a); *Crowl*, *supra*, 225 Cal. App. 3d 334, 348.) As noted in *Crowl*, only section 44938’s 45-day advance notice requirement is a jurisdictional prerequisite to proceeding with disciplinary action based upon unprofessional conduct; the failure to comply with other provisions of this statute is an “evidentiary consideration” for the Commission. As discussed in Findings 82 and 83, the District substantially complied with section 44938 by providing respondent with sufficient and repeated notice of his unprofessional conduct and the need to remediate his conduct. The District provided respondent ample opportunity to improve or eliminate his unprofessional conduct; however, he failed to do so.

As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, based upon consideration of the *Morrison* factors (Findings 84-91), the District established by a preponderance of the evidence that respondent should be dismissed for unprofessional conduct during the relevant period.

6. *Evident Unfitness for Service*: As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, based upon consideration of the *Morrison* factors (Findings 84-91), the District established by a preponderance of the evidence that respondent’s conduct demonstrated an evident unfitness to teach. Contrary to respondent’s argument, actual harm to students is not required. Respondent’s conduct over an extended period of time reflected temperamental defects or inadequacies that make him unsuitable for teaching, which are reflected in (a) his consistent lack of insight and inability to improve his teaching despite receiving intense support and feedback; and (b) his habit of blaming his shortcomings on others and not taking responsibility, which manifests as a lack of honesty.

7. *Persistent Violation of Rules*: As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Finding 93, respondent persistently violated rules regarding confidentiality, leaving students unsupervised, and failing to complete absence forms after being repeatedly instructed to do so.

8. *Legal Cause to Dismiss*: With the exception of the matters identified in Legal Conclusion 3, the District established by a preponderance of the evidence that respondent is subject to dismissal based upon the distinct and independent grounds of unprofessional conduct, unsatisfactory performance during 2010-2011 school year and through March 28, 2012 of the 2011-2012 school year, evident unfitness for service, and persistent violation of or refusal to obey laws or regulations within the meaning of Education Code section 44932, subdivision (a) (1), (4), (5) and/or (7).

//

//

ORDER

Respondent Steven Frank shall be dismissed from his position as a permanent certificated employee of the Sacramento City Unified School District.

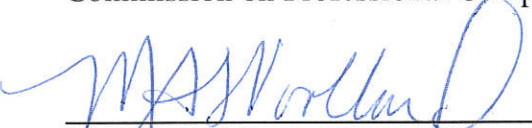
DATED: September 30, 2014


Zack Schultz, Member
Commission on Professional Competence

DATED: September __, 2014

Simone Simmons, Member
Commission on Professional Competence

 October 1, 2014
DATED: ~~September~~, 2014


Marilyn A. Woollard, Chairperson
Commission on Professional Competence


ORDER

Respondent Steven Frank shall be dismissed from his position as a permanent certificated employee of the Sacramento City Unified School District.

DATED: September ___, 2014

Zack Schultz, Member
Commission on Professional Competence

DATED: September 30, 2014



Simone Simmons, Member
Commission on Professional Competence

DATED: September ___, 2014

Marilyn A. Woollard, Chairperson
Commission on Professional Competence

