

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
LOS ANGELES UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Accusation and  
Statement of Charges Against:

DAVID ARNOLD,  
A Permanent Certificated Employee,

Respondent.

OAH No. 2012050786

**DECISION**

This matter was heard by the Commission on Professional Competence in Los Angeles on June 17 – 19 and 24 – 28, 2013, under the authority of Education Code sections 44932 and 44939. The Commission was comprised of the following panel members: Timothy Buttle, teacher, Los Angeles County Office of Education; Karen G. Rapien, teacher, Fullerton Union High School District; and Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings.

Complainant Vivian K. Ekchian, Chief Human Resources Officer, Los Angeles Unified School District was represented by Carolos Villegas, Attorney at Law. Respondent David Arnold was present throughout the hearing and represented by Rosty Gore, Attorney at Law.

Prior to the evidentiary hearing, the Administrative Law Judge determined that the two other panel members were qualified to serve on the Commission on Professional Competence. The Administrative Law Judge then held a hearing on the parties' motions in limine and made rulings as reflected in the record. Thereafter, complainant presented witnesses and exhibits in support of her case-in-chief and respondent presented evidence for his case-in-chief. Respondent testified and was subjected to questions on cross-examination. Complainant recalled a witness to testify on rebuttal. On conclusion of the evidentiary phase of the hearing, the parties presented oral argument.

Oral, documentary, and stipulated evidence having been received and oral arguments heard, the Commission on Professional Competence submitted this matter for decision on June 28, 2013, deliberated and considered the evidence in closed session, and finds as follows:

## FACTUAL FINDINGS

1. The Administrative Law Judge takes official notice that, on April 20, 2012, the Accusation and Statement of Charges was made and filed by complainant Vivian K. Ekchian in her official capacity as Chief Human Resources Officer, Los Angeles Unified School District, State of California (District). With administrative offices located at 333 South Beaudry Avenue in Los Angeles, the District is one of the largest comprehensive school districts in the nation. One of the schools in the District is Bell High School located in the City of Bell.

2. At all times relevant herein, David Arnold (respondent) has been a permanent certificated employee of the District. On undetermined dates from 1991 through 1994 and from July 1995 through August 18, 2010, he was assigned to teach biology and science at Bell High School.

3. (A) Respondent grew up in a family in which both parents were teachers and school principals for the District. His grandparents were also teachers and principals. He attended school in the District. In junior high school, he received speech and language services for stuttering. In 1995, respondent graduated from Narbonne High School which was a magnet school for mathematics and science and where he also participated on the basketball and track teams. Respondent then matriculated to Morehouse College in Atlanta where he attained a bachelor of arts degree in interdisciplinary studies with an emphasis in biology in 1991.

(B) During the summer breaks from college, respondent pursued interests in both the teaching and medical fields. From 1987 through 1989, respondent was an instructional aide at the Jordan-Locke Community Adult School where he supervised a summer youth program and tutored students. In the summers of 1989 and 1991, he volunteered at Harbor-UCLA Medical Center where he conducted preliminary screenings of patients. In the summer of 1989, he was a phlebotomist at the Veterans' Administration Hospital in West Los Angeles. In 1991, he was a teacher's assistant at the Maxine Waters Employment Preparation Center where his duties included tutoring of students.

(C) After graduating from college, respondent returned to Los Angeles. In November 1991, he accepted a teaching position with the District under a provisional contract and began teaching at Bell High School. In 1992, he was a mentor teacher for the Teach for America program. After three years of teaching, respondent left his teaching job near the beginning of the 1994-1995 school year and entered the pre-medical studies program at California State University Fullerton with the goal of fulfilling what he thought was his dream of becoming a physician. Over the next eight months or so, he took pre-medical courses, sat for the Medical College Admission Test, and applied to medical school. However, respondent had second thoughts about medical school when he realized that he missed teaching. He did not complete the pre-medical studies program or the application process for medical school and, instead, was able to return to his teaching position at Bell

High School. The same principal was still at Bell High School and welcomed respondent back for the 1995-1996 school year.

(D) In July 1995, respondent resumed teaching at Bell High School under a probationary contract. He completed coursework for his teaching credential at California State University Dominguez Hills and then attained his single subject clear credential in life science in or about 1995. In July 1997, he became a permanent certificated employee with the District. Respondent has been a credentialed teacher for the District for approximately 17 years.

4. (A) From in or about July 1995 through August 18, 2010, respondent taught the following subjects at Bell High School: biology, advanced placement biology, life and physical science, integrated coordinated science, and life skills. He received awards for his teaching. In 1997, he was nominated by a student for a teacher recognition award. In December 2001, the principal at Bell High School commended respondent for his efforts, fine work, and dedication to the students. In August 2009, he received an Excellence Award for the performance of his students on the California Standards Tests.

(B) While teaching at Bell High School, respondent was involved with the educational activities of his students outside of the classroom. Twice every school year, respondent took students on field trips to expose them to different venues for science. For example, he has taken students to museums and to the biology department at UCLA. In the 2009-2010 school year, respondent arranged for a student field trip to a laboratory and he and other teachers escorted and supervised students on a day trip to Catalina Island. He also helped with the preparation and presentation of the high school's annual Eco-Gallery, year-end parties, and the school website, by periodically taking and/or uploading photographs of his students engaged in classroom and school activities. He obtained permission of the parents for taking and using their students' photographs. Respondent has been a faculty sponsor for students' club activities and a teacher for after-school tutoring sessions and Saturday school.

5. For the school years from 1995-1996 through 2007-2008, respondent received satisfactory performance evaluations. He met and satisfied all areas of evaluation for the annual performance evaluations of instructional personnel, including the areas of planning and designing instruction, classroom performance, and general professional skills. Over the years, respondent developed a reputation at Bell High School as a strict and well-prepared teacher who was fair and capable of motivating his students to learn the subject matter. Prior to August 2010, he did not have any disciplinary history as a teacher or certificated employee of the District.

6. In addition to his teaching duties, respondent was a coach for athletic teams at Bell High School. In 1993, he was a volunteer coach for the track team in the field events. Beginning in or about 1994 and continuing until 2006, respondent was an assistant coach for the track team. In or about 2006, the head track coach decided that he was going to retire in four years and selected respondent to succeed him as the head track coach. The track teams

were comprised of both male and female student athletes. In 1997, respondent began coaching boys' basketball and was appointed the coach of the freshman and sophomore team. As a track and basketball coach, he was required to be present on the track field and in the gymnasium on the high school campus. Respondent has not received any complaints about his performance or conduct as an athletics coach.

7. (A) With respect to his daily teaching schedule, respondent taught biology in periods 1, 3, and 4 and integrated coordinated science to ninth grade students in period 2. He had conferences in period 5 and coached sports teams in period 6 and after school. His classes were evenly divided between male and female students. He had approximately 30 or more students in each of his classes.

(B) As a biology teacher, respondent taught in a classroom which had a long laboratory counter. The laboratory counter was built contiguously along and wrapped around two walls and had eight extensions or peninsula counter tops. These extensions protruded into the classroom space and were the laboratory table tops that respondent and the students used to conduct experiments and laboratory exercises. The laboratory counter and table tops had sinks and faucets. There were glass beakers and test tubes and other laboratory supplies and instruments available for the students. Between the laboratory table tops, there were five-foot wide aisles where the students stood while conducting the laboratory assignments. In the middle of the classroom, there were desks and chairs for the students. The desks were designed so that four desks could be put together into a pod for four students. Respondent arranged the desks so that there were approximately eight pods of student desks in the classroom. The pods were approximately three feet apart. Due to the large number of students in his classes, there were also single desks placed in the aisles between the counter table tops. With this number of desks, student chairs, and laboratory table tops, the classroom when occupied with students was crowded and there was little room to move around the classroom.

8. (A) While giving instruction to his students, respondent used white boards on which he wrote information and assignments with felt pens as well as an overhead screen in the middle of the classroom that he pulled down for Power Point presentations. He used a laptop computer and audio-visual equipment issued by the District to project information and data onto the screen so that the students could view the information and the visual aids. When he gave lectures and Power Point presentations, respondent had a custom or practice of standing and walking around his classroom. He circulated among the students, who were sitting during his lectures, to make sure that they were paying attention and listening to him and not talking with their peers. When he gave assignments and laboratory exercises for students to complete in class, he likewise circulated around the classroom to answer any questions, provide additional instruction, and ensure that students were doing their own work.

(B) Respondent found it difficult to walk around the classroom due to the number of students and the congregation of desks and chairs, and the small spaces between the desk pods and laboratory counter and tabletops. In addition, the classroom was cluttered

with students' backpacks. Many students kept their backpacks at their desks and wore or carried them to the laboratory counters to prevent the loss of personal items. Respondent also had a custom or practice of looking around the classroom and at students when he took attendance and while students were doing assignments at their desks. He constantly surveilled the students to make sure that they were not using any electronic devices or earphones to listen to music, had their required books and materials, were on task, and doing their assignments. On occasion, he had to take electronic devices from students to make sure they were paying attention and doing their work but returned the personal property to the students after class.

9. (A) For most of his teaching career, respondent has had a teaching style that was strict, firm, and relatively impersonal. As exhibited during the hearing in this matter, respondent tended to be somewhat aloof and impassive.

(B) For several years prior to the 2010-2011 school year, respondent was one of approximately 15 teachers in the "Humanitas" small learning community (SLC) at Bell High School. The purpose of a SLC is to provide a more individualized and personalized learning environment for students by dividing a large school, such as Bell High School, into smaller groups of students. One of the tenets or attributes of a SLC is personalization. In a Policy Bulletin for Characteristics and Attributes of Small School Learning Communities, the District has defined personalization as the "demonstration of sustained and mutually respectful personal relationships where every student is well known by a group of educators who advise and advocate for them and work closely with them and their families over time." In a SLC, a teacher is supposed to get to know his students, show concern for them, and help them to succeed. In practical terms, teachers in a SLC are required to meet with individual students in student intervention meetings to discuss the student's academic, disciplinary, or emotional issues.

(C) In or about the 2008-2009 school year, respondent participated in professional development training at an accreditation meeting of the Western Association of Schools and Colleges where he learned specific strategies for implementing personalization in the classroom. He and other teachers were advised to greet students, to ask them about their weekends, and to compliment their outfits or how they were dressed. At the end of the 2009-2010 school year, respondent had occasion to laugh during class. A student remarked that it was the first time that she had seen respondent laugh. Respondent realized that he could be more personable in the classroom or to students and vowed to implement more personalization strategies in the classroom in the next school year.

(D) Respondent, however, has a slight handicap when speaking to students or lecturing in the classroom. He stutters when speaking or lecturing. His stuttering was apparent when he testified in the hearing and corroborated by other witnesses. He is careful in choosing his words and pauses or hesitates before speaking to minimize his stuttering. Once he begins speaking, respondent's stuttering is not pronounced or disabling although he will stammer occasionally. Respondent's stuttering did not affect his testimony or apparently his teaching performance. Yet, while pausing before he begins to speak,

respondent will blink or look forward for a second or two to control his stuttering. Some students thought respondent's stuttering or his mannerism for controlling or coping with the speech impediment was a little strange and made fun of him while in the company of their peers. His attempts to be more personable when combined with his strict teaching style and mannerisms for controlling his stuttering very likely made respondent appear to be weird and socially awkward to some students.

#### 2010-2011 School Year

10. (A) The 2010-2011 school year began at Bell High School on or about July 1, 2010. Respondent was assigned to teach three periods of biology. The students in these three periods were, for the most part, were tenth graders starting their second year of high school. Since it was the beginning of a new school year, there were more than 30 students in each of respondent's biology classes.

(B) On the first day of school, respondent allowed the students in the first period biology class to select their seats for the semester as a reward or incentive for being required to come to school so early each day. Students, both boys and girls, chose to sit with or near their friends. For his other classes, respondent assigned seats to the students for the semester.

11. (A) It was not established that, from July 1, 2010, through August 31, 2010, respondent exhibited or engaged in favoritism towards the female students in his classes or gave female students more privileges or benefits than the male students.

(B) Complainant presented student witnesses who testified, in part, that respondent treated the female students in his classes better than the male students. For example, student Leslie R indicated respondent was nicer to the girls; she and student D [REDACTED] F stated respondent let girls sit together with friends in class. Student N [REDACTED] R testified that respondent favored the female students by letting them sit where they wanted. Student L [REDACTED] Z testified respondent gave hall passes to girls. Both N [REDACTED] R and L [REDACTED] Z claimed that respondent gave them higher grades because they were girls. Student V [REDACTED] V said she noticed respondent allowed female students to do more things in his class, such as go to the restroom and sit with friends. Student J [REDACTED] S stated girls were chosen as teacher's aides more often than boys. D [REDACTED] C stated respondent allowed the female students to "get away with things." She said she received an "A" in respondent's class and never studied. Student D [REDACTED] O testified respondent was nicer to the girls and spoke to them more often. Student T [REDACTED] R claimed respondent took photographs only of the girls after asking them to pose and gave academic credit to girls even when they did not complete assignments.

(C) However, the weight of the probative evidence demonstrated that respondent did not give more privileges to the female students in his classes or treat them in a manner that was more favorable than the way he treated the male students. Respondent did not allow only female students to select their seats in his classes. As stated above, on the

first day of school in July 2010, respondent allowed all pupils in his first period biology class, including the boys, to choose their seats as a reward or incentive for being required to come to school so early each day. Like other pupils in first period biology, D ■ C, L ■ R, D ■ F, and N ■ R, who were all friends, chose to sit together at the same pod of four desks. Respondent did not let students in his other classes choose their seats. Respondent had teacher's aides but did not choose only female students to be his aides. When he asked students whether anyone wanted to act as a teacher's aide, the female students volunteered more often than their male counterparts. Respondent did not give more hall passes to girls than boys. All students in his classes were allowed to have two hall passes for the semester. Respondent found that the female students asked to visit the restroom more frequently than the male students, due to feminine health reasons. Respondent let the female students go to the restroom as needed. Moreover, respondent did not take photographs only of the female students. He took photographs of both boys and girls while they were all engaged in academic activities and he submitted the photographs to school personnel for the Eco-Gallery, school exhibits, and the school website. When he took photographs, respondent did not focus solely on the girls or ask them to pose.

(D) Respondent did not give higher grades to girls just because of their gender and did not let girls to do less work than the boys or to skip doing work for the same grade. None of the students who complained about respondent favoring girls in grading were aware of how respondent graded their assignments or tests or how he assigned grades to them. In the first week of August 2010, he provided the students' grades for the first progress report of the 2010 fall semester and held parent conferences on or about August 12, 2010. As corroborated by student E ■ R, respondent posted lesson plans and bonus grading points on the board in his classroom. As corroborated by teacher Jessica Esparza nee Rivera, respondent also posted the students' grades in his classroom. In other words, the students in respondent's classes knew or should have known their grades in his class on an ongoing basis prior to any progress report and knew or should have known the effect that their performance on certain assignments would have on their overall grades. Respondent treated and graded both the female and male students in his classes in the same fair manner and assessed grades based solely on their academic performance.

August 16, 2010

12. (A) Seven weeks into the 2010-2011 school year, on or about August 16, 2010, respondent gathered the students in his first period biology class around a table to view a diagram or chart that he had laid out for them. Student D ■ C stood in front of the table, inadvertently blocking the view of other students. D ■ C was a tenth grader, whose older sister S ■ and her sister's friends had been students in respondent's class in prior school years. Her sister told D ■ C before the school year that respondent was a "perv," which was short for pervert.

(B) Because D ■ C was standing in front of the diagram on the table, respondent placed a hand on her waist at her beltline and moved her to one side of the table.

D ■ C turned around, thinking another student was pushing her. A male student gestured and/or said that it was not him. When she realized that it was respondent who had moved her, D ■ C became upset and mad. She thought respondent was going to try to move her again in the same manner and put up her hand to signal stop, left the group of students around the table, and went back to sit at her desk.

(C) At her desk, D ■ C used her cellular telephone and called or sent a text message to her sister to tell her about this incident. Her sister encouraged her to file a complaint with the school principal or authorities at Bell High School.

13. (A) On August 16, 2010, D ■ C's sister S ■ called Bell High School and spoke with Assistant Principal David Arenas. S ■ reported to the assistant principal that, when she was a student in respondent's class in a prior school year, respondent "repeatedly touched her shoulders and watched her in a way that made her feel that he was 'checking her out.'" S ■ also stated that her sister D ■ C was the subject of similar behavior in respondent's class in the current school year.

(B) On August 16, 2010, Assistant Principal Arenas summoned D ■ C to his office at Bell High School. The administrator met with the student and had her write a statement in her own handwriting. D ■ C described the incident that had occurred that day in respondent's classroom.

(C) In her written statement, D ■ C referred to another alleged incident that involved another student and possible sexual abuse. D ■ C wrote that respondent had inappropriately touched L ■ R when she was bending over a table; the student reported that respondent walked behind L ■ R, placed his hand on her back, and rubbed "his privates" on her buttocks. D ■ C also told the assistant principal about alleged incidents involving two other students.

14. (A) Following the receipt of D ■ C's statement, Assistant Principal Arenas summoned students L ■ R, D ■ F, and N ■ R, all of whom were enrolled in respondent's first period biology class with D ■ C. All four female students were friends and sat together at the same pod of desks in respondent's class. After speaking with D ■ C, the assistant principal interviewed the three other girls and asked them to write statements.<sup>1</sup>

(B) School administrators then asked the City of Bell Police Department to conduct a criminal investigation. On August 16 and 17, 2010, police officers interviewed

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<sup>1</sup> In November and December 2012, students who had given written statements to the assistant principal were questioned or interviewed by an investigator hired by respondent's counsel and asked to write additional statements. While those statements were admitted into evidence, the Commission deemed those additional statements as unreliable due to what the Commission perceived as dishonest or unethical tactics by the investigator to gain access to the students in their homes and obtain their statements. As such, the Commission did not make any findings from those interviews.



respondent, the four female students referenced above, and a number of other students from respondent's four periods of classes. Four additional students submitted written statements. The Bell Police Department presented its investigative report to the Los Angeles County District Attorney's office and requested the filing of criminal charges against respondent. The criminal case was rejected and the police investigation was closed.

(C) On August 18, 2010, the District removed respondent from the classroom and replaced him with a temporary teacher. Respondent was assigned to a District office and placed on paid administrative leave. On September 30, 2010, after the police investigation was closed, the District assigned its Employee Relations Investigative Unit (IU) to conduct an administrative investigation into the students' allegations of respondent's misconduct. On October 7, 2010, IU investigators interviewed the four female students, D [REDACTED] C, L [REDACTED] R, D [REDACTED] F, and N [REDACTED] R. On October 8, 2010, an IU investigator obtained the Gateway laptop computer that was issued to and used by respondent. On October 12, 2010, a forensic analysis or scan was completed upon the laptop computer. The forensic scan revealed that inappropriate images had been saved on the laptop computer.

(D) On January 12, 2011, IU investigators interviewed respondent. He told the investigators that he did not recall ever having knowingly or intentionally touched any students. When asked whether it was ever appropriate to touch students, he stated that it was appropriate when he needed to get students' attention and they were not responding to him. Respondent denied giving preferential treatment to any students with respect to grades or assignments. He denied the four female students' allegation that he did school work or assignments for them. When asked whether he constantly asked female students about what they did over the weekend, respondent replied that he asked all of his students about their weekends and sometimes used the query as a greeting to an entire class. When informed that pornographic images were found on his laptop computer, respondent replied that he did not know about the images or how the images were placed there. He denied having ever viewed pornographic images on any internet websites on the laptop computer.

(E) On January 28, 2011, IU investigators interviewed two additional students who were enrolled in respondent's classes. The investigators tried several times to contact D [REDACTED] C's sister S [REDACTED] but were unable to do so. On February 17, 2011, the lead IU investigator completed the District's administrative investigation and prepared a report.

15. On December 15, 2011, the District issued a Notice of Unsatisfactory Acts of Certificated Employee and a Notice of Suspension of Certificated Employee to respondent in connection with his alleged conduct in the classroom during the first two months of the 2010-2011 school year. On April 12, 2012, the District issued the Accusation and Statement of Charges to respondent who then filed a Notice of Defense to request a hearing. In or about April 2012, the District placed respondent on unpaid administrative leave. This matter ensued. Jurisdiction exists in this matter.

Student D ■ C

16. (A) On or about August 16, 2010, while D ■ C and other students stood around a classroom table on which respondent had placed a diagram or chart for them to view, respondent placed his hand on D ■ C's waist or at her beltline and moved her to the side. Respondent moved D ■ C because she was standing in front of the table and blocking the view of other students.

(B) It was not established that respondent placed both of his hands on D ■ C's waist. Nor was it established that respondent grabbed D ■ C by her waist as she claimed in her written statement. On direct examination, D ■ C testified that respondent put a hand on her back to move her. On cross examination, D ■ C said she felt a hand on the left side of her back. As such, the evidence demonstrated that respondent used one hand to move D ■ C from the front of the table. The student's original complaint that respondent had "grabbed" her by the waist was not supported by the evidence.

(C) It also was not established that respondent attempted to place his hands on D ■ C's waist a second time to physically move her or that D ■ C blocked or stopped respondent from touching her again. Rather, D ■ C became upset after realizing that respondent had moved her by putting his hand on her waist and she thought respondent was going to try to move her again. She put up her hand to stop what she thought was going to be respondent's next action. The evidence did not demonstrate that respondent tried to move the student a second time.

17. It was not established that, during the period from July 1, 2010, through August 31, 2010, respondent looked at D ■ C from "head to toe" while biting his lip. Insufficient probative evidence was presented to show that respondent ever bit his lip while looking at D ■ C. In her written statement, student N ■ R stated respondent "was biting his lip" when he looked at another girl who was wearing shorts. However, N ■ R did not identify the other girl or identify the other girl as D ■ C. Student K ■ A testified that respondent did not bite his lip or wink. Student J ■ M did not recall having ever seen respondent bite his lip while looking at students in her class. According to student L ■ Z, respondent did not bite his lip while looking at students. Student E ■ L testified that, on one occasion while standing in the classroom, she saw respondent lick his lips while staring at someone but she did not testify that respondent bit his lip and she did not identify that person or student. As such, the evidence on this allegation was indefinite and not convincing.

Student L ■ R

18. (A) It was not established that, on one occasion during the period from July 1, 2010, through August 31, 2010, and in the presence of D ■ C, respondent passed behind L ■ R in class, placed his hands on her back, and twisted his body so that his genital area rubbed up or against L ■ R's buttocks. Nor was it established, as D ■ C recounted in her

written statement, that, during this same incident, respondent rubbed his "privates" on L [REDACTED] R's "bottom" or buttocks while L [REDACTED] R was bending over a table. These allegations, which were based on D [REDACTED] C's written statement, were not supported by the evidence and were largely untrue.

(B) On an undetermined date in the first two months of the 2010-2011 school year, respondent assigned a laboratory exercise to his first period biology class. L [REDACTED] R and other students stood at and around laboratory table tops to conduct the exercise. In order to observe the students while they performed the exercise and provide instruction or guidance, respondent walked around the classroom. He had to maneuver around and between the students, the pods of desks, and laboratory counters or table tops to make his observations. As he passed the countertop where L [REDACTED] R was working on the exercise, respondent turned sideways to walk through a narrow space between L [REDACTED] R and another student or the opposite countertop. To make sure that he did not touch L [REDACTED] R with his body or that L [REDACTED] R did not back up against him while he passed behind her, respondent put his hand on her back for one second, gave a verbal cue, and quickly walked sideways through the space. Other than his hand on the student's back, no part of respondent's body came into contact with L [REDACTED] R or her buttocks.

(C) L [REDACTED] R corroborated that respondent passed behind her in class while she was bending over the table top and looking at liquid in a glass container and touched her in the center of her back. She did not testify that respondent touched her buttocks with his crotch or genital area. D [REDACTED] F saw respondent touch L [REDACTED] R on the back during the laboratory exercise and noticed that L [REDACTED] R looked uncomfortable. D [REDACTED] F added that there was room for respondent to pass by L [REDACTED] R without having to touch her back but also admitted that she saw the incident at a 90 degree angle. She also did not have a direct or unobstructed view of the incident. In addition, according to D [REDACTED] C's testimony, there was very little room behind L [REDACTED] R when respondent walked through the space behind her and put his hand on her back. D [REDACTED] C confirmed that respondent walked through the space quickly and did not linger behind L [REDACTED] R. Other than D [REDACTED] C's written statement, no evidence was presented to show that respondent rubbed his genital area or crotch against L [REDACTED] R, committed any act of sexual abuse, or exhibited any sexual or inappropriate intent when he walked behind the student.

19. (A) It was not established that, on undetermined dates between July 1, 2010, and August 31, 2010, respondent entered the gymnasium after school and watched student L [REDACTED] R from across the gymnasium while she practiced with the girls' volleyball team.

(B) During early part of the fall semester of the 2010-2011 school year, L [REDACTED] R was a student-athlete on the girls' junior varsity volleyball team. The girls' junior varsity volleyball team held its practices on the second floor of the gymnasium three times weekly during sixth period and after school. Respondent was the coach of the freshman and sophomore boys' basketball team and held basketball practices in the gymnasium during sixth period and after school. He was required to walk through that portion of the gymnasium where the girls' volleyball team practiced to go to the boys' physical education

office and retrieve and return the basketballs for his team's practices. Whenever he entered the second floor of the gymnasium, respondent opened a door that made a distinctive noise which drew the attention of the coach of the girls' junior varsity volleyball team. Respondent walked by the volleyball practice court on his way to the boys' physical education office at least three times weekly. He looked at the volleyball practice to make sure that he did not get hit by one of the volleyballs being used by the players. Respondent did not watch or look at L [REDACTED] R or any other female student-athlete while walking through the gymnasium. He did not stop to watch the volleyball practice or to watch or look at L [REDACTED] R while she practiced volleyball. The junior varsity volleyball coach did not see respondent looking at his players or at L [REDACTED] R and did not see respondent act in any inappropriate manner in the gymnasium.

(C) In her written statement, L [REDACTED] R indicated that, three or four times during volleyball practice, respondent would give her "a very weird look" and would not stop looking at her until he was out of the gymnasium. When she testified at the hearing, L [REDACTED] R could recall only one occasion that respondent looked at her in the gymnasium during volleyball practice. She indicated that respondent came into the gymnasium carrying basketball equipment and that he did not stop and stare at her and did not smile or smirk at her. When weighed against other substantive evidence, including the testimony of respondent and the volleyball coach, the written statements and testimony by L [REDACTED] R and D [REDACTED] C did not demonstrate that respondent watched L [REDACTED] R from across the gymnasium or looked at her for an inappropriate reason.

Student N [REDACTED] R

20. It was not established that, on one or more occasions during the period from July 1, 2010, through August 31, 2010, respondent passed N [REDACTED] R and touched her on the waist, making her feel uncomfortable. No probative evidence was presented on this allegation. N [REDACTED] R did not mention in her written statement that respondent had touched her waist. She testified, in fact, that respondent did not touch her.

Student D [REDACTED] F

21. (A) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent made a fist or fists with his hand or hands and then touched student D [REDACTED] F on the side of her body with his fist or fists.

(B) The evidence on this allegation was not persuasive. In her written statement, D [REDACTED] F wrote that, "[i]n the beginning of class", which was presumably on August 16 when she made her statement, respondent "made a fist and touched [her] side w/o saying anything." When she testified on direct examination, D [REDACTED] F stated that, in fact, respondent did not touch the side of her body. On cross examination, she said respondent touched her back once. In other words, D [REDACTED] F provided testimony that contradicted and did

not support her written statement. When questioned again on re-cross examination, D ■ F testified that respondent made a fist, touched her mid-back from one side to the other with his knuckles, and, while doing so, opened his hand to touch her back with his fingertips. D ■ F's testimony about this alleged incident was not believable, for it was not clear how she could have possibly seen or felt respondent opening or closing his hand and touching her back with his knuckles and fingertips when these purported acts occurred behind her.

(C) In addition, D ■ F exhibited a tendency to embellish her narratives. For example, in her written statement, she alleged that, during a laboratory exercise, respondent "put his hand and slid it through my friend D ■'s back." However, D ■ F then admitted that she did not actually see respondent touch D ■ C, D ■ C's waist, or any other girls. While she was certainly an intelligent and charming student, like her peers, D ■ F was not a credible witness.

22. It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent looked at D ■ F up and down, resulting in her feeling weird and not wanting to be looked at in that manner. In her written statement on August 16, 2010, D ■ F stated that, during first period biology class that day, respondent looked at her and her friends "weird as usual." However, D ■ F testified that respondent did not look at her in class and, if he did, she did not notice him looking at her. D ■ F did not provide any statement or testimony that respondent looked at her up and down.

23. (A) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent repeatedly brushed up against D ■ F or touched her hips, back, and shoulders.

(B) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent leered or looked down D ■ F's shirt.

(C) No probative evidence was presented on these allegations. It was not clear what report or evidence that the District may have relied upon to make these allegations.

Student V ■ V

24. On one or more occasions from on or about July 1, 2010, through August 18, 2010, respondent touched student V ■ V on her upper back and shoulders during fourth period biology class. Respondent touched V ■ V on her upper back and shoulders four or five times in the classroom. He touched her in a gentle way but not in a sexual way. He did not trace or run his fingers across her back. Nevertheless, V ■ V was made to feel uncomfortable in class by respondent touching her upper back and shoulders. She tried to avoid him by moving closer to her desk.

Student K [REDACTED] A

25. (A) From on or about July 1, 2010, through August 18, 2010, during fourth period biology class, respondent touched student K [REDACTED] A on her upper back and shoulders. He touched or patted K [REDACTED] A on her upper back on two or three occasions and on her shoulders on two or three occasions. K [REDACTED] A was made to feel uncomfortable in class when respondent touched her on the upper back and shoulders. She tried to avoid respondent during class by not asking questions and moving in her seat away from him when he walked by her desk.

26. (A) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent passed his fingers across K [REDACTED] A's back "from left to right when he walked passed [sic] her."

(B) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent grabbed K [REDACTED] A's shoulder and gave her looks.

(C) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent grabbed K [REDACTED] A's shoulder for an unnecessary amount of time and leered at her.

(D) In her written statement given on or about August 16, 2010, K [REDACTED] A wrote that "it was twice that [she] felt that [respondent] made [her] feel sexually uncomfortable." The student indicated respondent "would pass his fingers gently across [her] back from [her] left shoulder to [her] right shoulder or visa [sic] versa, whichever way he was passing by." She added that, a couple of weeks later, respondent "would grab onto [her] shoulder for an unnecessary amount of time." In other words, K [REDACTED] A reported to the assistant principal on August 16, 2010, that respondent touched her twice. When she testified at the hearing, K [REDACTED] A said that respondent "slid" his fingers across her back on two to three occasions and grabbed her shoulder on two to three occasions. She added that, on one of those occasions, respondent kept his hand on her shoulder and massaged it. Regarding the looks that respondent purportedly gave her, K [REDACTED] A testified that respondent did not look at her in an inappropriate manner. Rather, she stated that respondent looked at her once when she was leaving his class and smiled at her. She characterized his look as flirtatious. In testifying in this matter, K [REDACTED] A thus embellished the statements that she gave in her written report, which had the effect of diminishing the reliability of both her written report and testimony. Moreover, no evidence was presented to corroborate that respondent slid or passed his fingers across student K [REDACTED] A's back or grabbed or massaged her shoulder. In fact, the student's best friend, V [REDACTED] V, who sat at the same pod of desks with her, testified only that respondent touched K [REDACTED] A's back.

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Student T ■ R

27. (A) It was not established that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent inappropriately touched female students in the presence of the male student T ■ R, a male student.

(B) In the written statement that he gave to the assistant principal on August 17, 2010, T ■ R stated, "[O]ne time [his] friend K ■ R was wearing short's [sic] and she had like a cut so the teacher [respondent] saw and he touched her like going up and she felt uncomfortable. Well he is a perv[.]" During the hearing, T ■ R testified about the occasion when K ■ R was wearing shorts and had a cut on the top of her thigh. T ■ R testified that respondent asked, "What is that?" and then touched K ■ R's thigh with his "whole hand, kind of." T ■ R added that K ■ R "freaked out" and stated something to the effect that, "Oh my God, he touched my leg!" T ■ R testified respondent touched K ■ R's thigh without pointing out the cut on her thigh. The complaint by T ■ R was not corroborated by K ■ R or any other student and was therefore not credible.

(C) K ■ R was first called as a witness during complainant's case-in-chief and prior to T ■ R being called as a witness. Initially, she testified that respondent brought his body a bit too close to other girls during her third period biology class but she did not recall respondent touching any girls in class. She did not testify that respondent had touched her in any way. K ■ R was not asked about a cut on her thigh or the alleged incident referenced by T ■ R in his written statement and testimony. Later, during the rebuttal phase of the hearing, K ■ R was called again to testify.

(D) With respect to this alleged incident, K ■ R came to school on an undetermined date wearing shorts and had a three inch cut on her left upper thigh. She had cut her leg shaving the night before. The cut was visible on her thigh. T ■ R had noticed the cut or scab during the nutrition period just before biology class. K ■ R testified on rebuttal that, while she was sitting at her desk, respondent noticed her cut while he was walking around the classroom. She testified that, from two or two and one-half feet away, respondent pointed out her cut with an index finger, asked about it, and placed his finger within "one centimeter" of her thigh. She testified she was made to feel uncomfortable because respondent had intruded into her private space. At no time prior to her testimony did K ■ R report to school authorities that respondent had touched her leg or thigh.

(E) The allegation by T ■ R that respondent touched K ■ R's thigh or leg was not corroborated by the testimony of K ■ R and, in fact, K ■ R ostensibly denied that the incident occurred. First, K ■ R did not testify about this incident when she was first called as a witness. She explained that she did not testify about the incident earlier in the hearing because she was not asked about it and it was not brought to her attention. She added, however, she did not recall the incident when she first testified during the hearing. Second, K ■ R testified that it was upsetting to her that she could not recall the incident but indicated she was trying to forget about it. Third, and most importantly, K ■ R admitted she would have gotten upset if respondent had touched her. She acknowledged that

she would have reported him and would have been able to recall the incident if, in fact, respondent had touched her leg. Based on her overall testimony and that she could not recall the incident, the testimony proffered by K [REDACTED] A failed to show that respondent touched her on her thigh. The weight of the evidence suggested that respondent did point out K [REDACTED] R's cut on her thigh in class, embarrassing her in front of her peers.

28. (A) T [REDACTED] R also testified that respondent came close to girls in class and touched girls' shoulders as he walked around the classroom and passed out papers. Although he did not mention any such incidents in his written statement, which was written much closer in time to when he was a student in respondent's class, T [REDACTED] R's testimony comported with the testimony of other students who said respondent touched their shoulders and back. However, it was not established by T [REDACTED] R's testimony that respondent's conduct in touching students' shoulders was inappropriate under the circumstances.

(B) In his written statement, T [REDACTED] R also claimed that respondent stood behind student J [REDACTED] M while she was seated at her desk and looked down her tank-top shirt at her breasts. T [REDACTED] R testified that he sat five feet from J [REDACTED] M and respondent was four inches behind and to her side when he looked down her shirt. T [REDACTED] R's allegation about respondent looking down the student's shirt was not believable. If respondent had stood only four inches from her, J [REDACTED] M presumably would have noticed her teacher that close to her. However, J [REDACTED] M did not complain about respondent standing very close to her or looking down her shirt in class. No other student witnessed this alleged incident. T [REDACTED] R acknowledged that respondent frequently walked around the classroom, observed students' work on their assignments, and offered his assistance to them. Because T [REDACTED] R was the only student who purportedly observed this incident and it was not clearly established how T [REDACTED] R could have known what respondent was looking at when or if he stood behind J [REDACTED] M, the evidence was not persuasive in showing that respondent engaged in inappropriate conduct by looking down the student's shirt.

(C) As a witness, T [REDACTED] R tended to embellish or exaggerate his testimony. He testified that respondent looked at female students in a "naughty way" and as if "he wanted them." He stated respondent told girls that they looked "gorgeous" and "pretty." He asserted that respondent took photographs only of girls in the class and asked the girls to "pose" and to "put their hands on their hips." T [REDACTED] R stated he watched out for K [REDACTED] R and other girls in respondent's class because he was worried that something "bad" would happen to them and they would be "molested" by respondent. He claimed that he and "all of us" students went to the counselor's office to request that they be transferred from respondent's class to another class. However, no other evidence or testimony by other students corroborated T [REDACTED] R's bold assertions. No students complained that respondent looked at them in a sexually desirous manner or complimented them as being gorgeous or pretty. The photographs taken by respondent in his classroom depicted both male and female students engaged in classroom or laboratory work and none of the girls in the photographs were shown to be posing with their hands on their hips. No evidence was presented to show that any students requested the transfers from any counselor. T [REDACTED] R's tendency to



embellish his testimony or complaints diminished to a significant degree the credibility of both his written statement and oral testimony.

### District's Sexual Abuse and Sexual Harassment Policies

29. (A) Under its Employee-to-Student Sexual Abuse and Related Discipline Policy, the District has proclaimed its commitment to maintaining a learning environment that is free from sexual abuse of students. Allegations of sexual abuse must be reported in accordance with applicable law and District policies regarding the reporting of suspected child abuse and responding to allegations of sexual harassment of students. The District is committed to ensuring that allegations of sexual abuse of students are dealt with promptly and effectively. Upon receipt of any information requiring mandatory suspected child abuse reporting for allegations of sexual abuse, employees must file a report of suspected child abuse with the local law enforcement agency. To ensure the child's protection and appropriate administrative action, the policy suggests that the reporting employee immediately notify the site administrator or the Local District of the inappropriate conduct.

(B) After the Local District Superintendent has received information of an alleged sexual abuse report that has been filed with an appropriate child protective agency, the Sexual Abuse Policy provides that the Local District Superintendent or his or her designee, with the assistance of Employee Relations, is responsible for following up with the appropriate law enforcement agency to determine how the matter is being handled. Once a law enforcement agency is investigating the matter, the Local District Superintendent must exercise discretion as to whether the employee under investigation should be removed from the school site and the site administrator is required to immediately commence an administrative investigation into the inappropriate conduct unless informed otherwise by the law enforcement agency. If the law enforcement investigation is concluded without the filing of criminal charges, Employee Relations and/or Human Resources must consider whether to recommend appropriate disciplinary action in consultation with the Office of General Counsel.

30. (A) Under its Sexual Harassment Policy, the District has proclaimed its commitment to maintaining a working and learning environment that is free from sexual harassment. Sexual harassment of or by employees or students is a form of sexual discrimination in that it constitutes differential treatment on the basis of sex, or actual or perceived sexual orientation or gender. Sexual discrimination is a violation of federal and state law and a violation of the Sexual Harassment Policy. The District considers sexual harassment to be a major offense, which can result in disciplinary action to the offending employee, including, but not limited to, termination from employment.

(B) The following guidelines apply under the District's Sexual Harassment Policy. As set forth in Education Code section 212.5 and California Code of Regulations, title 5, section 4916, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or other verbal, visual, or physical conduct of a sexual nature made by

someone from or in the work or educational setting, whether it occurs between individuals of the same sex or individuals of opposite sexes. Sexual harassment may occur under any of the following conditions: submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress; submission to, or rejection of, the conduct by an individual is used as a basis of employment or academic decisions affecting the individual; the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment; and submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

(C) Sexual harassment may include, but is not necessarily limited to, verbal, visual, and physical conduct as well as threats, demands, or pressure. Verbal sexual harassment is unwelcome conduct such as the use of suggestive, derogatory, or vulgar comments; the use of sexual innuendo or slurs; making unwanted sexual advances, invitations, or comments; pestering for dates; making threats; and/or spreading rumors about or rating others as to their sexual activity or performance. Examples of visual sexual harassment may include unwelcome conduct such as the display of sexually suggestive objects, pictures, posters, written material, cartoons, or drawings; the use of graffiti and/or computer-generated images of a sexual nature; and/or the use of obscene gestures or leering. Physical sexual harassment is unwelcome conduct such as unwanted touching, pinching, kissing, patting, or hugging; the blocking of normal movement; stalking; assault; and/or physical interference with work or study directed at an individual because of the individual's sex, sexual orientation, or gender. Threats, demands, or pressure to submit to sexual requests in order to keep a job or academic standing or to avoid other loss, and/or offers of benefits in return for sexual favors.

#### Touching Students on the Waist, Back, and Shoulders

31. (A) As set forth in Findings 12, 16(A), 18(B) – (C), 24, and 25 above, on undetermined dates from July 1, 2010, through August 18, 2010, respondent touched D [REDACTED] C on the waist once in order to move her away from a table, touched L [REDACTED] R once on the back in order to walk behind her through a narrow space, touched V [REDACTED] V on the upper back and shoulders on four to five occasions, and touched K [REDACTED] A on the upper back and shoulders on four to six occasions.

(B) Complainant did not present any evidence or testimony by an administrator or expert as to when a teacher may touch a student, if at all. Two of respondent's character witnesses, however, presented testimony that comported with the training and experience of the majority of the Commission. Former or retired social studies teacher and track coach Ernest Aguirre did not ever see any coach touch student-athletes but he did see respondent give "high fives" to student-athletes and pats on the back, which he did not find to be inappropriate. Social studies teacher and technology coordinator Jose Barzaga

testified that it would not be appropriate for a teacher to touch or leer at students. However, Barzaga added that he has patted students on the shoulders in order to gain their attention or to stop them from talking while he gave lectures. He has also given "high fives" to student for a job well done. Barzaga further suggested that it was appropriate to pat students on the back or shoulders in order to pass or walk around a crowded classroom as long as one gave a verbal cue such as "excuse me." Barzaga has touched students to move them but he would not touch a student or female student on the waist in order to move the student.

(C) Here, respondent admitted that he may have touched or patted L [REDACTED] R, V [REDACTED] V, and other students on their backs while passing or walking by them in his crowded classroom. As established by his uncontroverted testimony, respondent gave a verbal cue, such as "excuse me," whenever he touched a student on the back or shoulders so that he could walk or pass by the student in the classroom.

32.. Based on Findings 12, 16 – 17, 29 – 30, and 31(B) – (C), above, it was not established that respondent's conduct in touching D [REDACTED] C on the waist on one occasion in the classroom was unwelcome physical conduct of a sexual nature or sexual harassment within the meaning of Education Code section 22.5 and California Code of Regulations, title 5, section 4916. While the physical contact initiated by respondent was inappropriate and unwelcome and caused consternation to D [REDACTED] C such that she was compelled to immediately file a complaint against her teacher, it was not established that respondent's conduct was sexual in nature. Rather, the evidence showed respondent touched D [REDACTED] C on the waist in order to move her to the side of a table because she was blocking the view of other students who were standing nearby. The conduct occurred in the presence of other students and did not involve any sexual intent or interest on the part of respondent as shown either by the nature of the touching or the circumstances thereof. No evidence was presented to show that respondent used, or planned to use, D [REDACTED] C's submission or rejection of the physical conduct to make an academic decision or that the conduct had a negative impact on the student's academic performance or created a hostile or offensive educational environment.

33. Based on Findings 18, 29 – 30, and 31(B) – (C) above, it was not established that respondent's conduct in touching L [REDACTED] R once on the back was inappropriate or constituted unwelcome physical conduct of a sexual nature or sexual harassment within the meaning of Education Code section 22.5 and California Code of Regulations, title 5, section 4916. Respondent put his hand on the student's back so that he could walk or pass by her in a narrow space without having any further accidental, physical contact with the student. The classroom was crowded and there was very little room for respondent to walk by or behind the student as he made his rounds in the classroom during a laboratory exercise. There was no evidence that respondent made or initiated the physical contact for an inappropriate or sexual reason. Respondent testified he gave a verbal cue whenever he touched a student to walk by the student. No evidence was presented to show that respondent used, or planned to use, L [REDACTED] R's submission or rejection of the physical conduct to make an academic decision or that the conduct had a negative impact on the student's academic performance or created a hostile or offensive educational environment.

34. Based on Findings 24, 25 – 26, 29 – 30, and 31(B) – (C) above, it was not established that respondent's conduct in touching V [REDACTED] V and K [REDACTED] A on their upper back and shoulders on several occasions in the classroom was inappropriate or constituted unwelcome physical conduct of a sexual nature or sexual harassment within the meaning of Education Code section 22.5 and California Code of Regulations, title 5, section 4916. The weight of the evidence demonstrated that respondent initiated or made physical contact with the two students in order to walk by them or around them in the crowded classroom. He indicated he always stated a verbal cue whenever he had to touch a student on the back or shoulders. As such, respondent's touching of the two students' back and shoulders was not inappropriate in the circumstances. Nevertheless, both V [REDACTED] V and K [REDACTED] A were made to feel uncomfortable in his class by his conduct. However, there was insufficient evidence to demonstrate that the physical conduct was of a sexual nature or done with sexual intent or interest. In fact, V [REDACTED] V testified that the touching on her upper back and shoulders was not sexual. K [REDACTED] A indicated that pats on her back and shoulder would be normal. It was not established that respondent used, or planned to use, the students' submission or rejection of the physical conduct to make an academic decision or that the conduct had a negative impact on either student's academic performance or created a hostile or offensive educational environment.

#### Staring or Looking at Students

35. (A) In addition to the specific allegations of leering and looking at certain students contained in the Accusation and Statement of Charges, complainant presented evidence through the testimony of a number of students that respondent generally stared at female students in his classes. Students testified respondent "checked out" the female students or looked at their breasts or buttocks. For example, L [REDACTED] R testified that respondent "checked out the girls" and looked at their chests although she was not certain how often. L [REDACTED] R, however, said she could not tell if respondent looked at her body. J [REDACTED] M stated respondent looked at girls while they were doing their classwork assignments, which made her feel uncomfortable. D [REDACTED] F testified that respondent looked at girls in a manner that differed from other teachers. D [REDACTED] F, K [REDACTED] A, K [REDACTED] R, and E [REDACTED] L stated respondent looked at girls "up and down" and at their breasts and/or buttocks. K [REDACTED] A said respondent did not look at her in that way. L [REDACTED] Z testified respondent looked at girls from "head to toe" and "checked out girls" twice each week. N [REDACTED] R indicated, in part, that respondent "checked out girls from head to toe" about three out of five days each week and when they were wearing shorts. J [REDACTED] S testified respondent looked at girls from "head to toe." D [REDACTED] C stated respondent looked at girls from "head to toe," looking at their buttocks and breasts. J [REDACTED] R testified respondent was respectful to her but looked at girls from "head to toe" and "checked them out." D [REDACTED] O stated respondent looked at girls and "checked them out."

(B) On the other hand, V [REDACTED] V indicated she could not recall respondent looking at girls in her class. J [REDACTED] M admitted respondent did not flirt or make any comments while looking at the female students. Respondent presented the countervailing

testimony of other students. W■■■■R testified respondent did not stare at girls in her class. B■■■■R stated she did not see respondent stare at girls or look at them inappropriately. A■■■■A testified respondent acted professionally and she did not see him stare at or "check out" girls in an inappropriate manner. E■■■■C testified respondent looked at both boys and girls like any other teacher would and did not stare at girls.

(C) Former colleagues of respondent indicated he always acted in a professional manner at the high school. Volleyball coach Efrain Barrajas-Alvarado never saw respondent look at girls. Counselor and former teacher Pilar Estabrook testified respondent was always respectful and professional with students and his eyes never "wandered." Social studies teacher and technology coordinator Jose Luis Barzaga did not see respondent stare or leer at girls; he observed respondent in the classroom on two occasions in the first two months of the 2010-2011 school year. Science teacher and former colleague John Reid never saw respondent act inappropriately towards or leer or stare at female students. Teacher Jessica Esparza, who was assigned to take over respondent's biology classes in August 2010, observed respondent on five occasions in the first two months of the 2010-2011 school year and found that he acted professionally in his classroom. Former teacher and track coach Ernest Aguirre worked with respondent on the high school track teams until he retired in 2010 and never saw respondent leer or stare at female student-athletes or look at girls in an inappropriate way.

36. (A) Furthermore, as set forth in Findings 26(B) – (D) above, the evidence did not establish that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent gave K■■■■A looks or leered at her.

(B) As set forth in Finding 17 above, the evidence did not establish that, during the period from July 1, 2010, through August 31, 2010, respondent looked at D■■■■C from head to toe while biting his lip.

(C) As set forth in Findings 22 and 23(B) above, the evidence did not establish that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent looked at D■■■■F up and down, resulting in her feeling weird and not wanting to be looked at in that manner.

(D) As set forth in Finding 19 above, the evidence did not establish that, on one or more occasions from July 1, 2010, through August 31, 2010, respondent watched L■■■■R from across the gym.

37. Based on Findings 35 and 36 above, a majority of the Commission determined by weighing the evidence that complainant did not prove by a preponderance of the evidence that, on one or more occasions from July 1, 2010, through August 18, 2010, respondent stared inappropriately at female students in his classroom, leered at the female students, or looked or stared at female students' breasts or buttocks. First, complainant did not prove the specific allegations pled in the Accusation and Statement of Charges that respondent purportedly looked or leered at female students, as summarized in Findings 36 above.

Complainant also failed to prove the most serious and blatantly sexual allegations of the Accusation and Statement of Charges, including the allegation that respondent passed his fingers across the back of K■■■■A, rubbed his genital area against L■■■■R, and touched D■■■■F's body. In addition, it was not established that respondent touched the thigh of K■■■■R. The failure to prove these allegations had the concomitant effect of causing the Commission to question the reliability of testimonial evidence that respondent customarily or generally looked at all or a number of female students inappropriately. Second, in their experience, the majority of the Commission was not familiar with or had ever heard students use the term "from head to toe" to describe how persons might look at others or at female students. In fact, in their written statements from on or about August 16, 2010, only one student used the term "head to toe." K■■■■A wrote that respondent gave her "these looks." D■■■■F wrote that respondent looked at her table "like checking us out." L■■■■R and T■■■■R wrote respondent gave "weird looks." In her affidavit, J■■■■R attested respondent "would 'check out' girls." The only student who used the term "head to toe" in her written statement was N■■■■R. The use of this term by so many of complainant's witnesses had a strong tendency in reason to show that the witnesses were repeating what had been suggested to them, which had the effect of diminishing the weight that could be accorded to their testimony. Third, the Commission found respondent was believable when he testified that he did not stare or look at female students or at their breasts and buttocks. His testimony was corroborated by students who testified in his defense that he did not stare at female students and, in part, by teachers and colleagues who testified as to his character and proper conduct as a teacher.

#### Personal Questions or Conversation

38. While not specifically alleged in the Accusation and Statement of Charges, complainant also presented the statements and testimony of students to complain how respondent complimented the female students and asked them questions or engaged them in conversations that were of a personal nature. For example, L■■■■R wrote that respondent asked students what they did on the weekend or how they were feeling. L■■■■R also testified respondent told girls that their outfits were nice and that they looked nice. D■■■■F said respondent asked students at her pod of desks what they had done on the weekends but she added that he did not ask for a date or make any suggestive comments. D■■■■F indicated respondent was friendly but serious when he was teaching. K■■■■A testified that respondent asked personal questions but did not elaborate as to what kind of questions that respondent asked of the students. T■■■■R indicated respondent complimented the female students. D■■■■O conceded that respondent talked to the male students and did not make any sexual or inappropriate comments.

39. Based on Findings 9 and 38 above, it was not established that respondent's custom or practice of asking students what they were doing or had done on the weekends or complimenting students on their outfits or dress was inappropriate. As described above, respondent and other teachers in their SLC at Bell High School were trained and encouraged to implement personalization strategies in their classrooms for the sake of facilitating the

academic and overall personal growth of the students. The questions or remarks that respondent asked or made to his students were innocuous and wholly in keeping with the personalization goal of the SLC. Respondent often asked students how was their weekend as a general greeting. Inasmuch as there was no evidence that respondent ever asked what could be construed as a sexual or romantic question or spoke about an inappropriate or sexually suggestive topic in front of the students, the Commission cannot conclude that respondent's questions or comments to the students were indicative of sexual harassment or other misconduct.

#### District Laptop Computer

40. Under the Employee Code of Ethics (rev. 2/03), employees of the District are required to follow the District rules, regulations, bulletins, and policies and procedures; improper conduct is not tolerated. With respect to the proper use of public resources, District employees must ensure that District facilities, equipment, and supplies, or other resources are used for District purposes only, except for occasional and limited personal use that does not interfere with the performance of duties or create an appearance of impropriety. (Exh. 34)

41. On an undetermined date, an operations coordinator for the District retrieved from respondent the Gateway laptop computer that had been issued to and/or checked out by him. On October 8, 2010, the District's IU investigator obtained the laptop computer from the operations coordinator. On October 12, 2010, the IU investigator then submitted the laptop computer to a District computer laboratory for a forensic scan. On October 12, 2010, Hong-Jan Lee, a forensic data analyst for the District, performed a forensic scan on the laptop computer. After retrieving the laptop computer from respondent, the District maintained a proper chain of custody of the equipment.

42. On or about October 12, 2010, after conducting the forensic scan, forensic analyst Lee prepared a one-page Forensic Scan Report. According to his report, Lee used a "FTK" (Forensic Toolkit) to extract 21 inappropriate or "adult pornographic" images from a file path on the laptop computer which included temporary internet files. In his report, Lee further stated:

- "I. Folder containing pornographic related images.
- "II. All of pornographic images dated as 05/11/2007."

The Forensic Scan Report (Exh. 28) and copies of the inappropriate images extracted from or found on the laptop computer (Exh. 29) were admitted into evidence. Forensic analyst Lee did not testify in the hearing and no further explanation was presented regarding his Forensic Scan Report.

43. (A) Based on Findings 14(C) – (D) and 40 – 42 above, during the two-month period from July 1, 2010, through August 31, 2010, the District found 21 pornographic

images on respondent's laptop computer. The inappropriate images were last accessed from or downloaded onto the laptop computer on May 11, 2007.

(B) Based on Findings 14(C) – (D) and 40 – 42 above, it was not established that respondent “maintained” or “saved” the pornographic images or adult websites on his laptop computer during the two-month period from July 1, 2010, through August 31, 2010. Nor was it alleged or established that respondent accessed or viewed the inappropriate images or adult websites on his laptop computer or displayed the inappropriate images or adult websites on his laptop computer so other persons or students could see unwelcome or inappropriate images or websites during this same two-month period or at any other time relevant herein.

44. Respondent first received the laptop computer from the District or Bell High School on or about June 29, 2005. On approximately six occasions from June 29, 2005, through April 26, 2010, he returned the laptop computer to the technology office at Bell High School for maintenance and record-keeping purposes. On every occasion that he returned the computer to the technology office, he picked up the computer from the technology office later on the same day. After he returned and obtained the laptop computer for the last time on April 26, 2010, respondent returned the computer to the high school about six months later on October 10, 2010, which was after he had been removed from the classroom.

45. At all times relevant herein, respondent used the laptop computer to prepare lesson plans, conduct research for his lessons, take attendance, display Power Point presentations in his classes, and participate in professional development and training meetings. He used the laptop computer in his classroom and took it home and to professional development sessions both on and off campus. On occasion, respondent left his laptop computer unattended in his classroom and at professional development meetings. He kept his Power Point presentations on his laptop computer as well as personal and family photographs.

46. Respondent insisted that he did not access adult internet websites or view inappropriate or pornographic images on his District-issued laptop computer at any time. He testified that he did not know where the inappropriate images came from or how the inappropriate images were downloaded or saved on his laptop computer. In an October 18, 2011 letter to the principal at Bell High School, respondent stated that he did not “put any pornographic images on the computer issued to [him].” (Exh. CCC)

47. Based on Findings 14(C) – (D) and 40 – 46 above, respondent violated the Employee Code of Ethics by failing to ensure that the laptop computer issued to him by the District was used only for District or educational purposes or did not create an appearance of impropriety. The discovery of the inappropriate images on the laptop computer demonstrated that, on May 11, 2007, this equipment was not used for District purposes. The images created an appearance of impropriety.



## Respondent and Character Witnesses

48. Respondent insisted that he did not view any female students as being attractive or pretty and did not judge any female students on the basis of their physical appearance. He testified he did not leer or stare at female students or their body parts or touch their upper backs and shoulders with sexual or illicit interest. Respondent recognizes that it is not appropriate or moral for a teacher to look at or touch students in such a manner. He admitted he placed his hand on students' backs to pass by the students and move about his crowded classroom and always said "excuse me" when he made physical contact. Respondent did not know and was not aware that the female students felt uncomfortable because he touched their backs to walk by them because no students complained to him. He is saddened and upset that students felt uncomfortable in his classroom and did not want to come to his class or to ask questions in order to avoid him. Respondent wants to return to teach in the classroom for the District and, if allowed to do so, he has learned that he should not make any kind of physical contact with students and give only verbal cues when he has to walk around students in his classroom. Respondent was a credible witness and demonstrated remorse for his conduct.

49. Efrain Barrajas-Alvarado has known respondent for several years. For the past five years since 2008, he has been a girls' volleyball coach and teacher's assistant at Bell High School. Prior to that time, from 2000 through 2005, Barrajas-Alvarado was a student at Bell High School. He was coached by respondent on the freshmen boys' basketball team for two months and on the track team when he was a senior. He graduated from Bell High School in 2005. During the time that he has known respondent, Barrajas-Alvarado has never seen respondent act or treat any student in an inappropriate way. In July and August 2010, he saw respondent come into the gymnasium where the girls' volleyball team practiced on a daily basis and he did not see respondent look, stop and watch, or stare at any of the female student-athletes. Respondent always walked through the gymnasium quickly and did not talk or interact or try to talk and interact with anyone. Barrajas-Alvarado did not hear any complaints about respondent from the girls on his volleyball team. He opined that respondent is a good teacher and coach. (Exh. FFFF)

49. (A) Pilar Estabrook is a counselor in the District. Since June 2012, she has been a middle school counselor at the International Studies Learning Center. From 1999 through June 2012, she worked at Bell High School as a teacher and then as a counselor. She taught science or chemistry from 1999 through 2006 and was the co-chairperson of the science department during the 2004-2005 school year. After obtaining her counseling credential, Estabrook was a counselor at Bell High School from 2006 through June 2012. She was also an assistant coach for the track team with respondent from 2001 through 2004.

(B) Estabrook has known respondent since 1999 inasmuch as they were colleagues in the science department and coaches for the track team. Since she taught eleventh grade chemistry, Estabrook and respondent had many of the same students in their classes. They worked and prepared lesson plans together in the science department. She also considers herself to be a friend of respondent; she attended his wedding in 2005. In

Estabrook's view, respondent is an outstanding and dedicated teacher who has always maintained a professional demeanor and attitude and observed proper boundaries. He was always respectful towards students. Estabrook never saw respondent leer at girls or act inappropriately with students. Respondent had a good reputation at Bell High School. He was known to be a strict but fair teacher and students learned a lot in his classroom. After she became a high school counselor and spoke with students, she received no complaints about respondent from students in her counseling workload and no requests from students asking to be transferred from his class. (Exh. MMMM)

50. (A) Jose Luis Barzaga has been a social studies teacher at Bell High School since 2001. He is a lead teacher in the Humanitas SLC and the technology coordinator. He has known respondent for 10 years as a fellow teacher and member of the Humanitas SLC. When he became lead teacher for the Humanitas SLC, Barzaga was required to observe colleagues, including respondent, while they were engaged in classroom teaching. He observed respondent in his classroom on six occasions in 2008 and 2009 and one or two occasions in the first two months of the 2010-2011 school year. Barzaga found respondent to be an enthusiastic, caring, and skillful teacher who broke his classroom into small groups for instructional purposes and provided support to students struggling with the curriculum. Respondent had a reputation for being a strict teacher and coach who required the student-athletes on his basketball teams to wear shirts and ties to school on game days. Nevertheless, respondent acted respectfully towards his students and the students respected him. Barzaga did not see respondent act inappropriately with students; he did not observe respondent leer or stare at female students or "check them out."

(B) As established by Barzaga's testimony and affidavit, teachers assigned to the Humanitas SLC at Bell High School were required to oversee not only the students' academic or instructional needs but also their social and emotional well-being. For example, teachers in the Humanitas SLC conducted intervention meetings with students and their parents to discuss their academic and emotional concerns. Moreover, as part of the personalization goal of the SLC, respondent and other teachers were encouraged to show that they cared about the students and to ask them what they did or what movies they might have seen on the preceding weekend. Respondent also helped to organize the Eco-Gallery that was held every year in the spring at Bell High School and for which students made presentations and displayed their research. Respondent provided photographs of his students engaged in school activities for the Eco-Gallery as well as for the school website. Barzaga confirmed that respondent stuttered when he spoke. (Exh. JJJJ)

51. John K. Reid has been a science teacher at San Pedro High School for three years. Previously, he taught at Bell High School for eight years from 2002 through 2010. He worked with respondent in the science department and got to know him as a mentor and friend. As members of the science department, Reid and respondent developed and shared curriculum and lesson plans and prepared examinations. Reid had the opportunity to observe respondent instruct students in the classroom on three or four occasions. In Reid's opinion, respondent was one of the finest science teachers at Bell High School and had excellent pedagogy and classroom management skills. He found respondent to be well-prepared and

dynamic. Respondent treated his students with respect and motivated them. Reid never saw respondent behave inappropriately with any student or look or stare at female students. Reid never heard of any complaints about respondent.

52. (A) Jessica Esparza, formerly known as Jessica Rivera, is the teacher who was assigned to teach respondent's classes for the remainder of the fall semester after he was removed on August 18, 2010. She taught at Bell High School for two years until October 2012. Prior to that, she taught at Nimitz Middle School in Huntington Park from 2007 through June 2010. Currently, she is a teacher at Gage Middle School in the District. Esparza has known respondent for 16 years, having graduated from Bell High School in 1999 where she participated on the cross-country and track teams and was coached by respondent for two years. She considers respondent to be a colleague and a friend.

(B) As a colleague of respondent in the science department at Bell High School, Esparza observed respondent while he taught students in his third period biology class, which was her conference period, on five occasions during July and August 2010. She found respondent was an excellent teacher who communicated goals of the lessons and explained the subject matter to the students. Esparza noted respondent moved around his classroom to make sure that the students remained on task, and that his classroom was crowded with approximately 34 students. He encouraged the students to ask for help if they needed it. Respondent had good rapport with the students and acted appropriately with them. Esparza found that respondent managed his classroom well and created a positive learning environment for the students who were engaged. Esparza did not see respondent behave inappropriately with any female students. He did not touch female students or look at them inappropriately. In Esparza's opinion, respondent was respectful towards male and female students. The students appeared to respect respondent and Esparza did not hear any negative comments about respondent from students or other teachers.

53. (A) Ernest Aguirre testified on behalf for respondent. Aguirre is a retired social studies teacher and head coach for the track teams at Bell High School. He worked at Bell High School from 1984 until 2009. He has known respondent for approximately 20 years. In or about 1993, he recruited respondent to be an assistant track coach. Respondent was an assistant track coach under Aguirre from 1993 until 2006 when he was selected by Aguirre to become the head track coach. Aguirre chose respondent to become an assistant and head track coach because he trusts respondent's judgment and has confidence in his abilities. Aguirre considers respondent to be a good friend and has invited him to family events. Respondent tutored two of Aguirre's two daughters in biology.

(B) Aguirre opined that respondent is an excellent teacher and role model who is dedicated to his profession and to helping young people succeed. Aguirre believes that respondent loves his job with the District and would not do anything to jeopardize it. In Aguirre's view, respondent is well-respected by his colleagues and has received only positive evaluations from his supervisors. He gave presentations at staff development meetings, tutored students, and communicated well with students and parents in the Latino community. Aguirre added that respondent was a good track coach. He was respected by other coaches

in the District. The track team at Bell High School included female student-athletes who comprised about 45 percent of the participants. The student-athletes practiced or had meets five days each week from January through June each spring semester. The female student-athletes wore track shorts and tops that were relatively revealing. Working with and observing respondent coach the track team for 16 years, Aguirre never saw respondent act or look inappropriately at any student-athlete. Aguirre never saw respondent leer or stare at female students or look at them in an inappropriate manner. Aguirre saw respondent give congratulatory "high fives" and pats on the back to student-athletes after a good effort or result but did not see respondent touch students improperly. Aguirre never received any complaints from students about respondent.

54. Several of the students who testified on behalf of complainant actually thought respondent was a good teacher or stated that they did well in his class. L [REDACTED] R thought respondent was a good teacher and should be allowed to keep teaching but not at Bell High School. She added that she thought respondent was not a sexual predator but, rather, a weird and socially awkward person. L [REDACTED] Z thought respondent was a good teacher; she enjoyed being in his class. D [REDACTED] F thought respondent was a "great biology teacher" and she appreciated him as a teacher. K [REDACTED] A stated she was a good student in biology and did well in the class. N [REDACTED] R liked her biology class. K [REDACTED] R indicated she got a good grade in biology.

55. Allegations contained in the Accusation and Statement of Charges or raised by the parties at the hearing in this matter for which there are no specific findings in this Decision were unproven or deemed surplusage and were therefore immaterial to the disposition of this matter.

\* \* \* \* \*

Pursuant to the foregoing findings of fact, the Commission on Professional Competence makes the following determination of issues:

#### LEGAL CONCLUSIONS

1. Complainant has the burden of proof in this matter inasmuch as the District is seeking to dismiss respondent from his employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2. It is well settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the

testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Ibid.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the trier of fact may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) The testimony of “one credible witness may constitute substantial evidence.” (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

3. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(1), and 44939, for immoral conduct in that it was not established that respondent engaged in any immoral conduct, based on Findings 1 – 55 above.

In general, immoral conduct has been defined as that which is hostile to the welfare of the general public and contrary to good morals. Immorality is not confined to sexual matters but also includes conduct indicative of corruption, indecency, depravity, dissoluteness, willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community and an inconsiderate attitude towards good order in the public welfare. (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

In the instant matter, the evidence did not demonstrate that respondent engaged in any immoral conduct. The allegations in the Accusation and Statement of Charges that charged or connoted sexual conduct or conduct indicative of indecent or depraved intent or interest on the part of respondent vis-à-vis female students in his classes were not proven. Respondent did not rub his genitals against L [REDACTED] R as he passed behind her during a laboratory exercise. He did not pass his fingers across the back of K [REDACTED] A or grab her shoulders. He did not touch the side of D [REDACTED] F’s body with his fist. Respondent did not leer at female students or look at them up and down as if he were “checking them out” as sexual objects. Respondent did touch the waist of D [REDACTED] C, the back of L [REDACTED] R, and the upper back and shoulders of V [REDACTED] V and K [REDACTED] A but not for any sexual purpose, prurient interest, or an inappropriate reason. He touched D [REDACTED] C’s waist in order to move her from the front of a table because she was blocking the view of other students. He touched L [REDACTED] R on the back so that he could walk quickly behind her during a laboratory exercise. He touched the upper backs and shoulders of V [REDACTED] V and K [REDACTED] A as he passed by them or around them in his crowded classroom. He always gave a verbal cue when touching a student on the upper back or shoulders. That inappropriate or pornographic images were found on his District-issued laptop computer did not connote immoral conduct either, for the images were saved on the laptop computer more than six years ago in May 2007 and it was not shown that respondent viewed the images.

4. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(7), for persistent violation of or refusal to obey reasonable regulations prescribed for the governance of public schools by the State

Board of Education or the governing board of the school district, based on Findings 1 – 55 above.

Under Education Code section 44932, subdivision (a)(7), the violation must be persistent or “motivated by an attitude of continuous insubordination.” (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

Here, complainant did not prove that respondent persistently violated any school rules or regulations. First, upon performing a forensic scan of the laptop computer issued to respondent, the District found that 21 pornographic and inappropriate images were saved or stored on the laptop computer. The saving or storage of the inappropriate images on the laptop computer constituted a violation of the District’s Employee Code of Ethics in that the District-issued laptop computer, a public resource, had apparently not been used for proper District or educational purposes. However, the forensic scan revealed only that the images were dated May 11, 2007. No evidence was presented to show that respondent viewed the images on May 11, 2007, or on any other date. Nor was it shown that respondent used or continued to use the laptop computer to access and view inappropriate websites and/or images. As such, no evidence was presented to show that respondent persistently violated the Employee Code of Ethics by using the laptop computer to access, view, or save inappropriate images.

Second, complainant did not demonstrate that respondent violated the District’s Employee-to-Student Sexual Abuse and Related Discipline Policy or its Sexual Harassment Policy. The preponderance of the evidence did not show that respondent engaged in sexual abuse or sexual harassment of female students. He did not rub his crotch against a female student or touch other female students on their backs, sides, or thighs in an inappropriate or sexual manner. He touched the waist of D [REDACTED] C to move her from the front of table as she was blocking the view of other students. He touched the back or upper backs and shoulders of three other students in order to pass or walk by them in his crowded classroom. His actions did not constitute sexual abuse or sexual harassment. Respondent did not leer at female students or look at them or their body parts in an inappropriate or unprofessional manner.

5. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(1), for unprofessional conduct, based on Findings 1 – 55 above.

As one of the specific grounds for which a permanent certificated employee may be dismissed from employment, unprofessional conduct has a broad import, for it refers generally to conduct demonstrating unfitness. However, a particular act or omission on the

part of a teacher may constitute not only unprofessional conduct but also evident unfitness for service and a persistent violation of or refusal to obey prescribed rules and regulations. (*Perez. v. Commission on Professional Competence* (1983) 149 Cal. App. 3d 1167, 1174-1175; *Board of Education v. Swan* (1953) 41 Cal. 2d 546, 551.) Unprofessional conduct may be viewed as a lesser included form of proscribed behavior within evident unfitness for service. Conduct constituting evident unfitness for service will often constitute unprofessional conduct, but the converse is not true. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App. 4th 1429, 1445.)

6. Cause does not exist to dismiss respondent from his employment pursuant to Education Code section 44932, subdivision (a)(5), for evident unfitness for service in that it was not established that respondent engaged in conduct which demonstrated that he is not fit to be a teacher due to a defect in temperament that cannot be remedied or otherwise, based on Findings 1 – 55 above.

Evident unfitness for service means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App. 4th 1429, 1444-1445.) Unlike unprofessional conduct, evident unfitness for service connotes a fixed character trait, not remediable upon receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.* at 1444.)

In general, the determination of evident unfitness requires an analysis based on the criteria set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, to decide whether, as a threshold matter, the questioned conduct of a permanent certificated employee indicates unfitness for service. (*Board of Education v. Jack M.* (1977) 19 Cal. 3d 691, 696.) If 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. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App. 4th 1429, 1445.)

In the *Morrison* case, the California Supreme Court held that where charges of immorality or unprofessional conduct are raised in a teacher dismissal case, the applicable standard is whether the person is fit to teach. (*Morrison, supra*, 1 Cal 3d. at 229.) The terms immoral or unprofessional conduct have been held too vague, standing alone, and must be applied to a specific occupation and given context by reference to fitness for the performance of that occupation. (*Basset Unified School Dist. v. Commission on Professional Competence* (1988) 201 Cal. App. 3d 1444, 1453.) The *Morrison* case requires that the determination whether a person is fit to teach be based on an objective and analytical approach consisting of a review of the teacher's conduct and an assessment of a variety of specific criteria which include: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the respondent; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the

likelihood of recurrence of the questioned conduct; and (7) the extent that discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher. These factors assist a board of education in determining whether a teacher's fitness to teach, and whether the teacher's future classroom performance and overall impact on his or her students are likely to meet the standards of the board of education. (*Morrison, supra*, 1 Cal. 3d at 229- 230.)

Following a mandatory application of the *Morrison* standard, the Commission on Professional Competence has broad discretion in matters of teacher discipline and dismissal. The role of the Commission is not merely to determine whether the charged conduct in fact occurred, but to decide whether the conduct, as measured against the *Morrison* criteria, demonstrates unfitness to teach. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220.)

7. Discussion—In this matter, the evidence demonstrated that, from July 1, 2010, through August 18, 2010, respondent committed several inappropriate acts with students and with respect to his retention of a laptop computer. The evidence showed respondent touched student D ■■■ C once on the waist in order to move her from the front of a table, touched student L ■■■ R once on the back in order to walk or pass behind her in the laboratory section of his classroom, touched students V ■■■ V and K ■■■ A several times on their upper back and shoulders as he walked by or around them in his classroom, and had 21 pornographic images on his District-issued laptop computer from May 11, 2007. To determine whether these acts constituted unprofessional conduct or demonstrate evident unfitness for service, the Commission must measure the conduct against the *Morrison* factors.

First, respondent's touching of the students adversely affected them as they were made to feel uncomfortable in his classroom. The degree of adversity should be affixed as moderate, for, while they complained to the assistant principal, the students did not appear to have suffered any lingering or long term effects. Except for D ■■■ C, the students felt that respondent was a good teacher, enjoyed his class, or received good grades. With respect to the pornographic images on the laptop computer, the retention of images on the computer did not adversely affect students or other teachers. No evidence was presented that respondent viewed or accessed the images or displayed the images to students or school staff. Second, respondent's conduct in initiating physical contact with the students occurred three years ago and the pornographic images on the laptop computer were dated more than six years ago. Third, the type of teaching credential held by respondent had no relevance to this analysis. Fourth, extenuating circumstances existed in this matter. Respondent moved D ■■■ C by the waist because she was blocking other students from being able to see a chart or information that he had placed on a table. He touched L ■■■ R on the back and V ■■■ V and K ■■■ A on the upper back and shoulders so that he could walk around his classroom which was crowded due to the number of students and their backpacks. On the other hand, respondent's touching of D ■■■ C on the waist and L ■■■ R on the back, which was below their upper back and shoulders, constituted aggravating circumstances. With respect to the images on his computer, the forensic scan disclosed that the images were dated more than three years



prior to when they were discovered by the District. That the evidence did not show respondent accessed or viewed the images is an extenuating factor. No evidence was presented of any publicity of respondent's conduct or his removal or suspension from teaching. Fifth, there was a praiseworthy aspect to respondent's conduct in that he touched L ■■■ R on the back so he could walk quickly behind her in a small space and avoid or prevent her from backing into him. Respondent also expressed verbal cues whenever he touched a student on the upper back and shoulders. Respondent did not have or exhibit any illicit or sexual interest or intent when he touched the female students on the waist, back, and shoulders. Contrary to what was alleged in the Accusation and Statement of Charges, respondent did not rub his genital area against the student or touch, grab, or brush up against students or leer at them in an illicit or improper manner. On the other hand, there could be no praiseworthy circumstance for having pornographic images on a District-issued computer. Sixth, there is no or very little likelihood that respondent would repeat his conduct. He is now well aware how physical contact with female students makes them feel and understands that he should not touch students even if he uses a verbal cue. There was no evidence that he accessed or viewed inappropriate images on his laptop computer in the last six years or would be inclined to do so in the future. Seventh, respondent's constitutional rights were not raised as an issue in his disciplinary proceeding with the District or in this matter.

Based on the foregoing review and required analysis of respondent's conduct under the *Morrison* factors, the Commission determined that respondent committed unprofessional conduct but only for having touched student D ■■■ C on the waist in order to move her and for having pornographic images on his District-issued laptop computer. His touching of the three other students on the back, upper back, and shoulders did not constitute unprofessional conduct because respondent made the physical contact only so that he could move about his crowded classroom, and not due to any illicit purpose. He gave verbal cues whenever he touched students to move past or around them. Respondent's touching the upper back and shoulders of the three students comported with the experience of a majority of the Commission. Teachers commonly touch or pat the upper back and shoulders of students to gain their attention, stop them from talking to their peers, and put the students back on task. To touch students on the upper back and shoulders so that a teacher can move about a crowded and busy classroom without bumping into them and to avoid further contact with them is likewise not inappropriate and does not constitute unprofessional conduct. Respondent's touching of D ■■■ C's waist to move her appeared to have been the result of a lapse in judgment and was a single breach of proper decorum or boundaries but did not involve inappropriate or sexual intent. His retention of the District-issued laptop computer containing three-old-year pornographic images was unprofessional for the reason that it violated the District's Code of Ethics to properly use school equipment and avoid the appearance of impropriety. However, while unprofessional, neither the single touching of the student on the waist to move her nor the retention of a computer with pornographic images demonstrated that respondent has a defect in temperament that makes him evidently unfit for service. Respondent is a strict but fair science teacher, who received satisfactory evaluations of his performance for a number of years and was able to motivate his students to learn and excel. Respondent's commission of the two instances of unprofessional conduct

were isolated events that in all likelihood will not be repeated in the future and do not require his dismissal from employment with the District.

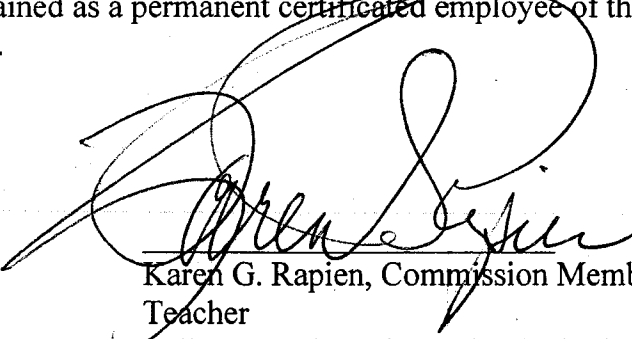
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WHEREFORE, the Commission on Professional Competence makes the following Order:

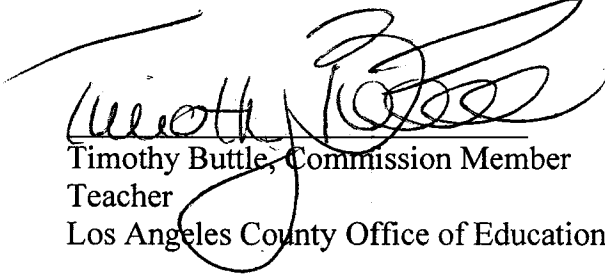
### ORDER

Accusation and Statement of Charges, OAH Case No. 2012050786, filed and issued by complainant Vivian K. Ekchian, Chief Human Resources Officer, on behalf of the Board of Education of the Los Angeles Unified School District, and against respondent David Arnold, is dismissed, based on Conclusions of Law 1 – 7 above, jointly and for all. Respondent David Arnold is retained as a permanent certificated employee of the Los Angeles Unified School District.


Dated: 9/23/13

  
Karen G. Rapien, Commission Member  
Teacher  
Fullerton Union High School District

Dated: 9/24/2013

  
Timothy Buttle, Commission Member  
Teacher  
Los Angeles County Office of Education

Dated: Sept 25, 2013

  
Vincent Nafarrate, Commission Member  
Administrative Law Judge  
Office of Administrative Hearings