BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Dismissal of:	OAH Case No. 2010030667
NANCY BEACH,	
Respondent.	

DECISION

On February 28, and March 1, 2, 3, 2011, Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter, together with Edward Chavez and Robert Petersen at Santa Ana, California.

Eric Bathen, Esq., and Jordan Meyer, Esq., represented Petitioner Santa Ana Unified School District (SAUSD).

Ernest F. Ching Jr., Esq., and Robert W. Miller, Esq., represented Nancy Beach (Respondent). Respondent was present on all days of hearing.

The parties submitted the matter for decision on March 3, 2011.

STATEMENT OF THE CASE

SAUSD seeks the dismissal of Respondent, contending that between September 2009, and January 2010, she emotionally abused and intimidated students and SAUSD employees, and created a hostile classroom environment for students, and a hostile work environment for SAUSD employees. SAUSD alleged numerous incidents to support its contention, described *post*. Based on these incidents, SAUSD contends Respondent engaged in immoral conduct, is evidently unfit for service, and has willfully refused to perform her regular assignments without reasonable cause.

Respondent denies the majority of SAUSD's allegations occurred as SAUSD purports, and denies that she created hostile environments for students or employees. Respondent seeks to retain her employment with SAUSD.

FACTUAL FINDINGS

Jurisdiction

1. SAUSD filed the Statement of Charges on or about February 16, 2010, and the Accusation on or about March 3, 2010. SAUSD served Respondent with a

Notice of Intention to Dismiss and a Notice of Intention to Suspend on or about February 16, 2010. SAUSD filed the First Amended Statement of Charges on or about June 3, 2010, and the Second Amended Statement of Charges on or about October 18, 2010.

2. Respondent filed a timely Notice of Defense, dated February 16, 2010. The additional contentions contained in the First and Second Amended Statement of Charges were deemed controverted by Respondent, in accordance with Government Code section 11507.

Respondent's Background

3. Respondent is a teacher. She is a permanent, certificated employee of SAUSD. Respondent has bachelor's degrees in psychology and music, and a master's degree in education. She has single subject credentials in music, mathematics, and social science, a multiple subject credential, and a BCLAD authorization. BCLAD is an acronym for "bilingual, cross-cultural language and development."

4. Respondent began working as a teacher with SAUSD in 1989. From 1989 through the 2007-2008 school year, Respondent taught mostly mathematics, choral, and choir at an intermediate school. Respondent has no history of discipline during the 19 years she taught at the intermediate school level.

5. In the 2008-2009 school year, Respondent moved to SAUSD's Segerstrom High School (Segerstrom) and taught mathematics. Respondent suffered no discipline during this first year teaching high school mathematics.

6. In the 2009-2010 school year, Respondent remained at Segerstrom, but instead of teaching mathematics, she began teaching five choral classes exclusively, replacing a long-standing teacher who had previously taught choral at Segerstrom.

The Period at Issue in this Matter

7. The incidents at issue in this matter occurred at Segerstrom during the 2009-2010 school year, specifically between September 2009, and January 2010.

Respondent's Advertisement and Choir Dress Payments

8. In the syllabus for her Treble Choirs class, Respondent advertised that she was available for private voice lessons at a rate of $17 for 30 minutes of lessons. No student ever signed up. In that same syllabus, Respondent informed students that they would have to pay $50 for their choir dresses. There was no evidence that any student paid any amount for his or her choir dress. After being informed of the contents of Respondent's syllabus, SAUSD staff informed Respondent that it was inappropriate for Respondent to advertise private voice lessons, nor was it accurate

that students had to pay for their choir dresses. Respondent acknowledged this information. She explained that she was unaware of the inappropriateness of advertising voice lessons or requiring students to pay for their choir dresses, but complied with SAUSD's directions.

Respondent's Interactions with Students[1]

Respondent's Outburst and Interaction with Student J.S.

9. In approximately late November, early December 2009, during chambers class, the students, while standing on risers[2], were developing choreography with Respondent. Respondent called for the students to stop moving and pay attention on numerous occasions but the students would not comply. The students were unruly and talked and danced among themselves, failing to comply with Respondent's requests for their attention. As a result, and after several unsuccessful attempts by Respondent to control the class, Respondent yelled, "shut up." Consequently, the students stopped moving and talking, and Respondent continued to teach the class. There was no evidence that Respondent's outburst harmed the students in any way.

10. At another point during this same class, most of the students, including student J.S.[3] continued to dance and move and failed to pay attention to Respondent, despite Respondent's repeated requests to stop their movements. J.S. was a senior. According to SAUSD and the deposition testimony of J.S., Respondent then walked over to J.S., grabbed his wrist firmly and said to him loudly, "just stop." J.S. got angry, but did not respond to Respondent. J.S. and the other students in the class stopped dancing. According to SAUSD and the deposition testimony of J.S., Respondent held J.S.'s wrist for between approximately five and 13 seconds and then let go. According to J.S., Respondent left no marks and did not hurt J.S. by grabbing him. Respondent and the students continued on with class. Several students in the class asserted that they saw Respondent grab J.S. by the wrist, while other students in the class asserted that they did not.

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[1] No student testified at hearing. Instead, and upon the parties' stipulation, the deposition transcripts and written statements of certain students were introduced into the record as direct evidence and numerous written student statements were introduced into the record as administrative hearsay, pursuant to Government Code section 11513, subdivision (d).

[2] Risers were described as progressively elevated steps, like bleachers, on which students would stand so that the students closest to the front were at floor level, and each row of students behind would be elevated by a consistent number of inches.

[3] All student names are referred to by initials to protect their privacy.

11. SAUSD alleged that while Respondent held J.S. by the wrist, she pulled J.S. off the riser. The evidence did not establish this allegation.

12. On or about December 2 or 3, 2009, Respondent was called to a meeting with Katrina Callaway (Callaway) regarding the J.S. incident. Callaway is an Assistant Principal at Segerstrom and had previously spoken with J.S. Respondent explained the incident to Callaway. Callaway asked Respondent if she had grabbed J.S.'s wrist. Respondent denied grabbing J.S.'s wrist, but told Callaway, that if she had grabbed J.S.'s wrist, she would have grabbed it in a specific manner, and then demonstrated on Callaway's wrist how she would have grabbed it. Respondent grabbed Callaway's wrist abruptly, in a manner that startled Callaway, but did not harm her.

13(a). At hearing, Respondent again denied grabbing J.S.'s wrist. The piano accompanist, Tanya Khurgel (Khurgel), was present in the class when this incident was alleged to have occurred, but Khurgel did not see Respondent touch J.S. Considering Respondent's testimony, the deposition testimony and written statements by J.S. and other students in the class, and all other pertinent evidence, it could not be concluded by a preponderance of the evidence that Respondent grabbed J.S.'s wrist.

13(b). Commission Member Petersen departs from the majority on this point and would find that Respondent grabbed J.S.'s wrist.

14. Respondent denied grabbing Callaway's wrist during their meeting or stating to Callaway that if she had grabbed J.S.'s wrist, she would have done it in a particular manner. Respondent's testimony on this point was unpersuasive, when considered in contrast to that of Callaway. However, it should be noted that Callaway's overall testimony was given less than full weight, as a result of her testimony regarding student A.S. (See Factual Finding 28 and Legal Conclusion 5(g).)

15. Thereafter, Respondent called J.S.'s father and informed him that J.S. was exhibiting behavioral problems in her class. Respondent asked J.S.'s father to speak with J.S. about this problem.

16. According to SAUSD, Respondent then told J.S.'s father that if J.S.'s behaviors continued, she would press charges or file a lawsuit against J.S. J.S.'s father testified that he did not recall Respondent stating that she would "press charges" but instead, he believed Respondent stated she would have to "go to court." J.S.'s father, however, could not definitively recall what Respondent specifically told him. J.S.'s father could not conclusively explain what he understood Respondent to mean by "going to court."

17. After the telephone conversation with Respondent, J.S.'s father was not upset with Respondent. J.S.'s father was mostly concerned with assuring that J.S.

acted properly at school. There was no evidence that the telephone conversation between Respondent and J.S.'s father was angry, threatening, or hostile in tone.

18. J.S.'s father displayed a forthright demeanor at hearing.

19. At hearing, Respondent denied threatening to pursue any charges or litigation against J.S. or J.S.'s father during the telephone call at issue. Respondent testified that she told J.S.'s father she would have to "write him [J.S.] up." The evidence did not conclusively establish what Respondent specifically said to J.S.'s father.

20. Several witnesses for SAUSD, including Callaway and Segerstrom's principal, Amy Avina (Avina), testified that J.S. was a good student, captain of the basketball team, and a student leader. Callaway and Avina could not recall any time before the incident with Respondent, when J.S. had been involved in any kind of disciplinary issue. Both Callaway and Avina were surprised that Respondent would characterize J.S. as a behavioral problem in her class. However, in his deposition, J.S. conceded that he was not always behaving in class and paying attention to Respondent. The evidence established that Respondent's characterization of the students in class, including J.S., during the incident in question, was accurate.

Student E.C.

21. In approximately early December 2009, E.C., a senior, was asked by his teacher to deliver a document to Respondent. E.C. went to Respondent's office, but Respondent was not there. E.C. sat in Respondent's office chair and accessed and used Respondent's computer to view and hear music. Respondent entered her office, saw E.C. at her computer, and asked E.C. sternly what he was doing there. Respondent stated sternly, and in a raised voice, that he needed to leave. E.C. made no effort in response to leave at that moment; and so Respondent placed one hand on E.C.'s right shoulder and pushed on E.C.'s shoulder to move him out of her chair and out of her office. E.C. left, and Respondent shut the door behind him. The door slammed shut.

22. In his written statement and deposition, E.C. stated that he did not appreciate Respondent touching him. E.C. characterized Respondent's touching, stating, "it wasn't, like, a shove"; instead, he described it more like a slight push. However, E.C. also referred to the touching as a "shoving." He wrote, "I didn't like it [Respondent's touching of him] at first, but, you know, that was a little extreme, her shoving me. In the end, we all—I apologized just for entering her classroom. We cleared it up." E.C. acknowledged he should not have been in her office, nor should he have accessed Respondent's computer. E.C. was not harmed by Respondent's touching.

23. At hearing, Respondent first described her touching of E.C. as a mild push to encourage his movement. However, she also described her touching of E.C. as a shove. Respondent asserted that her touching of E.C. was not violent, hard, or intended to cause any physical harm, but solely meant to encourage E.C.'s movement. The evidence supported Respondent's description.

24. SAUSD alleged that, on another day, while in class, Respondent grabbed E.C. by the wrist. The evidence did not establish that Respondent ever grabbed E.C. by the wrist.

Student A.S.

25. On or about December 9, 2009, student A.S., a 17-year-old senior, was in Respondent's class. Contrary to school policy, A.S. took her cellular telephone into class and kept it on her lap. The cellular telephone was turned on. Respondent noticed that A.S. was causing a distraction and noticed the cellular telephone on A.S.'s lap. Respondent approached A.S. and asked her for the telephone. A.S. asked Respondent several times why she wanted the telephone; Respondent continued to request the telephone. A.S. complied, while telling Respondent, "You're weird." Respondent took possession of the telephone and told A.S. to stand in the furthest corner of the classroom. A.S. complied, and remained standing as the class continued. A.S. felt embarrassed by Respondent's punishment of her, considered standing in the corner a "ridiculous" circumstance, and wanted to leave the classroom. After one or two minutes, A.S. took her school agenda book, signed herself out of class, and asked Respondent to sign the book as well, as Respondent's signature would allow A.S. to leave the class. Through this process, A.S. would be allowed to go to the school counselor's office. Respondent agreed, but told A.S. that she would escort A.S. to the counselor's office herself. Respondent took steps to take the cellular telephone to the school office with A.S. and left the piano accompanist, Khurgel, in charge of the students while she and A.S. exited the class. Respondent left A.S. at the school office, where A.S. began to cry. Respondent thereafter returned to her class.

26. A.S. explained that she cried because she was frustrated. She asserted that she was not using the telephone, but had only picked it up to see the time. Other students in the class stated that they saw A.S. texting with the telephone. A.S. further explained that she had it on her lap because she was wearing a dress and had no pocket in which to place it. A.S. also explained that she refused to keep the telephone in her purse or backpack, items she kept in another section of the classroom, because she was afraid others might steal the telephone. A.S. believed that she had not done anything wrong. A.S. felt Respondent had picked on her, and further asserted that since that episode, she did not want to return to Respondent's class, because she felt "awkward" in the classroom and she did not "feel safe" anymore.

27. Segerstrom's school policy does not allow students to have cellular telephones in the classrooms. The school policy states, "They [cellular telephones, among other electronic devices] are not to be visible or on at any time, for any reason during school hours." As the policy states, there are no exceptions. The policy further directs telephones in classes to be confiscated.

28. On direct examination, when asked whether it was appropriate for A.S. to have her cellular telephone on her lap during class, Callaway stated that it was appropriate because A.S. was wearing a dress and had no pocket in which to place it, as long as the student was not using the telephone. On cross-examination, after acknowledging the school policy and the lack of any exceptions to the policy, Callaway conceded that it was appropriate for Respondent to confiscate A.S.'s telephone. Callaway did not explain why she opined as she did on direct examination, in light of the school policy.

Respondent's Disciplinary History at Segerstrom

29. SAUSD administrative staff were made aware of Respondent's interactions with the students discussed in Factual Findings 8-28, as well as on-going problems with SAUSD staff, as set forth *post*, in Factual Findings 44-50. As a consequence, on December 14, 2009, SAUSD suspended Respondent without pay for seven days, effective December 10, 2009, through December 18, 2009.

30. Effective January 27, 2010, SAUSD placed Respondent on administrative leave with pay, while SAUSD investigated the claims against Respondent of which SAUSD personnel had been made aware.

SAUSD's Overall Allegation of Retaliation

31(a). SAUSD contended that as a consequence of the student complaints against her, staff complaints against her (see generally Factual Findings 8-28 and 44-50), and SAUSD's suspension of her in December 2009, that Respondent retaliated against her students and generally against SAUSD, by emotionally abusing students and staff, requiring students to do inappropriate assignments and take inappropriate examinations, exhibiting threatening and intimidating behaviors toward students and staff, and treating students poorly, as described *post*. The evidence did not establish that Respondent retaliated against students and staff in response to any actions by SAUSD or student and staff complaints.

31(b). Commission Member Petersen departs from the majority on this point, and would find that, by her actions, including her curt and rude manner, Respondent retaliated against students and Khurgel after returning from the December 2009 suspension.

Student K.M.

32. In or about January 2010, Respondent met with student K.M., K.M.'s mother, and K.M.'s sister. K.M. was a senior. The meeting was precipitated by an earlier incident where K.M. failed to complete a worksheet assigned by Respondent. K.M. argued that the reason she was not able to complete the worksheet was because Respondent had not taught the subject matter on the worksheet adequately or at all. K.M.'s greatest concern with Respondent at that time was that Respondent had not covered the subject matter during the semester and that Respondent had failed to develop a study guide for the class. K.M. and her mother requested the meeting to discuss these concerns. By the time of the meeting, Respondent had developed a study guide and had presented one to K.M.

33. During the meeting, K.M., her mother and her sister, all explained to Respondent how K.M. was "stressed out" by Respondent's class and the overall lack of preparation for the final examination, and the earlier lack of a study guide, particularly because final examinations approached. Respondent told K.M. and her family that, contrary to K.M.'s assertion, Respondent had been teaching and reviewing the worksheet subject matter over the course of the semester. Respondent explained to them that most students had completed the worksheet, and that if K.M. sought additional time to complete assigned work, Respondent would only be able to provide additional time if K.M. secured a reasonable accommodation from the school. Respondent further explained that such an accommodation could only be secured if Respondent had a recognized disability and an individual education plan (IEP) through the school's special education program. Respondent further suggested that if K.M. wanted to consider obtaining an IEP, she would need to talk to the school's counselor. K.M.'s sister testified that Respondent's general attitude during the meeting was "cold" and off-putting.

34. K.M.'s mother was unaware what an IEP was, but K.M., having acted as a student aide in Segerstrom's special education program, explained the IEP process to her mother. K.M., K.M.'s mother, and K.M.'s sister were upset by Respondent's suggestion. According to K.M.'s sister, and K.M., Respondent's suggestion of an IEP appeared to them more like a condescending remark meant to belittle K.M. K.M. believed Respondent was implying that K.M. was intellectually slow, or had mental retardation. K.M. described Respondent's suggestion as "absolutely horrifying."

35. K.M. described in her written statement that on the day of the meeting, she had noticed Respondent driving through the parking lot looking for a parking space. K.M. wrote, "I became very scarred [*sic*] not knowing what would happen after this meeting. I truly wouldn't be comfortable enough to remain in a classroom with her [Respondent] again."

36. The evidence did not establish that Respondent sought to belittle or offend K.M. by her suggestion. The evidence did not establish that Respondent spoke to K.M. or her family members in a condescending or belittling manner, but K.M.'s sister's characterization of Respondent as "cold" was believable, given that Respondent did not squarely dispute that description in her testimony. Furthermore, the vast majority of students and staff who provided written statements and testimony also described Respondent generally as cold, aloof, insensitive, and rude; and there was no persuasive evidence to counter these descriptions. As to K.M, however, there was no persuasive evidence that K.M. genuinely feared Respondent or was otherwise harmed by Respondent's suggestion of how to seek an accommodation for extra time for assigned work.

Respondent's Disclosure of Personal Health Information

37. Sometime between September 2009, and January 2010, while in an all-girl class, Respondent told a group of female students that she would be out of school for a time, as she was undergoing a medical procedure. A few students inquired if anything was wrong. Respondent responded, informing the students that she was undergoing a procedure to correct a problem with her bladder that made her "leak" on occasion. She explained that such a condition commonly occurs after childbirth. Some students found the information "disgusting" and inappropriate to convey to students in the classroom. Other students did not consider the information inappropriate, nor did they find it embarrassing. Some students considered it odd and many laughed as Respondent explained her condition.

38. At hearing, Respondent explained that she felt comfortable explaining the situation to the all-female class, and did not consider the information inappropriate.

Grading the Winter Concert

39. In or about January 2010, Respondent's class was preparing to perform at a winter concert. The students expected to be graded on their performance and understood that the winter concert grade was a significant portion of their overall course grade. Respondent was serving her suspension at the time of the winter concert and therefore did not attend the performance. After the concert, and after Respondent served her suspension and returned to teaching the class, Respondent told the students that she felt she could not give the students grades for their winter concert performance because she did not observe the performance. The students felt this was unfair. Students complained to the school administration. Avina directed Respondent to derive grades by seeking the input of staff who attended the performance. Thereafter, Respondent issued grades to students for the winter concert.

Respondent's Written Final Examination and Other Coursework

40. Respondent did not believe when the school year started, that a written final examination was required, but as the semester came to a close, she was led to believe a written examination was indeed required. She quickly developed a written final examination that contained what she believed was appropriate subject matter. The examination contained music notation that was photocopied from other material and pasted onto ruled paper. Respondent also cut out questions printed on other documents and pasted those onto ruled paper; questions related to the pasted music notations and these additional questions constituted the final examination.

41. SAUSD argued that the final examination was inappropriate in both appearance and subject matter. Avina opined that the examination as inappropriate in appearance and "embarrassing."

42. Respondent explained at hearing that she believed the academic quality of the examination was appropriate and that the sloppy appearance was due to the rapidity with which she had to put the examination together. There was no persuasive evidence that the examination's subject matter was inappropriate. Commission Members Petersen and Chavez, who have teaching backgrounds in music, find the examination's subject matter appropriate for Respondent's students. Thus, the examination had a messy and sloppy appearance, but the subject matter was academically appropriate.

43. On one occasion, Respondent assigned a crossword puzzle to students. The crossword puzzle's questions related to music history. SAUSD contended that the crossword puzzle was inappropriate. However, the crossword puzzle questions were thematically and academically appropriate for Respondent's class(es) and the evidence did not establish that Respondent ever assigned more than one crossword puzzle to the class.

Respondent's Interactions with SAUSD Staff

Tanya Khurgel

44. SAUSD alleged that between September 2009, and January 2010, Respondent emotionally abused and intimidated Khurgel, the school's piano accompanist. Khurgel's first language is Russian, and while she speaks English well, she feels unsure of her English proficiency. At hearing, Khurgel exhibited a good grasp of the English language, but a moderately limited vocabulary. That is, Khurgel understood the questions being asked of her and could easily make herself understood, but her word use was awkward, as might be expected of a person whose first language was not English.

45. Several students asserted that Respondent regularly spoke to Khurgel rudely, in a demeaning and condescending manner, and generally treated her badly. The students gave general examples of how Respondent would get easily frustrated with Khurgel when Respondent believed Khurgel was not following Respondent's direction or instructions, and Respondent would speak to her in a short and rude manner.[4]

46. On one occasion sometime between September 2009, and January 2010, during class, Respondent insisted that Khurgel play a musical piece in a standard "four-four" tempo, but Khurgel continued to play the piece in a "two-four" tempo. Respondent became upset and walked quickly toward Khurgel, who remained sitting at the piano. After reading the sheet music herself, Respondent understood that Khurgel was properly playing a "two-four" tempo, but Respondent failed to apologize to Khurgel for her demeanor.

47. On another occasion, during class, Respondent became upset and frustrated at Khurgel when Khurgel could not follow Respondent's direction to play a musical piece in a particular fashion. Respondent walked quickly over to the piano where Khurgel sat. Respondent moved quickly to sit at the piano bench without thought to Khurgel occupying the bench. Khurgel quickly moved out of the way and stood up while Respondent angrily explained to Khurgel how the piece should be played. Respondent angrily circled the sections of music Respondent expected Khurgel to play, while curtly stating how she "hated" Khurgel's "passive, aggressive" manner. Khurgel felt intimidated and demeaned by Respondent's statements and mannerisms. Khurgel believed that if she had not moved off of the bench quickly at that time, Respondent would have pushed into her. Respondent and Khurgel did not touch on this occasion.

48. On or about December 7, 2009, Respondent and her husband, David Stankey[5] (Stankey) approached Khurgel while Khurgel sat at the piano bench. Both Respondent and Stankey are tall. Respondent is approximately five feet, nine inches tall, and Stankey is approximately six feet, three inches tall. Khurgel is not tall. As Khurgel sat, Respondent and Stankey leaned over Khurgel and asked her if she had spoken with the school administration regarding one of the student incidents. Khurgel felt intimidated by Respondent and Stankey and consequently told them that she had not. This was untrue; Khurgel had spoken with the school administration regarding the particular student incident, but Khurgel felt intimidated by Respondent and Stankey when they asked her about it, and consequently, Khurgel felt the need to misstate the truth to Respondent and her husband. The evidence did not conclusively

[4] Most students consistently asserted that Respondent was rude and short with them in class as well.

[5] David Stankey is also a teacher employed by SAUSD, teaching at Segerstrom.

establish that Respondent or her husband spoke to Khurgel in a threatening or intimidating manner.

49(a). The evidence did not establish that on any occasion between September 2009, and January 2010, Respondent touched Khurgel, made absurd demands of her or unreasonably required her to do a job out of her job description, as alleged. While Khurgel credibly testified that she felt demeaned and belittled by Respondent's curt and short manner, and it was clear that Respondent and Khurgel were each easily frustrated by the other. The problems between Respondent and Khurgel were based on miscommunications, misunderstandings, and misperceptions on the part of both individuals. However, the evidence established that Respondent acted in a rude and demeaning manner toward Khurgel on various occasions. However, the evidence did not establish that Respondent was intending to intimidate, threaten, or otherwise harm Khurgel. Additionally, the evidence did not establish that Respondent's manner toward Khurgel was so negative that Respondent's manner objectively made a hostile work environment for Khurgel.

49(b). Commission Member Peterson departs from the majority and would find that Respondent's overall actions against Khurgel created a hostile work environment for Khurgel.

Raul Garcia

50. Between September 2009, and January 2010, Respondent interacted with the school's band director, Raul Garcia (Garcia). Garcia and Respondent were required to share office space. Garcia found Respondent a very difficult person with whom to interact. At various times, he would find furniture moved into improper and inconvenient places—actions he attributed to Respondent. Garcia believed these actions were intentional and meant to annoy and harass him. Garcia explained that Respondent would demand things instead of ask for things and would treat him rudely. On one occasion, in November 2009, Garcia entered his office and found Respondent and her husband going through Garcia's things. Garcia was concerned by this and complained to the principal, Avina. Over time, as Garcia consistently encountered Respondent to be rude and unpleasant toward him, he believed his work environment was hostile and considered resigning his position. When Garcia had brought his concerns to Avina's attention, Avina suggested to Garcia that he meet and speak with Respondent. Garcia never spoke directly to Respondent about his concerns.

51. The evidence did not establish that Respondent's actions objectively made a hostile work environment for Garcia.

Evidence of Respondent's Character and Reputation

52. Respondent proffered character evidence from individuals who have worked with Respondent in professional choirs outside of the school setting. These individuals, who have known Respondent for approximately 20 years, and have seen Respondent interact with adult choirs, and at least one non-school children's choir, described Respondent as demanding, generous, cooperative, and a good listener. They have not seen Respondent lose her temper, or yell or scream when frustrated. They further described Respondent as a nice person who is very knowledgeable and professional about music and music instruction.

LEGAL CONCLUSIONS

1. The District has the burden of proof to prove its allegations by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

2(a). Education Code section 44932, subdivision (a)(1) states, in part, that "no permanent employee shall be dismissed except for one or more of the following causes . . . (1) [i]mmoral . . . conduct. [¶] (5). Evident unfitness for service."

2(b). "Immoral conduct," means conduct that is hostile to the public welfare and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. It can be conduct that is willful, flagrant, or shameless, or conduct showing moral indifference to the opinions of respectable members of the community or as an inconsiderate attitude toward good order and the public welfare." (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

2(c). Evident unfitness for service "means 'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.'" (*Woodland Joint Unified School District v. Commission on Professional Competence* (*Zuber*) (1992) 2 Cal.App.4th 1429, 1444.) "'Evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid*.)

3. In analyzing the relevant Education Code provisions in teacher dismissal matters, the State Supreme Court noted that even where cause for discipline is found to exist, the Commission on Professional Competence is vested with discretion to decide the appropriateness of a given sanction, including dismissal. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 219-223.) The California Supreme Court reasoned that even where cause for discipline is found to exist, "a commission on professional competence is empowered to exercise its

collective wisdom and discretion to determine that dismissal is not appropriate in a given case." (*Fontana Unified School District v. Burman*, *supra*, 45 Cal.3d. at 222)

4. It is 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 the selected material." (*Stevens v. Parke Davis & Co.*, *supra*, 9 Cal.3d at 67-68 [quoting *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767].) Further, the fact finder may reject the testimony of a witness although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

5(a). Respondent did not engage in immoral conduct, nor is she evidently unfit for service, as analyzed in Legal Conclusions 5(b) through 5(n), and 7.

5(b). Respondent's outburst of "shut up" was a poor choice of words, but did not constitute immoral conduct or demonstrate that Respondent is unfit for service.

5(c). Despite the assertions by J.S., it was not established by a preponderance of the evidence that Respondent grabbed J.S.'s wrist. The evidence established that Respondent grabbed Callaway's wrist during their meeting, but Respondent denied grabbing J.S.'s wrist in that meeting. The totality of the evidence did not establish Respondent's touching of J.S. None of Respondent's interactions with J.S. constitute immoral conduct or demonstrate that Respondent is unfit for service. The evidence did not establish that Respondent threatened J.S. or J.S.'s father with pursuing criminal charges or other litigation during the telephone call between J.S.'s father and Respondent.

5(d). Respondent should not have touched E.C., but the touching did not rise to the level that dismissal would be an appropriate consequence. Both E.C. and Respondent described the touching as a shove at one point; but at other points, both E.C. and Respondent asserted that Respondent's touching was not a shove. The evidence established that the touching was a mild push meant to encourage E.C. to move out of Respondent's chair and office. The touching was not violent or harmful. Respondent's touching of E.C. did not constitute immoral conduct or demonstrate that Respondent is unfit for service. As to the additional allegation involving E.C., the evidence did not establish that Respondent grabbed E.C.'s wrist at any time.

5(e). Respondent's interactions with A.S. were entirely appropriate and failed to constitute immoral conduct or demonstrate that Respondent is evidently unfit for service. A.S. violated school policy by having her cellular telephone switched on and on her lap in class. Respondent took appropriate actions, including having A.S. stand in the corner of the classroom, and choosing to escort A.S. to the school's

administrative offices. A.S.'s assertions that she felt picked on and did not feel safe in Respondent's class after the incident were illogical, given that A.S. violated school policy and that Respondent took steps in accordance with the policy. Additionally, having Khurgel take over the class for the time it took for Respondent to escort A.S. to the administrative office was not improper and did not unreasonably require Khurgel to perform job duties outside of the scope of her own job description.

5(f). Commission Member Petersen departs from the majority and concludes that it was inappropriate for Respondent to have left Khurgel in charge of the class while she escorted A.S. to the school's administrative office.

5(g). In her testimony regarding A.S, Callaway failed to reconcile her opinion sanctioning A.S.'s telephone in class with her concession, upon cross-examination, that, pursuant to the school policy, Respondent took proper steps to confiscate the telephone. Considering the school policy against having cellular telephones in class and Callaway's position as an assistant principal, Callaway's opinion demonstrated a bias against Respondent. Callaway did not assert that she had momentarily forgotten the policy. There was no evidence that the policy was new or had recently been amended. As the assistant principal, it was illogical for Callaway to approve of a student action that blatantly violated school policy. Such a position demonstrated that Callaway sought to cast Respondent in a negative light. Her opinions and other testimony as to A.S. and her testimony overall were therefore given less weight.

5(h). Respondent's suggestion that K.M. speak to a counselor about an IEP assessment if she seeks the accommodation of extra time for assignments was not established to be retaliatory. As K.M. was a senior student with no history of requiring special education services, Respondent's suggestion was uncalled for and demonstrated insensitivity toward K.M. and her family. However, K.M. and her family incorrectly presumed that all special education students with IEPs have mental retardation or are otherwise intellectually slow. This is not true.[6] While K.M.'s inaccurate understanding of special education led her to feel offended by Respondent's suggestion, the evidence did not establish that Respondent intended to offend K.M. Therefore, it cannot be concluded that Respondent's suggestion was objectively offensive to K.M., that Respondent intended to retaliate against K.M. for

[6] Pursuant to Government Code section 11425.50, the ALJ may use his "experience, technical competence, and specialized knowledge" "in evaluating evidence." The ALJ hears matters involving the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.), and has mediated a significant number of special education matters for numerous school districts throughout California. Consequently, the ALJ has experience and knowledge regarding the eligibility requirements of special education services, the development of IEPs, and the manifestations of mental retardation, among other developmental disabilities.

the overall complaints against Respondent, or that Respondent intended to emotionally abuse K.M. K.M.'s assertion that she was fearful of Respondent was not believable and appears to be an exaggeration that merits no credit. Respondent's interactions with K.M., K.M.'s mother, and K.M.'s sister do not constitute immoral conduct or demonstrate that Respondent is unfit for service.

5(i). Respondent's failure to initially give her students grades for the winter concert was a reasonable position, given she was not present at the concert and did not observe the students' performances. Such a position by Respondent was not retaliatory in nature, does not constitute immoral conduct or demonstrate an evident unfitness for service.

5(j). Respondent's disclosure of her personal health information to female students was not the most fitting disclosure, far from optimal; but it was received differently by different students. Not everyone was offended. Furthermore, the subject matter, within the context of students asking about Respondent's impending temporary absence, did not constitute immoral conduct or demonstrate an evident unfitness for service.

5(k). The academic quality of the final examination and crossword puzzle were appropriate for Respondent's students. While the final examination's appearance was sloppy, the sloppy presentation did not constitute immoral conduct or demonstrate Respondent's evident unfitness for service.

5(l). Respondent's advertisement for voice lessons and payment for choir dresses placed in the syllabus were established to be the result of Respondent's lack of knowledge about the rules at Segerstrom. Respondent immediately complied with the rules, upon notice by school administration. These actions by Respondent did not constitute immoral conduct or demonstrate Respondent's evident unfitness for service.

5(m). Respondent's disputes with Khurgel appear to have stemmed from Respondent's curt and disrespectful demeanor and both Respondent's and Khurgel's misunderstandings. These interactions, however, did not constitute immoral conduct, did not demonstrate Respondent's evident unfitness for service, and did not objectively create a hostile work environment for Khurgel.

5(n). Similarly, Respondent's interactions with Garcia, considering especially that Garcia failed to ever address his concerns directly with Respondent, did not objectively constitute a hostile work environment for Garcia. The disputes between Garcia and Respondent were much more akin to personality clashes that were likely exacerbated by Respondent's demeanor. Respondent's interactions with Garcia did not constitute immoral conduct or demonstrate Respondent's evident unfitness for service.

6. In *Morrison v. State Board of Education*, (1969), 1 Cal.3d 214, the California Supreme Court held that for purposes of teacher dismissal, conduct characterized as "immoral," "unprofessional," or "involving moral turpitude" must be limited to conduct indicating that a teacher is "unfit to teach"; otherwise, these terms would be unconstitutionally vague and overbroad. (*Morrison v. State Bd. of Ed.*, *supra*, 1 Cal.3d at 229.) The *Morrison* Court listed factors relevant to determining whether a teacher's conduct indicates unfitness to teach:

> [T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

(*Id*. at 229-230.)

7(a). These *Morrison* factors are analyzed below considering each factor in the same order that each is presented in the preceding paragraph.

The likelihood that the conduct may have adversely affected students or fellow teachers

7(b). Respondent's conduct did not adversely affect students and fellow teachers in any substantial way, as set forth in Legal Conclusion 5.

The degree of such adversity anticipated

7(c). The degree of such adversity anticipated is of no consequence here, where Respondent's conduct did not adversely affect students or teachers in any significant way.

The proximity or remoteness in time of the conduct

7(d). The alleged and actual acts by Respondent are relatively recent.

The type of teaching certificate held by the party involved

7(e). Respondent holds teaching credentials and was employed to teach choral.

The extenuating or aggravating circumstances, if any, surrounding the conduct

7(f). There was a consensus among the students and teachers that Respondent had a difficult personality, was curt, rude, and generally insensitive. This was established by the evidence. These traits aggravated the personality clashes and disputes in which Respondent found herself. Additionally, Respondent failed to consider how students might, for example, receive information relating to her personal health, how a student would react to her suggesting that she inquire about special education accommodations, and whether she should place hands on a student to move him out of her chair and office. These actions demonstrate that Respondent failed to prudently assess her actions before engaging in them. Similarly, with Khrugel, Respondent failed to consistently address her in a respectful manner when there was a difference of opinion or dispute between them. None of these actions or any others alleged by SAUSD rose to the level of dismissal; however, these aggravating factors should serve to counsel Respondent that she must consider her actions carefully, think about how her actions may be perceived, and that she should never place hands on a student, no matter how physically benign the intention.

The praiseworthiness or blameworthiness of the motives resulting in the conduct

7(g). Respondent's own negative personality traits, as discussed in Legal Conclusion 7(f) merit some responsibility for SAUSD's action against her. As the numerous complaints against Respondent were lodged by students and teachers alike, it was reasonable for SAUSD to question whether Respondent was at fault for at least some of the allegations, even if ultimately, the evidence in the record failed to so establish.

The likelihood of the recurrence of the questioned conduct

7(h). In approximately 20 years of teaching within SAUSD, Respondent has no history of discipline with the District. Additionally, there was no evidence that Respondent was recalcitrant regarding the actions complained about by SAUSD. Thus, and after experiencing this proceeding, it is reasonable to conclude that there is a low likelihood that Respondent will engage in similar conduct in the future.

The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers

7(i). As no disciplinary action is to be imposed against Respondent, an analysis of the extent to which such action may inflict a chilling effect on teachers' constitutional rights is unnecessary.

8. Analysis of the *Morrison* factors further establish that there is insufficient evidence to conclude that Respondent is unfit to teach.

9. Cause for dismissal does not exist under Education Code section 44932, subdivisions (a)(1), for immoral conduct, pursuant to Factual Findings 1-52, and Legal Conclusions 1-8.

10. Cause for dismissal does not exist under Education Code section 44932, subdivision (a)(5) for evident unfitness for service, pursuant to Factual Findings 1-52, and Legal Conclusions 1-8.

11. Education Code section 44939 states in part:

> Upon the filing of written charges . . . or upon a written statement of charges . . . charging a permanent employee of the district with . . . willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

12. For the reasons set forth in Legal Conclusions 1-11, pursuant to Factual Findings 1-52, there is no evidence that Respondent willfully refused to perform her regular teaching assignment without reasonable cause between September 2009, and January 2010.

13. Cause for dismissal does not exist under Education Code section 44939, for willful refusal to perform regular assignments without reasonable cause, pursuant to Factual Findings 1-52, and Legal Conclusions 1-12.

ORDER

The Accusation and Statement of Charges against Respondent Nancy Beach in OAH case number 2010030667 are overruled. The Santa Ana Unified School District shall not dismiss Respondent Nancy Beach from employment.

Date: _____ _____
Edward Chavez, Commission Member

Date: _____ _____
Daniel Juárez, Commission Member

DISSENT

Commission Member Petersen respectfully dissents from the majority. Commission Member Petersen joins in all of the factual findings and legal conclusions herein, except as noted throughout the Decision. Commission Member Petersen would conclude that Respondent physically grabbed student J.S. as alleged, emotionally abused and intimidated students and SAUSD employees, retaliated against students and teachers for her suspension and the complaints lodged against her, and created a hostile classroom environment for students and a hostile work environment for Tanya Khurgel. For these reasons, Commission Member Petersen would sustain SAUSD's Accusation and Statement of Charges, and dismiss Respondent from employment with the Santa Ana Unified School District.

Date: _____ _____
Robert Petersen, Commission Member