

BEFORE THE
BOARD OF EDUCATION OF THE
LONG BEACH UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MARY MIRANDA,

Respondent.

OAH No. 2010110365

DECISION

The Commission on Professional Competence (Commission) heard this matter in Cerritos, California, on June 14, 15, 16, 20, 21, and 22, 2011, and held deliberations on June 22, 2011, and August 1, 2011. The Commission consisted of Carolyn Friedman, Luci Coppola, and Administrative Law Judge Amy C. Lahr, Office of Administrative Hearings, State of California, who presided.

Anthony DeMarco and Heather Dozier, of Atkinson, Andelson, Loya, Ruud & Romo, represented the Long Beach Unified School District (District). Michael Feinberg and Amy Cu, of Schwartz, Steinsapir, Dohrmann & Sommers, represented Mary Miranda (Respondent).

District employed Respondent as an elementary special education teacher. District alleged that Respondent demonstrated immoral conduct, evident unfitness for service, and persistent violation of school laws and regulations, based on multiple incidents that occurred on three dates. Respondent denied the alleged causes for dismissal and the underlying charges upon which they were based.

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

FACTUAL FINDINGS

Jurisdictional Findings

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

2. On October 19, 2010, the District gave notice to Respondent, pursuant to Education Code¹ sections 44934 and 44936, of its intent to dismiss her. At the same time, the District served Respondent with notice of immediate suspension pursuant to section 44939. Respondent thereafter made a request for hearing.

3. On November 3, 2010, the District served an Accusation (Accusation), pursuant to section 44944 and Government Code section 11507, seeking Respondent's dismissal. Respondent timely filed a Notice of Defense and requested an administrative hearing.

4. Ruth Perez Ashley, Assistant Superintendent, Human Resource Services, made and filed the Accusation and Statement of Charges in her official capacity.

5. All prehearing jurisdictional requirements have been met.

Respondent's Background and Hiring by the District

6. Respondent obtained a Bachelors Degree in Psychology from the University of Maryland in 1995. She is pursuing a Masters in Educational Administration from California State University, Long Beach. She holds a Clear Multiple Subject teaching credential, Clear Specialist Instruction Credential in Special Education (Severely Handicapped), and a National Board Certification as an Early Childhood through Young Adulthood Exceptional Needs Specialist.

7. Respondent began working as a special education aide at a U.S. Department of Defense school in Avino, Italy in 1995-1996. She relocated to Long Beach and began working as a substitute teacher for the District in 1997. For the next three school years, the District employed Respondent as a pre-Kindergarten ("pre-K") teacher for students with moderate to severe disabilities.

8. Prior to the start of the 2000-2001 school year, Respondent assisted in developing a pilot program for pre-K students with autism. In September 2000, Respondent taught a pre-K Special Day Class ("SDC") comprised of autistic students. Thereafter, Respondent taught a pre-K and Kindergarten combination class, and eventually a Kindergarten and first-grade combination SDC through school year 2009-2010. Her most recent teaching position at the beginning of the 2010-2011 school year was a Kindergarten through second-grade SDC combination class.

9. In September, 2010, as a result of the District's investigation into the conduct at issue in this matter, the District notified Respondent that she was being removed from her classroom teaching assignment, and placed on administrative leave. Respondent has not taught since her removal from the classroom.

¹ All further statutory references are to the Education Code, unless otherwise specified.

The May 21, 2010 Incident

10. Respondent's classroom had four instructional aides to assist her with students. Mamut John (John) testified at the hearing. John worked as an instructional aide in Respondent's classroom since 2006. At some point between the 2009-2010 school year, John became concerned about Respondent's conduct toward a six-year-old, first-grade autistic student, S.L. John was concerned because she observed Respondent on approximately five or six occasions where Respondent used forceful techniques to get S.L. to comply. John decided that she wanted to report Respondent's behavior, and thought she needed evidence. Thus, John decided to videotape Respondent in the classroom.

11. John used her mobile phone, placed inside of her jacket pocket, to videotape Respondent in the classroom on three separate dates.² John recorded the first video on May 21, 2010. In the video, S.L. is seated on a chair facing the classroom door, apparently in a "time-out." S.L. is sitting quietly. Respondent sat down on a bookshelf less than one foot away from him. Respondent is heard stating to S.L. "Touch the door and I will touch your face." Respondent then placed one hand on the back of S.L.'s head, and the other hand under his chin, and forcibly and abruptly maneuvered S.L.'s head in an upward angle toward her. She then stated to him, in a loud voice, "I said 'no' and 'no' means 'no,'" and "put your hands down." Respondent then abruptly removed her hands from S.L.'s head and caused his head to jerk forward.

12. Respondent used a color-coded behavior chart in her classroom. If a student misbehaved, they moved from green to yellow. Even if a student was on yellow, they might be allowed outside for recess. The evidence established that Respondent had an arbitrary method for determining when a student was permitted to recess outside.

13. During the May 21st video, Respondent instructed the class to line-up for recess, except for a few named students. Respondent did not call S.L.'s name as one of the students who should not line up. S.L. attempted to join the line for recess. Respondent then grabbed S.L. by his shirt collar, pulled him toward her, and caused him to turn around abruptly. She again put one hand on the back of S.L.'s head, and the other hand under his chin, and forcibly and abruptly maneuvered his head in an upward angle. Respondent yelled at S.L. "Stop . . . what color . . . yellow." She did not explain to S.L. that because his behavior chart was on yellow, that he was not allowed to recess outside. Instead, Respondent stated, in a sarcastic tone, "Goodbye friends, have a great recess!" This caused S.L. to break down and cry and scream. Respondent repeated this phrase several times as the other children exited the room. She then placed S.L. in a "basket hold" restraint by seating him in a chair, crossing his arms over his chest, and holding his hands from behind while leaning on him. As established by the credible documentary and testimonial evidence, this restraint was

² The videotapes were viewed by the panel at the hearing and during deliberations. Although the quality of the video was not ideal, Respondent's actions were clearly identified by the panel.

not approved by the District and was potentially physically dangerous to S.L. S.L. continued to scream.

14. Respondent's conduct toward S.L. constituted excessive use of force which the circumstances did not warrant. As established by the credible documentary and testimonial evidence, intervention, especially physical, is to be used only when necessary. S.L. had been sitting quietly. Respondent's direction to S.L. regarding recess was confusing. She essentially caused his meltdown and then used an unapproved physical restraint. Respondent did not apply any of the techniques that she had been trained to do. Respondent provoked S.L.'s behavior and escalated the situation, and did not give him a way out.

15. Although Respondent's exact height and weight were not offered as evidence, the Commission observed that Respondent is significantly taller and heavier than S.L.

The May 25, 2010 Incident

16. The second video, recorded on May 25, 2010, shows Respondent physically abusing S.L. In the video, Respondent has her arm around S.L.'s body, using one hand to restrain both of S.L.'s hands. She forcibly held S.L. with his back pressed against the front of her body. Respondent's other hand grabbed S.L.'s face, and forcibly and abruptly turned his head. Respondent repeatedly yelled at S.L., "you will not bite me." Respondent's actions constitute excessive force toward S.L.

17. Respondent's conduct of grabbing S.L.'s face, around his mouth area, portrays a form of discipline, rather than a restraint, as she claimed. It can be inferred that S.L. experienced pain from Respondent's actions, based on her forceful movements of grabbing his face.

The June 3, 2010 Incident

18. In the third video, recorded on June 3, 2010, Respondent is seen hitting and shoving S.L. throughout a period of approximately 12 minutes. For example, Respondent repeatedly slapped S.L.'s face, arms, and shoulders with both of her hands, causing S.L.'s head to jerk backward. At one point, Respondent grabbed S.L.'s face so hard that his lips pursed like a fish. When she removed her hand, red marks were visible on S.L.'s face. In another segment, Respondent grabbed S.L.'s wrists in her hands, held his arms above his head, and moved him across the classroom. She seated herself behind S.L. in a chair, and held his wrists and arms forcibly while he struggled and screamed. At one point, Respondent grabbed S.L. by the neck. Respondent pushed S.L. from behind with such force that it caused S.L. to fall forward. She pushed S.L. hard, in the back, approximately 10 times in one episode, for a duration of 30 seconds. S.L. cried throughout this incident. At one point on the video, he is heard crying "ouch!" Respondent relocated S.L. to another area of the classroom and asked John to bring her arm guards, which Respondent had borrowed from her son's football equipment. While Respondent put the arm guards on, S.L. appeared fearful, and was screaming. Respondent then forcefully and repeatedly shoved the arm

guards into S.L.'s mouth. Respondent also held S.L.'s arm and struck it against the arm guard, saying "Go ahead hit, hit, hit." At other points on the video, Respondent is heard saying "You will not hit me. I will not let you." These contradictory instructions were confusing, especially to a six-year-old autistic student. Respondent is also heard telling S.L. "You'll end up hurt before I do, because you're smaller." Respondent's actions constitute excessive force against S.L.

19. The pitch of S.L.'s crying throughout the video sounds distressed. At varying times, S.L. is crying and screaming so hard that he is gagging; at another point his chest is heaving from crying so hard. It can be inferred that S.L. experienced pain from this encounter with Respondent.

20. At certain points on the video, the other students in the classroom are visible. Their eyes were wide open and they look terrified and fidgety. They had to be prompted by John to turn around and do their work, because they were distracted by Respondent and S.L. Respondent's actions clearly had a negative impact on the other students in the classroom.

The September 2010 Events

20. John did not initially provide the three videos to school authorities. She hoped that Respondent's behavior would be better after the summer break. When she returned in September 2010, John observed that Respondent's behavior toward students had not changed. John met with the three other aides from Respondent's classroom, and together they drafted a letter to the Holmes Elementary School Principal, expressing their concerns. (Exh. 10.) The letter, dated September 16, 2010, states, in part "Although we love the children that we work with and want the best for them, we feel that [Respondent] is keeping us from performing our job the best way we can because of her intimidations and belittling ways that she regards us as well as the students and their parents. We also feel like the children in the class are enduring physical and psychological abuse that is impeding their learning. We have witnessed [Respondent] choking, hitting, shoving and being physically abusive to her students in [sic] numerous occasions." The letter is signed by all four classroom aides: John, Carolyne Vergara-Gonzales (Vergara-Gonzales), Evelyn Mitchell (Mitchell), and Carol Lundy (Lundy).

21. On September 16, 2010, John, Lundy, Vergara-Gonzales, and Mitchell filed a "Suspected Child Abuse Report." John gave the three videos that she recorded to the District and the Los Angeles County Sheriff's Department. Respondent was arrested on September 23, 2010. One week later, the Los Angeles County District Attorney's Office filed a felony complaint with two felony counts of child abuse, in violation of Penal Code section 273(a), against Respondent. The evidence did not establish the outcome of the criminal proceeding.

22. Vergara-Gonzales testified at the hearing. She worked as an aide in Respondent's classroom for approximately two years. She became concerned that Respondent used significant force to correct S.L. On more than two occasions, Vergara-Gonzales observed Respondent grab S.L. by the wrists and forcefully sit him in a chair. She

also saw Respondent grab S.L.'s cheeks on several occasions. Vergara-Gonzales observed Respondent act sometimes act aggressively toward other students, but noticed that Respondent acted that way more often with S.L.

23. As established through the testimony of Vergara-Gonzales, the other children in Respondent's classroom were bothered by the way that Respondent yelled at S.L., and by Respondent's conduct toward S.L.

24. Mitchell also testified at the hearing. The District has employed Mitchell as an instructional aide since 1999. Mitchell worked in Respondent's classroom during the 2009-2010 school year. Mitchell expressed concern about an incident where she observed Respondent grab S.L. by the face and yell at him. Mitchell thought that Respondent's behaviors toward S.L. were sometimes inappropriate and seemed to agitate S.L. more. Mitchell wrote portions of the joint letter (Exh. 10), and agreed with all of its contents. Mitchell thought that Respondent was too aggressive with S.L. Mitchell has had to restrain S.L. on occasion, and she did so in an approved method with the assistance of another aide, so as not to hurt S.L. Mitchell never had to push, shove or hit S.L. to restrain him.

25. Ruth Perez Ashley (Ashley) District Assistant Superintendent, Human Resource Services, testified at the hearing. Ashley viewed the videos and observed Respondent acting inappropriately and using excessive force. In particular she noted that S.L. barely weighs 45 pounds, and Respondent is a large woman. Ashley cried while watching the three videos. She was confident that there could be no remediation for Respondent's behavior and chose not to give her an opportunity to remediate. In her 25 years of working in the District, Ashley stated that this is the most egregious behavior by a teacher that she has ever seen.

26. Tiffany Brown (Brown), Director of Coordinated Student Services, testified at the hearing. Brown holds a Bachelor's degree in Applied Behavioral Science, a Master's degree in Counseling, a Doctoral degree in Educational Leadership, and a Pupil Personnel Services credential in School Psychology. As established by Brown's testimony, the District has not approved of the use of "flooding" or "overcorrection," which were the terms Respondent used to justify her behavior toward S.L. During the hearing, Brown reviewed each of the three videos, and opined that Respondent repeatedly violated the District's policy regarding positive school conduct, which states that employees must do no harm. She also opined that Respondent's behavior violated the Hughes Bill, the law which protects student safety in behavior management, because in her opinion, Respondent was abusive toward S.L. Respondent also violated the District code of ethics, which states that employees must serve as a role model. Finally, Respondent violated the District policy regarding student discipline, which states that a teacher may only place their hands on a student to quell or squelch an aggressive interaction. The videos showed multiple occasions where S.L. was calm, and yet Respondent touched him in an inappropriate manner. In addition, the videos showed Respondent provoking S.L. which created a potential need for Respondent to place her hands on S.L.

27. Brown also explained the progression that student discipline should undertake. The first level is a verbal prompt; the next level is a verbal prompt plus a gesture. Finally, if a physical prompt is necessary, it should be with a light touch; for example, using two fingers to turn a student's chin. Respondent repeatedly failed to use the progressive discipline model. She often went directly to physical prompts, without first using verbal prompts or gestures. In addition, Respondent's physical prompts were not gentle. Respondent used unnecessary force against S.L. Brown opined that Respondent was verbally aggressive toward S.L., that she did not give him clear direction, and that she taunted S.L. The role of a teacher is to deescalate a situation, and calm a student. Respondent is seen repeatedly doing the opposite. As established by Brown's testimony, the restraints that Respondent used on S.L. were not District-approved, and were inapposite to the District training provided to Respondent.

28. Stacie Alexander (Alexander), Special Education School Support, testified at the hearing. Alexander is a member of the District Behavior Intervention and Coaching Team. She is also a District trainer of Crisis Prevention Institute (CPI) methods, which teach how to respond most appropriately to, and de-escalate, a crisis situation. Alexander provided CPI training to Respondent in April 2008. Alexander taught that restraints were only to be used as a last resort, and only when a student is demonstrating behavior which is causing imminent danger to themselves or others. Alexander taught two different restraints: the "Children's Control Position," and the "Team Control Position," which she demonstrated at the hearing, and were also explained through documentary evidence. (Exh. 17, pp.171, 172.) Respondent did not employ either of these approved restraints at any time during the three videos. Alexander did not teach the "basket hold," which Respondent is seen using multiple times on S.L., because it is high-risk. The basket hold is specifically not recommended because it could prevent the diaphragm from working and seriously restrict breathing. (Exh. 17, p. 193.) Alexander taught District staff that when blocking a student, an open palm should be used. District staff also learned a "bite-release" technique, which is not a forceful movement, but rather the staff member should lean into the student to loosen their jaw, and then roll their wrist or arm out of the student's mouth. Respondent is seen forcefully shoving her arm into S.L.'s mouth during the videos, even when S.L. was not biting Respondent. As established through Alexander's testimony, Respondent violated District policy by restraining S.L. while he was having a "meltdown." A meltdown is not a restrainable offense, unless the student is posing a threat to themselves or others, such that if a staff member does not respond, someone might be hospitalized. In addition, a staff member may not restrain against potential injury. This was not the case in the three videos with Respondent and S.L. Alexander viewed all three videos and opined that Respondent's behavior and actions throughout were contrary to what she was taught in training.

Expert Testimony

29. Roy Mayer, Ph.D. (Mayer) testified as an expert in non-violent intervention in elementary education at the hearing. The District presented Mayer's testimony, in part, to refute Respondent's theory that she engaged in "flooding" as a behavioral therapy for S.L. Mayer defined "flooding" as a behavior therapy procedure that immerses the person in the stimuli of which they are afraid. The Hughes Bill prohibits flooding, and accordingly, the

District could not approve of its use. Thus, Respondent's claim that she engaged in flooding violated both District policy and state law.

30. Respondent claimed that she engaged in "overcorrection" with S.L. Mayer defined overcorrection as using positive practice as a reductive procedure. Mayer observed Respondent using "negative practice" in the videos, which he described as practicing the same negative behavior repeatedly with the intent of extinguishing or satiating the behavior. He explained that the problem with this method is that children have a difficult time discriminating as to when a behavior is or is not appropriate, especially children with autism, like S.L. Mayer noted that overcorrection and negative practice could only be used if it was included in S.L.'s individualized education plan (IEP), and having reviewed S.L.'s IEP, Mayer did not see any flooding, overcorrection, negative practices, or any other aversive techniques approved.

31. Mayer viewed the three videos. He opined that Respondent's behavior color-scheme was aversive, and that it provoked, rather than reduced, S.L.'s temper-tantrums. Mayer opined that none of Respondent's conduct was "best practices," and instead, that she repeatedly engaged in aversive and threatening behavior toward S.L. When he viewed Respondent pushing S.L., Mayer opined that Respondent's conduct was not an appropriate technique even if S.L. was attempting to hit her. In fact, he opined that Respondent's conduct was not appropriate under any circumstances. Mayer also opined that Respondent used excessive force toward S.L. because he saw S.L.'s head snapping back as Respondent pushed him. In addition, Mayer opined that Respondent used excessive force because he heard S.L. screaming "ouch." Mayer opined that shoving a child in the back is aversive.

32. Respondent also claimed that her actions were considered "blocking" against S.L.'s behaviors. As established by Mayer's testimony, Respondent's theory is without merit. Mayer explained that blocking is not striking out, and that Respondent's conduct in the videos was not blocking. Mayer opined that it is never appropriate to strike a child as Respondent did, and that her conduct could have caused pain for S.L. Mayer also opined that Respondent's behaviors were neither flooding nor overcorrection, and that neither were District-approved. Mayer also commented that when Respondent engaged in the behavior that she called flooding or overcorrection, it was an inappropriate time, because S.L. was in a meltdown and it is extremely difficult for a child to learn anything when they are agitated. Mayer also commented that Respondent appeared angry on the video, evidenced by the tone of her voice and the amount of pressure she used when striking S.L. Mayer specifically noted that "Respondent clenched her fist as she was striking out" at S.L., and that he was certain that it would have felt like a hit to S.L.

33. With almost every interaction analyzed, Mayer opined that Respondent's practices were inappropriate, ill-timed, poorly implemented, and aversive techniques. Mayer opined that Respondent's techniques escalated, rather than deescalated the situation. Mayer observed Respondent slap S.L. in the face and commented "the whole interaction was aversive and it bothers me." Mayer opined that even if S.L. was striking Respondent, it did not justify her actions. Mayer opined that Respondent's techniques were inappropriate no

matter what S.L.'s history was. Mayer stated that Respondent should have complimented S.L. when he deescalated, because this is industry practice for educators, and a teacher with as many years of practice as Respondent should know and understand.

Evidence Offered in Mitigation

34. Respondent testified at the hearing. She admitted that she had made mistakes, and after having an opportunity to reflect, she would do some things differently. However, Respondent repeatedly justified her actions and blamed others. She pointed out that her evaluations showed no areas of improvement needed. Respondent stated that she has used these techniques many times in the past, and no one ever criticized her or told her it was inappropriate. She claims she received District training which taught her the restraints that she used on S.L. The credible evidence showed that Respondent's behavior was not consistent with the District's current trainings, and thus, Respondent's testimony in that regard is not credited. Respondent also claimed that when she grabbed S.L.'s face, she was prompting him to make eye contact, and denied squeezing his face. Again, the credible evidence belied Respondent's statement; that is, the testimony of multiple witnesses, and the video evidence demonstrated that Respondent grabbed S.L. face on several occasions, without the need for eye contact. Respondent blamed S.L.'s parents for lack of involvement. S.L.'s mother testified at the hearing, and refuted Respondent's statements. Respondent also blamed the District for not providing S.L. with Intensive Behavioral Intervention (IBI), which would have provided him with a one-to-one aide. Respondent also blamed her classroom aides, claiming that they did not properly follow her behavior management plan and that they needed more training. The credible evidence showed that classroom aides John and Mitchell received the CPI training, and neither used improper restraints.

35. With regard to the May 21, 2010 video, Respondent claimed that she "misspoke" when she told S.L. "touch the door and I will touch your face!" She denied that she intended to threaten S.L. Respondent justified her physical handling of S.L. by stating that she put her hands on S.L.'s neck to support it, and that it was not a forceful gesture. Although Respondent acknowledged that she could have used a verbal cue for S.L., she did not think that she was aggressive. Respondent also denied saying "goodbye friends" in a taunting manner as his classmates exited for recess, which caused S.L.'s meltdown. The credible evidence does not support Respondent's statement, and her testimony is not credited.

36. Respondent also blamed S.L. for her conduct. When viewing the May 24, 2010 video, Respondent claimed that S.L. tried to stab her in the eye with a pencil, kicked a chair over, and then bite her. She stated that she had to restrain him because otherwise he would have gone after other students, and that she was not using more force than necessary. The credible evidence does not support Respondent's theory, and her testimony is not credited.

37. With respect to the June 3, 2010 video, Respondent acknowledged some wrong-doing on her part. In retrospect, she would not grab S.L.'s face and force him to

make eye contact. When she stated “you’re going to get hurt before I do, because you’re smaller,” she agreed that she could have chosen different words. Respondent did not, however, accept full responsibility for her actions and denied conduct which is clearly established through the testimonial and video evidence. For example, Respondent claimed that she used the “blocking” technique, when in reality, she was striking S.L. She also denied hearing S.L. cry “ouch,” and downplayed it by stating that he often says “ouch” for no reason. The credible testimony of Respondent’s classroom aides established that S.L. did not say “ouch” for no reason, and thus Respondent’s testimony is discredited. Respondent also denied threatening S.L., slapping him, and squeezing his face. At one point when S.L. appeared to be calming down, he leaned his head forward and Respondent claimed that he was trying to head-butt her. The credible evidence does not support her statement, and her testimony is not credited.

38. During cross-examination, Respondent admitted that the District did not teach her to use the restraints that she performed on S.L., nor did they tell her it was appropriate to use flooding or negative practices. Nor did she learn those methods in any of the trainings or reference materials that she received. She also admitted that at her deposition on March 4, 2011, she stated that she would still have employed all of the same techniques, even after she had been arrested and charged with two felony counts of abuse. It was only after she heard Mayer’s testimony that she realized that grabbing S.L.’s face and using flooding techniques were inappropriate. Respondent also testified during cross examination that it never occurred to her that what she was doing could cause pain or physical discomfort to S.L. She did not believe that jerking S.L.’s head caused him pain or had any effect on him, because, according to her, S.L. did not exhibit signs of distress. She attributed his screaming as a maladaptive behavior, and not something that she induced by physically handling him. When she viewed the June 3, 2010 video during cross examination, Respondent acknowledged that S.L. was not hitting her, but justified her conduct by maintaining that he could have hit her. Respondent did admit that when she pushed S.L. in the back repeatedly for at least 30 seconds that it could have caused him pain. She also acknowledged that during the time period when she pushed him, S.L. was not head-butting her, or striking out. Respondent claimed that S.L. had been thrashing, but that it was not captured on the video. Respondent contended that the amount of force she used against S.L. was necessary. Respondent was not aware that her methods were ineffective because no one was there to observe her and tell her. She claimed that she needs more classroom support.

39. Respondent claimed that if the District had instructed her not to use the methods she employed in her classroom, that she would not have done so. If she were returned to the classroom, Respondent would employ other methods. Respondent took pride in her work and was distraught by the allegations against her. Respondent submitted copies of her credentials, certifications, trainings and workshops, and letters of appreciation and recommendation. All evidence has been considered.

40. Respondent presented the testimony of Susana Juarez-Corrales (Corrales) and Kathleen Hatchell (Hatchell). Corrales testified about her observations of S.L.’s behaviors. Corrales did not have S.L. as a student in her class. Nor did she ever observe Respondent

interact with S.L. Thus, her testimony is given little weight. Hatchell has been employed by the District for 25 years. She has known Respondent for nine years, and her classroom has been along side Respondent's for the past six years. Hatchell thought that Respondent has done a lot to help gain awareness for the District's autism program and autistic students.

41. Respondent also called Alayne Pickens (Pickens) to testify on her behalf. The District employed Pickens from 1998 through 2008, and re-hired her again at the beginning of 2011. Pickens worked as an instructional aide in Respondent's classroom from 2003 through 2008. Pickens attended CPI training in 2007. Prior to viewing the three videos, Pickens testified that she had never observed Respondent use excessive force or act aggressively toward a student, and it would surprise her to hear that Respondent had pushed a child. Pickens was, in fact, surprised when she reviewed the videos at issue. Pickens observed that Respondent pushed S.L. in the video. Pickens testified that Respondent's conduct in the videos was inapposite what she had learned in CPI training. Pickens stated that said she would not push a student in the same manner that Respondent had during the video. When Pickens saw Respondent grab S.L.'s face on the video, she testified that she had not ever observed Respondent engage in that type of behavior. During CPI training, Pickens learned to turn her body away from a student, as a type of blocking. Pickens thought the main point that CPI taught was to move away from a student, which was contrary to what Respondent did in the videos. Pickens opined that Respondents conduct looked more like pushing than like blocking. Pickens would not emulate the type of behaviors that she saw Respondent engage in during the videos.

LEGAL CONCLUSIONS

Evident Unfitness for Service

1. Section 44932, subdivision (a)(5), permits dismissal of a permanent employee for "evident unfitness for service." Evident unfitness for service under this provision is established by conduct demonstrating that the teacher is "clearly not fit, not adapted or suitable for teaching, ordinarily by reason of temperamental defects or inadequacies." *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444. If the teacher is found unfit for service, "the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Id.* at p. 1445.)

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

impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. The determination of fitness for service required by *Morrison* is a factual one.

Respondent's conduct on May 21, 24, and June 3, 2010 indicates unfitness to teach under the *Morrison* factors. The conduct involved young first grade students in her class during school hours. The students were adversely affected and the degree of adversity was significant. A teacher's use of force against a student adversely impacts a school's students, teachers, staff, parents, and the learning environment. Respondent's students were emotionally scarred. They were frightened; S.L. was physically injured. Aides and District administrators who observed Respondent's conduct or heard about it, were also adversely impacted as the conduct could diminish regard for teachers at the school. The conduct occurred approximately one year before the hearing. Respondent holds a teaching certificate that is appropriate for the class she taught in the District. In aggravation, Respondent instigated S.L.'s behavior and then justified her conduct in response. A teacher does not need training or a written policy to know that it is unacceptable to strike, push or shove a child, grab a child's face, taunt him and provoke tantrums, and grab a student by his arms to move him. There were no mitigating circumstances.

Recurrence of the misconduct is likely for several reasons. Respondent did not fully acknowledge her wrongdoing. Even after being arrested and charged with two felony counts of child abuse, and hearing testimony from multiple witnesses who explained the harm in her techniques, Respondent did not completely accept that she did anything wrong. Instead, Respondent blamed S.L. for causing the misconduct due to his classroom behavior when Respondent was solely to blame. Respondent sought to blame the District for failing to properly train her or inform her that her methods were inappropriate. Respondent was dishonest about what happened. She denied conduct which was credibly established through multiple witnesses and video evidence. She claimed that she did not realize at the time that her conduct had an extreme negative impact on S.L. Even at the hearing, Respondent was still misleading about the facts and she did not understand that her prior action of shoving a football armguard into a child's mouth was inappropriate conduct. Respondent did not have awareness of the severity or the inappropriateness of her behavior. Respondent engaged in inappropriate physical contact on May 21, May 24, and June 3, 2010, and, given her lack of awareness, it is likely to recur. Respondent's conduct and apparent lack of insight about the incidents reveal defects in temperament and character that evidence an unfitness to serve as a teacher. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429.)

Respondent's conduct adversely affected students and other District employees, and the degree of adversity is significant. Respondent has expressed some remorse for her conduct, but she has not fully acknowledged the extent of her misconduct and has not fully accepted responsibility for the incident.

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

The analysis of the *Morrison* factors demonstrates Respondent's present unfitness for service. Respondent's unfitness is evident, and is caused by her temperament. Even at the hearing, Respondent did not have the awareness that it was inappropriate for her to threaten, slap, push and squeeze a student's face. Respondent's existing deficiencies are the result of "temperamental defects or inadequacies."

Accordingly, as set forth in factual finding number 10 through 39, cause for dismissal has been established pursuant to section 44932, subdivision (a)(5).

Immoral Conduct

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

"The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." (*Weiland, supra*, 179 Cal.App.2d at p. 811.)

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

Respondent engaged in immoral and unprofessional conduct in that her conduct was willful and showed an inconsiderate attitude toward good order and the public welfare. The students in Respondent's class were very young (ages five to seven). Respondent created an unsafe and insecure environment in her classroom that could easily have been avoided. Respondent displayed an inconsiderate and disrespectful attitude toward the welfare of her students. Without provocation, Respondent hit S.L., grabbed him to physically move him, grabbed his face, shoved a football armguard in his mouth and pushed him. Respondent did not require prior notice to know that she cannot push, shove, grab a student's face, or shove a football arm guard into a student's mouth. She was angry, and willfully acted upon her anger. Respondent's conduct was flagrant and shameless, showing moral indifference to the opinions of respectable members of the community.

The May 21, May 24, and June 3, 2010 incidents are serious. Respondent inflicted corporal punishment upon student S.L. She failed to take responsibility for the conduct. Dismissal is warranted.

Accordingly, as set forth in factual finding numbers 10 through 39, cause exists to suspend and discharge Respondent for immoral and unprofessional conduct, pursuant to Education code sections 44939 and 44932, subdivision (a)(1).

Persistent Violation of Rules

4. Section 44932, subdivision (a)(7), permits dismissal of a permanent employee for “persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.”

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

Education Code Sections 49000 and 49001

The District asserts that Respondent repeatedly imposed corporal punishment on S.L. in violation of Education Code section 49001, subdivision (b).

Education Code section 49001, subdivision (a), defines “corporal punishment” to include the willful infliction of physical pain on a pupil. Education Code section 49001, subdivision (b), prohibits persons employed by the public schools from inflicting corporal punishment.

Respondent willfully inflicted physical pain on student S.L. in violation of Education Code section 49001, subdivision (b). Although Respondent may not have intended to hurt S.L., Respondent intended to push, shove, grab S.L.’s face and make physical contact with him. Respondent intentionally shoved football arm guards into S.L.’s mouth, repeatedly. Respondent intentionally pushed S.L. in the back for approximately 30 seconds, causing his neck to snap forward and back. Respondent’s conduct involved the infliction of physical pain on a pupil and can be considered corporal punishment within the meaning of Education Code section 49001, subdivision (a).

Respondent's violations of Education Code section 49001, subdivision (b), were shown to be "persistent" violations of "the school laws of the state" and those prescribed by the District. Respondent engaged in physical conduct three times during the 2009-2010 school year. The videos captured conduct that was not an isolated incident. Cause therefore exists to dismiss Respondent pursuant to Education Code section 44932, subdivision (a)(7).

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

ORDER

The determination of the Board of Education of the Long Beach Unified School District to dismiss Respondent Mary Miranda as a permanent employee of the District is affirmed.

Respondent Mary Miranda is dismissed from her position as a certificated employee of the Long Beach Unified City School District.

DATED: _____

AMY C. LAHR
Administrative Law Judge
Office of Administrative Hearings

DATED: _____

CAROLYN FRIEDMAN
Commission Member

DATED: _____

LUCI COPPOLA
Commission Member