

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Dismissal of:

SHANE CARNIVAL (EN 760776),

A Permanent Certificated Employee,

Respondent.

OAH No. 2013110085

DECISION

On September 14-17, 21-24, 2015, and February 29 through March 2, 2016, Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on behalf of the Commission on Professional Competence (Commission).¹

Michelle Meek, Attorney at Law, Liebert Cassidy Whitmore, and Meredith Karasch, Assistant General Counsel, Los Angeles Unified School District represented complainant, Justo H. Avila, Chief Human Resources Officer, Los Angeles Unified School District (LAUSD or District).

Daniel J. Kolodziej and Rosty Gore, Attorneys at Law, Trygstad, Schwab & Trygstad, represented respondent Shane Carnival (respondent), a permanent certificated employee of the District, who was present throughout the hearing.

Oral and documentary evidence was received and the record was closed and submitted for decision on March 2, 2016. The Commission finds as follows:

FACTUAL FINDINGS

Jurisdiction and Allegations

1. On September 27, 2013, Vivian K. Ekchian, then Human Resources Officer for the District issued the Statement of Charges, and on October 29, 2013,

¹ On September 14, 2015, the parties stipulated to have this matter heard by the ALJ sitting alone. (Ed. Code § 44944, subd. (c)(1).)

respondent submitted a request for hearing.² On November 20, 2013, respondent submitted a Notice of Defense. On November 21, 2013, complainant made and filed the Accusation in her official capacity, and on October 10, 2014, complainant filed an Amended Accusation. All jurisdictional requirements were met to proceed to hearing before the Commission.

2. The District alleges that respondent is subject to dismissal from his employment as a permanent certificated employee of the District for unprofessional conduct, in violation of Education Code section 44932, subdivision (a)(1)³; immoral conduct, in violation of sections 44932, subdivision (a)(1) and 44939; dishonesty, in violation of section 44932, subdivision (a)(3)⁴; unsatisfactory performance, in violation of section 44932, subdivision (a)(4)⁵; evident unfitness for service, in violation of section 44932, subdivision (a)(5)⁶; persistent violation 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, in violation of section 44932, subdivision (a)(7)⁷; and willfull refusal to perform regular assignments without reasonable cause, in violation of section 44939.

3. The District's Amended Accusation and Statement of Charges alleged following charges: that respondent watched pornography on his personal laptop computer in classroom at John Burroughs Middle School (Burroughs) and a pornographic image was inadvertently viewed by one of his students; that he forged a school administrator's signature on multiple documents without the administrator's

² On March 20, 2013, the District issued a Notice of Unsatisfactory Service or Acts of Certificated Employee to respondent specifying allegations and charges that ultimately constituted the September 27, 2013, Statement of Charges. On March 20, 2013, the District also issued a Notice of Suspension to respondent suspending respondent for a period of 15 days without pay.

³ All further statutory references shall be to the Education Code unless otherwise specified.

⁴ Effective January 1, 2015, section 44932, subdivision (a)(3), was changed to section 44932, subdivision (a)(4).

⁵ Effective January 1, 2015, section 44932, subdivision (a)(4), was changed to section 44932, subdivision (a)(5).

⁶ Effective January 1, 2015, section 44932, subdivision (a)(5), was changed to section 44932, subdivision (a)(6).

⁷ Effective January 1, 2015, section 44932, subdivision (a)(7), was changed to section 44932, subdivision (a)(8).

knowledge or authority and submitted the documents to California State University Dominguez Hills (CSUDH) for his administrative credential; he possessed a 3-3 1/2 inch locking blade pocket knife on school grounds in violation of school policy; he touched female students in an inappropriate manner in the classroom; he made inappropriate statements and gestures to, and in the presence of, students in his classroom; he allowed a picture of a topless woman to appear on the smart board in his classroom during class instruction; and respondent showed a picture of two naked children to students in the classroom.

Background

4. Respondent is a 47 year-old teacher who taught sixth grade mathematics and science with the District from 2002 until 2012. Respondent received a Bachelor of Science degree in psychology from CSUDH in 1997. He was hired as an intern by LAUSD in 2002. In September 2010, he was involuntarily transferred from Daniel Webster Middle School to Burroughs. Respondent filed a grievance with the District objecting to the transfer to Burroughs. In 2010, respondent attended CSUDH to obtain an administrative credential. Respondent is married and has two children, a 10 year-old boy and a 12 year-old girl. He is very active in his children's activities and enjoys an outdoor lifestyle, including participating in the Boy Scouts with his son. Respondent also serves as a chaperone for many of his children's activities.

5. At all times relevant to the Amended Accusation and Statement of Charges the following District policies or guidelines were in effect: the LAUSD Code of Conduct with Students (CCS); the LAUSD Child Abuse and Neglect Reporting Requirements Policy Bulletin; the LAUSD Employee Code of Ethics (ECE); the LAUSD Ethics Policy Bulletin; the LAUSD Sexual Harassment Policy; the LAUSD Student and Employee Security Policy; the LAUSD Acceptable Use Policy (AUP) for District Computer Systems; and the LAUSD Software Policy and Code of Ethics . Respondent was familiar with, and received annual training on, these policies and guidelines. At the beginning of the 2011-2012 school year respondent received the John Burroughs Middle School Faculty Handbook which contained copies of all of the aforementioned LAUSD policies and guidelines. Respondent signed a Faculty Handbook Distribution List acknowledging receipt of the faculty handbook, and on September 6, 2011, attended a Burroughs faculty meeting during which these policies and guidelines were discussed, disseminated and/or made available to all teachers in attendance.

Charge No. 7 (C [REDACTED] G. Allegations)

6. In approximately November or December 2011, C [REDACTED] G., a sixth grade student in respondent's class, ran into respondent's classroom during lunch break to get his physical education (PE) shorts from his backpack. He ran into the classroom unannounced and noticed respondent sitting at his (respondent's) desk. C [REDACTED] G. got his PE shorts from his backpack and walked towards respondent's

desk to tell him why he was in the classroom. As he walked up to respondent's desk C [REDACTED] G. saw what he described as a pornographic picture of two naked women on respondent's personal laptop computer. D [REDACTED], C [REDACTED] G.'s friend, came with him but waited just outside the classroom door.

7. C [REDACTED] G. was shocked when he saw respondent watching pornography on his laptop computer. He did not immediately tell D [REDACTED] or his parents about the incident. A few days later, C [REDACTED] G. told his parents about the incident because he believed it was inappropriate for respondent to watch pornography in the classroom. On December 13, 2011, C [REDACTED] G.'s parents complained to Dr. Steve Martinez, the principal at Burroughs, about the incident. Dr. Martinez reported the incident to the Los Angeles Police Department (LAPD) who instructed Dr. Martinez to handle the investigation administratively within LAUSD. Dr. Martinez temporarily removed respondent from the classroom pending an investigation. In a written statement dated December 13, 2011, C [REDACTED] G. wrote that he and Deangelo walked into respondent's classroom to get their PE shorts when they saw respondent watching pornography on the laptop. (Exh. 31.) Deangelo's written statement, however, indicated that he did not remember walking into respondent's classroom with C [REDACTED] G. or seeing anything. (Exh. 32.)

8. At hearing, C [REDACTED] G. admitted that his written statement was inaccurate because D [REDACTED] did not come into the classroom with him. However, he credibly testified that he included D [REDACTED] in his statement because D [REDACTED] was with him, and he assumed D [REDACTED] saw the pictures because D [REDACTED] stuck his head into the classroom door and asked whether he had gotten his PE shorts.

9. Respondent testified that he was not watching pornography on his laptop and denied that C [REDACTED] G. saw pornography on his laptop computer. He testified that he could not have accessed pornography on his laptop computer in the classroom because the District has an internet filter which blocked access to pornographic websites when using the District's internet server. Respondent stated he would have had to use the District's internet server to access the internet. Dr. Martinez confirmed that the District used software which blocked access to pornographic websites when using its internet server. Sean Sievers, a LAUSD Computer Forensic Specialist, conducted a test of the LAUSD web-content filtering technology on September 15, 2015, using a personal laptop computer. Sievers confirmed that the LAUSD internet filter successfully blocked access to pornographic websites using the District's server. Sievers opined, however, that respondent could nevertheless have viewed pornography on his laptop computer if the pornographic material was already stored in respondent's laptop, negating the requirement to access the internet.

10. Respondent did not complete and submit a LAUSD Property Registration Form (Exh. 4, pg. 21) to use his personal laptop computer in the

classroom, which is required by the District.⁸ Dr. Martinez asked respondent to allow the District to inspect his personal laptop but respondent refused, telling Dr. Martinez that the burden of proof was on the District to prove the C [REDACTED] G. allegations. Respondent testified that he was uncomfortable allowing the District to inspect his personal laptop and he did not believe it was necessary. Because the District was not allowed to inspect respondent's personal laptop, which he was not authorized to use in the classroom, the District could not confirm that respondent had pornographic materials on his personal laptop. In January 2012, respondent was returned to the classroom after the Christmas break and C [REDACTED] G. was removed from respondent's class.

11. C [REDACTED] G.'s version of this incident is credited over respondent's denial that the incident occurred. C [REDACTED] G. reported the incident to his parents a few days after it occurred. Dr. Martinez testified that he did not believe C [REDACTED] G. had any reason to lie or fabricate the incident, and Dr. Martinez believed the student was being truthful. Prior to the District concluding the investigation into this incident, respondent donated his personal laptop computer to Goodwill, making the computer unavailable for inspection by the District. Respondent's refusal to allow the District to inspect the lap and his disposal of the laptop prior to conclusion of the investigation shows that respondent did not cooperate with the District's investigation of the incident raises a reasonable inference of guilt or lack of credibility on this allegation. Respondent was also not authorized to use his personal laptop computer in the classroom showing that respondent had no instructional related purposes for having his personal laptop in the classroom.

Charge No.s 15 through 21 (Unauthorized Use of Asst. Principal Helen Yoon's Signature)

12. On or about December 16, 2011, during an inspection of the LAUSD desktop computer assigned to respondent's classroom in connection with the C [REDACTED] G. incident investigation, Dr. Martinez discovered three documents that had purportedly been signed by "Dr. Helen Yoon", the Assistant Principal at Burroughs and the Sixth Grade Administrator, in December 2010.⁹ The documents revealed that respondent was enrolled at CSUDH in the Educational Administration Program (EAP) during the Fall semester of 2010 seeking his administrative credential. The three documents: a Field Based Project Proposal (Exh. 11); a CSUDH EAP Communication Log (Exh. 12); and a "Shadowing Log" (Exh. 13), all had Dr. Yoon's forged signature on them. These documents related to a Parent Academic

⁸ A LAUSD Property Registration Form is required for insurance coverage to allow teachers who use their personal equipment for instructional or work-related duties to obtain reimbursement if the equipment is damaged during use in the classroom.

⁹ Dr. Yoon testified as Dr. Helen Yoon-Fontamilas.

Night Field Project Proposal respondent submitted to his EAP advisor for his administrative credential at CSUDH.

13. At hearing respondent admitted that he forged Dr. Yoon's signature on the documents and that Dr. Yoon had not authorized his use of her signature or served as his Field Mentor in the field project. Respondent testified that he forged Dr. Yoon's signature because he was under a lot of stress trying to complete the CSUDH field project, which was complicated and delayed when he was involuntarily transferred in September 2011 from Webster to Burroughs. He tried to use the Burroughs Parent Academic Night to complete the project but had difficulty getting his CSUDH advisor to approve his Field Based Project Proposal. Respondent testified that he made a poor choice in forging Dr. Yoon's signatures and submitting documents without her authorization. Respondent also admitted that entries he made on the "Shadowing Log" (Exh. 13, pg. 2) were and that he never enlisted Dr. Yoon to mentor him for the field project. Dr. Yoon testified that she was not aware of respondent's CSUDH field project or that he was working on his administrative credential. She confirmed that the signatures on the documents were not her handwriting and that she had not authorized respondent to submit these documents to CSUDH with her signature.

14. Respondent testified that in January 2011, he withdrew from the CSUDH EAP program because the transition from Webster to Burroughs was too difficult. He stated that he did not benefit from forging Dr. Yoon's signature because he did not complete the administrative credential program. However, respondent completed the Fall 2010 semester at CSUDH and received academic credit for his field project. Respondent did not disclose to his CSUDH EAP advisor that he had forged Dr. Yoon's signature on documents submitted for the field project or that Dr. Yoon had not participated as his mentor in the project.

Charge No.s 13 and 14 (Knife Incident)

15. On January 19, 2012, Tomas H. Juarez, Burroughs School Safety Officer. He contacted Dr. Martinez and informed him that respondent had a pocket knife clipped to his pants in the school eating area.. Dr. Martinez encountered respondent walking towards him and observed a metallic clip on one of respondent's pants pockets contacted Los Angeles School Police Department (LASPD) officer G. Kim, who was already on the Burroughs school campus. Dr. Martinez advised officer Kim that respondent was in possession of a pocket knife on the school campus.

16. Officers Kim and Juarez located respondent just outside the Burroughs front school entrance talking on his cell phone. Officer Kim approached respondent and asked him if he had a knife and respondent replied "yes." (Exh. 20, pg. 2.) Respondent took a folding knife out of his right front pants pocket and handed the knife to officer Kim. Officer Kim informed respondent that it was against the law for him to have a knife on the school campus. Respondent indicated that he did not know that it was illegal to possess the knife he possessed on school grounds because he

thought the length of the knife determined its illegality, suggesting that he believed his knife was not illegal because of the blade length. Respondent also told officer Kim that he used the knife to open packages and cut things in his classroom and that he had brought the knife on campus on multiple occasions.

17. Officers Kim and Juarez took respondent into custody and escorted him to the Burroughs main office where they met with Dr. Martinez. Dr. Martinez took pictures of the pocket knife and observed that the knife had a serrated edge. (Exh. 17.) LASPD officer T. Estrella issued respondent a citation for violating Los Angeles Municipal Code (LAMC) section 55.10 (carrying a knife in plain view), a misdemeanor. Section 55.10 defines “knife” to include any knife that has a blade of three inches or more in length. (Exh. DD, pg. 1.) Officer Estrella’s LASPD Release From Custody Report and the Los Angeles Police Department (LAPD) Property Report both indicated that the knife confiscated from respondent was a “folding knife, approx. 3” blade” (Exh. 20, pp. 2-3). Respondent was reassigned to the local district office during the investigation of the knife incident.

18. Dr. Martinez convened a LAUSD Threat Assessment Team to determine whether respondent’s possession of the knife on school grounds posed a safety threat to students. The threat assessment team included Dr. Martinez, Dr. Margaret Kim (Dr. Kim), LAUSD Director of Secondary Schools, Local District 3, an LASPD officer, a representative from the LAUSD general counsel office, and a representative from the LAUSD Mental Health Department. The threat assessment team concluded that respondent was a low threat risk and not a danger to students. Dr. Kim and Superintendent of Schools Dr. Brenda Manuel interviewed respondent after the threat assessment team had met. Respondent was cooperative and appeared apologetic for bringing the knife on school grounds. He told Dr. Kim that he brought the knife to school to open packages, specifically stating that he had difficulty opening boxes and Student Periodic Assessment (SPA) test packages. Respondent also told Dr. Kim that he that he carried the pocket knife for his personal protection as a member of his Neighborhood Watch group. Dr. Kim believed that respondent had brought the knife to school on only one occasion. She was not aware that respondent had brought the knife to school on multiple occasions. Had Dr. Kim known respondent had the knife on school grounds on more than one occasion, it would have impacted the threat assessment team’s determination that respondent did not pose a safety threat to students. Respondent told Dr. Kim that he understood the LAUSD weapons policy and assured her that he would not bring the pocket knife to school again.

19. The January 19, 2012 citation against respondent based on LAMC, section 55.10 was dismissed. However, the record is unclear regarding the circumstances surrounding dismissal. The evidence established that the pocket knife was at least three inches in length. Dr. Martinez testified that LAUSD school policy prohibited any weapons on the school campus, including the pocket knife confiscated from respondent. There is signage on the Burroughs school campus clearly notifying visitors, students, and employees that weapons of any sort are prohibited on school

grounds. Respondent's pocket knife constituted a weapon prohibited by LAUSD school policy.

Charge No.s 1 and 2 (R█████ D. Allegations)

20. On March 22, 2012, four students came to Dr. Yoon's office and expressed concerns about inappropriate conduct by respondent in the classroom. R█████ D., S█████ B., T█████ J., and N█████ H., students in respondent's 2011-2012 sixth grade class at Burroughs, came as a group to Dr. Yoon's office. Ms. Yoon did not interview the students, but instead asked them to prepare written statements describing their complaints. Although the students were in the same room while writing their statements, Ms. Yoon observed the students and did not allow them to talk to each other or discuss their complaints. Dr. Yoon informed Dr. Martinez about the students' complaints and gave him their written statements. Dr. Yoon believed the students were telling the truth in their written statements.

21. In her written statement dated March 22, 2012, R█████ D. stated that respondent always stared at her and other female students in class and asked them questions like "how was your weekend." (Exhs. 35 & 61.) R█████ D. complained that respondent stared at her constantly in class and spoke to her in a whisper-like tone of voice that was creepy and scary. She felt really uncomfortable and scared in respondent's class. (Exh. 67.) On one occasion respondent stared at R█████ D.'s chest and told her to button her shirt. (Exh. 35.) In February 2012, respondent rubbed R█████ D.'s back and whispered to her "how was your weekend?" (Exhs. 35 & 61.) This made R█████ D. uncomfortable and scared because of the way respondent whispered the comment. In February 2012, respondent also said to R█████ D. "Hello R█████ good girl," which she did not like because of the way respondent said the comment. (*Id.*) R█████ D. was uncomfortable with the way respondent stared at her and spoke to her. She stated that respondent "freaks" her out because he watched porn videos on his computer. R█████ D. stated that she "felt scared" (Exh. 35) and "weird" (Exh. 61) as a result of respondent's conduct.

22. S█████ B. and T█████ J. observed respondent's conduct towards R█████ D. in class. (Exhs. 36, 37, & 76.) S█████ B. stated that respondent said "hi" to R█████ D., but did not say "hi" to any other students. (Exh. 36.) T█████ J. heard respondent ask R█████ D. how her day was, say that R█████ D. was a "good girl," and saw him staring at R█████ D.'s breast. (Exh. 37.) She believed respondent "mostly says hi only to R█████" in the classroom. (*Id.*) T█████ J. observed respondent's statements and conduct towards R█████ D. during the first semester before the winter break. (Exh. 76.) N█████ H. also stated that respondent "touches" R█████ D. and says "hi" to her in class, and also stares at R█████ D.'s chest. (Exh. 38.) N█████ H. stated that respondent looked at children's bodies in class and talked to students in a "creepy voice," describing respondent's voice as a "whisper like voice." (*Id.*)

23. R█████ D. was interviewed by LAPD officers C. Cornell Stefan (Ofc. Stefan) on March 22, 2012, and Melissa Lynch on May 29, 2012. Consistent with her

written statements to Ms. Yoon and Dr. Martinez, R█ D. told both officers that respondent constantly stared at her in class and during stretching exercises which made her feel very uncomfortable. She told both officers that respondent rubbed her back in a circular motion, and told Ofc. Stefan that respondent touched her in this manner approximately three times per week beginning in November 2011. R█ D. told Ofc. Lynch that respondent made her feel uncomfortable because “he looks at me weird sometimes and the way he talks to me.” (Exh. 26, p. 1.) She told Ofc. Lynch that respondent said “Oh Hi R█, good girl,” in a tone of voice that was “strange” and “freaks me out.” (*Id.*) R█ D. told both officers that in February 2012, she began to feel uncomfortable with the way respondent spoke to and touched her in class because she heard from other students that respondent watched pornography on his computer. She also described an incident in which respondent walked up behind her while she was seated at her desk placed his hands on her shoulder and she moved away, requiring him to put his hand on her chair.

24. When interviewed by Ofc. Lynch on May 10, 2012, respondent denied speaking to R█ D. in a different or weird manner or that he had touched or rubbed her lower back or shoulder. Respondent told Ofc. Lynch that he had approached R█ D. on one occasion when he saw her crying in class and she discussed with him difficulty she was having identifying with her “sexuality.” R█ D. later told a school administrator, (Ms. Schwartz) that she had spoken with respondent about her sexuality. Ms. Schwartz referred R█ D. to the school counselor, Ms. Bradley.

25. Consistent with the written statements she provided to Ms. Yoon and Dr. Martinez, and her statements to the LAPD officers, R█ D. testified that she did not become concerned or uncomfortable with respondent’s conduct until the second semester of the 2011-2012 school year. R█ D.’s attitude towards respondent changed when she found out he watched porn on his computer in class. R█ D. credibly testified that respondent rubbed her back in class and made comments to her such as “hi R█ good girl.” Respondent rubbed R█ D.’s back in a massaging motion which made her feel uncomfortable, and he did not touch any other student’s back in a similar manner. R█ D. said respondent’s “weird” tone of voice made her very uncomfortable and she believed he spoke to her differently compared to other students in the class. She described respondent’s tone of voice as being “pedophilish,” and stated that he sounded like a “rapist or pedophile” that she had seen on television. She was genuinely disturbed by respondent touching and speaking to her in this sexual manner. R█ D. was also very uncomfortable with respondent staring at her and standing behind her desk for long periods during class.

26. R█ D.’s allegations were further supported by the testimony of S█ B. and N█ H. S█ B. observed respondent rubbing R█ D.’s lower back in the classroom on multiple occasions but could not recall exactly when the incidents occurred. She believed it was during the first semester of the 2011-2012 school year, but stated she did not report the incidents until March 2012. S█ B. felt awkward and uncomfortable when she saw respondent touching R█ D. in this manner. S█ B. believed respondent spoke to R█ D. in a very personal way,

which was different than how he spoke to other students. She also believed respondent would ask female students how their day was, but he never asked male students about their day. According to S ■■■ B., respondent spoke to her and other students in a “creepy way,” and she believed his personal conduct in class was offensive and inappropriate. Even though she did not complain about respondent’s conduct until March 2012, S ■■■ B. stated that she and her classmates talked about respondent being “creepy” well before she made her complaint.

27. N ■■■ H. testified that respondent stared at R ■■■ D. in a sexual way, and she believed respondent paid more attention to R ■■■ D. than he did any other student in the class. She recalled that respondent asked R ■■■ D. about her vacation while neglecting to ask any other students about their vacation. She observed respondent touching R ■■■ D. on the shoulders when he asked her about her vacation. N ■■■ H. was disgusted by respondent putting his hands on R ■■■ D.’s shoulders, and believed that R ■■■ D. was uncomfortable when respondent touched her in that manner. Although N ■■■ H.’s written statements indicated that she saw respondent looking at R ■■■ D.’s breast and she did not recall this incident at hearing. She also did not recall stating that she “felt like I was about to be raped” (Exh. 38) in respondent’s class, but she believes she wrote this comment because she was disturbed after observing respondent touching R ■■■ D. N ■■■ H. was nervous and scared in respondent’s class which made her believe that she could have been raped in his class. In hindsight, however, she testified she probably would not include that statement in her written statement today. N ■■■ H. maintained that her written statements otherwise accurately reflected what she observed in respondent’s class and that she still believed respondent spoke to R ■■■ D. in a sexual way that was inappropriate and made her feel very uncomfortable.

28. Respondent testified that he did not remember rubbing R ■■■ D.’s back, but admitted that he could have done so. He stated he did not believe he rubbed her back in a circular motion but he may have touched her back, and the student misunderstood the touching. Respondent admitted that he could have asked R ■■■ D. how her weekend was or words to that effect, but he denied that he stared at the student in class. He admitted that he may have whispered in R ■■■ D.’s and other students’ ears at times, but he did this so that he would not disturb other students when he was speaking to a student. Respondent denied that he intentionally stood behind R ■■■ D.’s desk in class, but stated that he stood in that location because it was the best vantage point to observe the entire class when the students were doing work or testing and it allowed him to monitor or prevent talking in class. Respondent suggested that he may have treated R ■■■ D. differently because he was aware that she was experiencing difficulty identifying her sexuality.

29. In March 2012, respondent had a conversation with R ■■■ D. about her sexuality. Respondent approached R ■■■ D. in class after he saw her crying and asked her what was wrong. R ■■■ D. disclosed to respondent that she had questions regarding her sexuality. R ■■■ D. admitted that she had a conversation with respondent regarding her sexuality and but she did not recall the specifics of the

conversation. Respondent referred R█ D. to the school counselor after this conversation. Although respondent denied that he treated R█ D. differently than any other student, he admitted that after this conversation, he may have given R█ D. a “little more special attention” because he was trying to be supportive of her after their discussion about her sexuality. The evidence, however, established that respondent began touching and rubbing R█ D.’s back and speaking to her in an inappropriate and sexual manner as early as November 2011. R█ D. became especially sensitive to respondent’s conduct in February 2012, well before her conversation with respondent her sexuality in March 2012. To the extent respondent attempts to suggest that R█ D. was comfortable enough with him to discuss her sexuality with him, it is important to note that R█ D. did not approach respondent to engage in this conversation, but that respondent approached the student after he saw her crying in class. Consequently, respondent’s assertion that he treated R█ D. differently because he knew she was experiencing difficulty with her sexuality is not credible.

30. Dr. Martinez and Dr. Yoon testified that they believed R█ D. was telling the truth about the allegations in R█ D.’s written statements. Both Ofc. Stefan and Ofc. Lynch testified at hearing. They both believed R█ D. was being truthful when she was interviewed by the officers. Although Ofc. Stefan was concerned that R█ D. may have been influenced by rumors that respondent watched pornography on his computer, Ofc. Stefan was satisfied that R█ D.’s statements were not unduly influenced by such rumors because of the manner in which the interview was conducted. Ofc. Lynch believed R█ D., T█ J. and █ B. were all being truthful when they described respondent’s conduct toward R█ D. Although Ofc. Lynch was aware that the students had heard rumors about respondent’s conduct in class she believed that their statements were credible. Ofc. Lynch did not believe respondent was telling the truth when he denied ever touching █ D. Respondent was fidgety during the interview with Ofc. Lynch and did not make eye contact. Ofc. Lynch submitted respondent’s case for prosecution to the District Attorney twice, but it was rejected both times.

31. The evidence established that respondent inappropriately touched R█ D., spoke to her in a whisper-like sexual tone of voice, treated her differently than he treated other students in his class, and that this conduct made the student feel very uncomfortable.

Charge No. 3 (I█ V. Allegation)

32. In October 2012, I█ V. complained that respondent rubbed his “pickle” (referring to penis) up against I█ V.’s hand on three occasions while the student’s hand was resting on his desk in class. (Exh. 66.) These incidents occurred between September 2011 and January 2012. I█ V. told Ofc. Stefan that respondent rubbed his penis up against his hand as respondent walked through the aisles in the classroom, and that the aisles in the classroom were wide enough for respondent to walk through without rubbing up against I█ V.’s hand. (Exh. 24.)

33. At hearing, I ■ V. testified that respondent rubbed his genitals up against his hand, estimating that this occurred approximately four times. He was surprised, freaked out, and felt weird as a result of respondent's conduct. I ■ V. testified that respondent intentionally touched him in this manner the first two times, and admitted that on one occasion respondent accidentally rubbed up against his hand and apologized. I ■ V. described respondent as being "creepy" and stated that entire sixth grade class also felt this way about respondent. He admitted that he and most of the students were aware of the rumors that respondent had been caught watching "porn" on his laptop computer in class. I ■ V. heard students saying that respondent was "perverted" and "sexually gross" and this impacted how he felt about being in respondent's class.

34. I ■ V. admitted, however, that the rumors about respondent made him believe that respondent intentionally rubbed his genitals against his hand. In hindsight, I ■ V. believes that respondent accidentally rubbed up against his hand. He is also not sure that respondent's genitals, as opposed to his thigh or leg, had pressed up against his hand. Contrary to his statements to LAPD officers, I ■ V. admitted that the aisles between the desks in the classroom were narrow, which may have caused respondent to rub up against his hand accidentally.

35. I ■ V. told M ■ M. that respondent had rubbed up against his hand and that he was uncomfortable and freaked out by the incidents. M ■ M. saw respondent press the "front" of his "hip" up against I ■ V.'s fingers which were on his desk. She could not be sure if respondent's "private parts" touched I ■ V.'s hand. M ■ M. recalled that I ■ V. looked shocked and uncomfortable when the incident occurred. She did not know whether respondent pressed up against I ■ V.'s hand intentionally or not, but she testified that it did not appear that respondent intended to make I ■ V. uncomfortable by respondent's actions. M ■ M. recalled that even though the incident was odd or weird, she remembered she thought it was funny at the time and I ■ V. laughed about it as well. M ■ M. recalled that this incident occurred during the first semester of the 2011-2012 school year.

36. Respondent denies that he intentionally rubbed his genitals up against I ■ V.'s hand, but admitted that it was possible that his lower body may have touched the student as he walked through the aisles in the classroom. He stated that the aisles were only two feet wide in the classroom and I ■ V.'s desk was next to the projector table which made the passage next to I ■ V.'s desk even narrower. Students' books and backpacks that were also frequently in the aisles. Thus, it is possible respondent's lower body could have touched I ■ V.'s hand as he walked through the aisles during classroom instruction. However, given I ■ V.'s lack of certainty that respondent genitals rubbed up against his hand, the student's admission that he now believes respondent accidentally rubbed against his hand, and respondent's the plausible explanation that his lower body may have accidentally touched the student's hand because of the narrowness of the aisles in the classroom, there is insufficient evidence to substantiate I ■ V.'s allegation.

Charge No. 8 (Christmas Carol Incident)

37. In December 2011, respondent and his sixth grade class was singing a Christmas carol along with song lyrics that were scrolling on the classroom smart board. Respondent was using his personal laptop computer and playing his guitar with a computer program that scrolled the song lyrics on the classroom smart board. At some point an image of a scantily clothed or naked woman popped up on the smart board (Christmas carol incident). Several students witnessed the Christmas carol incident but the students' description of the female image varied. The general description of the image was that of a female scantily clothed, or was either naked or covering her breasts with her hands. Respondent immediately turned the image off after it appeared. However, several students saw the image and began laughing about the incident.

38. R■■■■ D. described the image as a naked girl covering her breasts. S■■■■ B. saw an image of a "completely naked" girl pop up on the smart board (Exh. 36.), but at hearing described the image as a woman in her underwear and bra. T■■■■ J. saw an image of a naked "woman showing her breast with nipples." (Exh. 37, p.2.) N■■■■ H. said the image showed a woman's "nipples" (Exh. 38, p. 2), and she referred to the image as "porn" (Exh. 63.) However, at hearing, N■■■■ H. admitted that she did not see the female image and that her written statement was based on other students' statements. The students generally believed that the image appeared accidentally as an advertisement pop-up and stated that respondent took the image down immediately. They all generally thought the incident was funny.

39. Respondent admitted that an image of a female popped up while the students were singing Christmas carols in class, but he recalled the image was of a female wearing a bikini. He stated that he accessed a website called "Ultimate Guitar" through the LAUSD school server and he used the Christmas carol song lyrics from the website for the students to sing the carol. Respondent had never seen any inappropriate material on this website. Respondent was surprised when a picture of a scantily clothed female popped up on the smart board and he closed his laptop computer immediately. Respondent admitted the students started snickering and laughing when they saw the image of the female.

40. Although the recollections of the students and respondent vary as to the description of the female image that appeared on the smartboard, the evidence conclusively established that the image was of a female who was scantily clothed or partially naked. The image was inappropriate for a classroom of sixth graders as was evidenced by respondent immediately closing his laptop to prevent his students from seeing the image. Respondent did not intend for the image to be shown to his students. The students did not believe that respondent intentionally displayed the female image. The students all believed the image popped up as part of an advertisement. However, respondent again was using his unauthorized personal laptop computer for instructional purposes in the classroom. He is responsible for

exposing students to inappropriate images as a result of using his personal laptop in the classroom.

41. Because the District's internet blocking software prevented access to websites that would display such an image, Siever, the District's Computer Forensic Specialist, believed that the female image popped up on respondent's laptop computer as a "residual browser artifact." He explained the image was probably already on respondent's laptop as a result of respondent previously visiting "blacklisted websites" off-line from the District's internet server. He opined that the image popped up even though the District's internet filtering software blocked access to such websites because the image was already stored in respondent's laptop. Because respondent refused to allow the District to inspect his personal laptop, it could not be confirmed how the female image appeared and from what source it originated. Siever admitted that residual browser artifacts could appear with any teacher's use of a computer that is used off-line from the District's internet server and that there was no technology that could prevent residual browser artifacts from popping up. Siever admitted that respondent could have unintentionally and unknowingly visited a blacklisted or porn website, and consequently stored adult images in the residual browser artifacts on his computer without his knowledge.

42. Respondent used his unauthorized personal laptop computer for instructional purposes in the classroom. As a result, an inappropriate female image was exposed to his students during the Christmas carol incident. Although respondent did not intend to expose his student to this image, he is responsible nevertheless because he used an unauthorized computer for instructional purposes. The evidence established that the District's internet filtering software was working properly and that the inappropriate female image was stored in respondent's personal laptop computer, and did not appear as a result of a failure of the District's internet blocking software.

Charge No.s 4, 5, 9, 10, 11 and 12 (Respondent's Inappropriate Gestures and Statements In Class)

43. Several students described gestures and statements by respondent in the classroom during the 2011-2012 school year that were weird, strange and inappropriate.

44. S [REDACTED] B. stated that respondent "lifts his shirt up in kid's faces and rubs his back" in class, and "when he bends over his butt is in children's face." (Exh. 36.) She testified that respondent lifts his shirt and scratches himself and bends over exposing his underwear while performing stretching exercises with students. Although she admitted that she did not think respondent purposefully did this during stretching exercises, she stated that he exposed himself to students in this manner on multiple other occasions not involving stretching exercises.

45. M■■■■ J. observed respondent touching his “private parts” between his legs in the classroom and felt uncomfortable every time respondent did this. (Exh. 65.) He testified that respondent would scratch himself in the genital area frequently during class and that this conduct shocked him and made him feel scared in respondent’s class.

46. Respondent referred to “M■■■■,” a student in respondent’s sixth grade class during the 2011-2012 school year, as “honey” and frequently called M■■■■ M. and other students in the class “sweetie.”

47. S■■■■ B. and T■■■■ J. heard respondent use the term “decimal porn” in class (Exhs. 36 & 37.), and N■■■■ H. stated respondent said “porn” in class on at least one occasion (Exh. 38). Respondent denied ever using the term “decimal porn” in class, but instead admitted that he frequently used the phrase “decimal form” referring to a mathematic phrase. He denies ever using the word porn in class or talking about sex or pornography in class. S■■■■ B. testified that she was certain respondent said “decimal porn” instead of “decimal form” in class and N■■■■ H. testified that she could not recall whether respondent ever used the word “porn” in class.

48. T■■■■ J., who did not testify at hearing, alleged in January 2012 she dropped her pencil box next to her desk, and respondent picked up the case and “came up very slowly” while looking at her legs (pencil box incident). (Exhs. 37 and 62.) When she thanked him for picking up her pencil box, respondent said “your well-well in a soft sensual tone”. (Exh. 62.) S■■■■ B. observed the incident and said respondent came up “really slow” while looking at T■■■■ J.’s legs. (Exh. 36, p. 2.) S■■■■ B. testified that respondent was definitely staring at T■■■■ J.’s legs when he picked up the pencil box. N■■■■ H. also observed the pencil box incident and believed respondent was staring at T■■■■ J.’s legs (Exhs. 63 & 69), and she testified she was disturbed when she noticed respondent intentionally looking at T■■■■ J.’s legs. Respondent denied he looked at T■■■■ J.’s legs but stated that he was having lower back problems which explained why he may have come up slowing from picking up the pencil box.

49. N■■■■ H. recalled an incident in which she was eating food in class and hiding the food in her lap. Respondent saw N■■■■ H. eating the food and came over and took the food from her. (Exhs. 63 and 69.) The District alleges that respondent took the food directly from N■■■■ H.’s lap. At hearing, however, N■■■■ H. admitted that she handed the food to respondent and that he did not take the food from her lap.

50. Students described these gestures and statement by respondent as being “creepy or “weird” and respondent’s conduct made the students fearful and uncomfortable in his class. Many of the students stated that respondent stared at students in a manner that was uncomfortable. The students were uncomfortable with respondent calling them “honey or “sweetie” in class and believed respondent was

creepy and a perverted. They expressed feeling unsafe, scared, nervous and shocked by things respondent would do and say in class.

51. Respondent testified that many of the complaints by the students were taken out of context because of the rumors associated with the C [REDACTED] G. incident. He admitted that he that he stared at students in class for classroom management purposes. He stated that he would frequently stare at students when they were goofing off and he wanted to signal to the student to get back on task. He admitted that he led stretching exercises with his students but denied that he looked at students' butts or touched any student during such exercises. He admitted that his shirt may have lifted during these stretching exercises but that it was not intentional. Respondent also admitted that he may have unconsciously scratched or touched his genitals or bent over and exposed his underwear in the classroom during instruction. But he denies that any such incident was intentional. Respondent denied that he made sexual jokes or statements in class. He stated that the complaints by his students raised his awareness of his in-class conduct and that he probably will do a lot things differently going forward.

52. Respondent admitted that after hearing his students' testimony, he understood how and why the students could make these allegations. Except for C [REDACTED] G., respondent believed that the students were genuinely expressing how they felt about his conduct in the classroom. He believed that C [REDACTED] G.'s allegations influenced several of the students' opinions about him and contributed to many of the students taking his statements and gestures out of context. Respondent testified that he regretted what his students had gone through during the investigation and stated that he would apologize to each student if given the opportunity.

53. The evidence established that the students in respondent's class were aware of the C [REDACTED] G. incident. Several students also observed respondent inappropriately touching R [REDACTED] D. and treating her differently than other female students in the class. Not unexpectedly, students' perceptions of respondent were influenced by what they heard and observed regarding the C [REDACTED] G. and R [REDACTED] D. incidents. As a result, students' fears, discomfort and concerns regarding respondent's conduct may have contributed to them misinterpreting benign or otherwise innocuous gestures and statements by respondent. However, the evidence established that respondent in fact did make several of the gestures and statements attributed to him by the students. Respondent stared at his students in an inappropriate manner, he exposed himself by lifting his shirt and scratching himself, and bending over and showing his underwear, he frequently touched his genitals in an inappropriate manner in the presence of his students, used the term "decimal porn" in class, and referred to his students as "honey" and "sweetie" in class. Even if respondent was unaware and did not intend to make these gestures and statements, such conduct by a teacher is inappropriate in the classroom. It was not established that respondent took food directly from N [REDACTED] H's lap or that he intentionally looked at T [REDACTED] J.'s legs. These complaints by N [REDACTED] H. and T [REDACTED] J. were not substantiated by the evidence.

Charge No. 6 (Naked Picture of Respondent's Two Children)

54. M [REDACTED] J. and M [REDACTED] complained that in September or October 2011, respondent showed the class a slide show that included a photo of two naked children that were between five and seven years of age. M [REDACTED] indicated in his written statement (Exh. 73) that he felt very strange and awkward after seeing the photos of the naked children. M [REDACTED] J. indicated that he felt shocked and uncomfortable after seeing the photos. (Exh. 65.) M [REDACTED] J. testified that respondent showed students a slide show of students from respondent's previous classes. He stated that the photo of the naked children was odd or weird and that he was "shocked" by the photo. M [REDACTED] J. initially thought that the photo of the naked children was inappropriate, but he testified that he now does not think the photo was inappropriate. M [REDACTED] did not testify at hearing.

55. Respondent admitted that the photo was a picture of his two young children naked who were less than two years old at the time the pictures were taken, not five and seven years old as alleged in the District. He showed the slides of his former students and his family at the beginning of the school year as an icebreaking exercise to introduce himself to his new students. Respondent stated that the students laughed when they saw the naked pictures of his children. He admitted that he should not have included the naked photo of his children in the slide show.

56. Respondent's decision to include the naked photograph of his children in the slide show, as he now admits, was not a prudent decision. However, the naked photo of respondent's very young or infant children cannot be construed as pornography or sexually motivated. The children were not five or seven years old as alleged by the District and respondent's motive in showing the photos was reasonable. Including the naked photo of his infant children, although not advisable, was not inappropriate conduct.

Conference Meetings and Performance Evaluations

57. On January 24, 2012, Dr. Martinez convened a conference meeting with respondent to discuss the January 19, 2012, knife incident, the December 16, 2011 discovery of Dr. Yoon's forged signatures on documents submitted for respondent's administrative credentials, and respondent's use of the classroom desktop computer during class for personal reasons unrelated to instruction. The C [REDACTED] G. allegation was not discussed at this meeting. At the meeting respondent asserted that he used the knife to open boxes and SPA packages and that he did not know the knife was prohibited by the LAUSD weapons policy. Respondent declined to answer questions regarding his forging Dr. Yoon's signatures on CSUDH EAP documents, or his use of the classroom desktop to access internet websites for personal use during classroom instruction time. Dr. Martinez counseled respondent that it was illegal to bring a knife or any type of weapon to the school campus, that it was inappropriate for respondent to sign an administrator's signature

on documents without their approval, and that it was inappropriate for respondent to use District's computers for personal use during class. Following the January 24, 2012, conference meeting respondent was returned to the classroom.

58. On May 11, 2012, respondent was given his Personnel Final Evaluation for the 2011-2012 school year. Although respondent questioned the validity of the evaluation at hearing, both Dr. Martinez and respondent signed the evaluation on May 11, 2012. Respondent was evaluated as having a "Below Standard Performance" for the 2011-2012 school year and identified several specific deficiencies including:

- (a) Failure to follow District policy on the use of audio-visual materials. Audio-visual materials are used without adequate evaluation or regard for appropriateness and effectiveness.
- (b) Inappropriate use of instructional time.
- (c) Violation of the Acceptable Use Policy when viewing inappropriate materials on the computer.
- (d) Failure to adhere to the District policy Code of Conduct with Students.
- (e) Your inappropriate conduct with a student in the classroom has resulted in a lack of continuity in the instructional program.
- (f) Failure to follow District policy and the Education Code. Your possession of a locking-blade knife on school grounds without adequate evaluation or regard for appropriateness.

Dr. Martinez made recommendations to respondent for improving his performance, counseled respondent on his strengths and weaknesses, and referred respondent to the appropriate District policies and guidelines for his review.

59. Other than the May 11, 2012 Personnel Final Evaluation, respondent received satisfactory performance evaluations from the District indicating an overall evaluation that he "Meets Standard Performance."

60. On December 11, 2012, Dr. Martinez convened a conference meeting with respondent to discuss the District's administrative investigation into complaints made by students in his 2011-2012 sixth grade class at Burroughs. The District convened this conference meeting after the investigation revealed additional student complaints arising from interviews conducted between June and October 2012. Respondent was advised of the multiple allegations made by several students in his 2011-2012 sixth grade class at Burroughs, including the allegations by C [REDACTED] G., R [REDACTED] D., I [REDACTED] V., N [REDACTED] H., T [REDACTED] J., M [REDACTED] J., and M [REDACTED]. Respondent essentially denied all of the allegations against him and suggested that R [REDACTED] D. was not credible because the student was seeing a psychologist a few times per week. Respondent was counseled regarding the alleged conduct and provided pertinent LAUSD policies and guidelines related to respondent's conduct with students.

61. Respondent was removed from the classroom on March 22, 2012, pending the LAUSD administrative investigation into the students' complaints. On March 20, 2013, the District provided respondent with a Notice of Unsatisfactory Service or Act(s) and a Notice of Suspension on the basis of the allegations in subsequently alleged in the District's Amended Accusation.

62. Respondent has no prior history of disciplinary action taken by the District. By all accounts, prior to the Statement of Charges and Amended Accusation in this case, respondent had met all of the performance standards required by the District.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proof in this matter and the standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.) Proof by a preponderance of the evidence requires a showing that it is more likely than not to be true. In other words, the evidence is more convincing than that which is offered in opposition. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).)¹⁰ The Commission's decision is deemed to be the final decision of the District's governing board. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 331.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*Id.* at pp. 343-344.) Thus, even where cause for dismissal has been established, a Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

¹⁰ Effective January 1, 2015, section 44944, subdivision (c)(1-3), was changed to section 44944, subdivision (d).

Determination of Charges

I. UNPROFESSIONAL CONDUCT & UNSATISFACTORY PERFORMANCE

3. Cause does not exist to dismiss respondent for unprofessional conduct pursuant to section 44932, subdivision (a)(1), or unsatisfactory performance pursuant to section 44932, subdivision (a)(4).

4. Unprofessional conduct as used in section 44932, subdivision (a)(1), may be defined as conduct that violates the rules or ethical code of a profession or is unbecoming a member of a profession in good standing. (*Board of Ed. v. Swan* (1953) 41 Cal.2d 546, 553, overruled in part, on another ground, in *Bekiaris v. Board of Ed.* (1972) 6 Cal.3d 575, 588, fn. 7.)

5. The term “unsatisfactory performance” is not specifically defined in the Education Code or case law. Inasmuch as there is separate cause for dismissal for unprofessional conduct in subdivision (a) of section 44932, and we are not to presume the Legislature intended to enact completely duplicative statutes (*In re Maes* (2010) 185 Cal.App.4th 1094, 1110), unsatisfactory performance must mean something different from unprofessional conduct. In fact, section 44938, subdivision (c), specifies that “unsatisfactory performance” does not include any other cause for dismissal specified in section 44932.

6. While unprofessional conduct can be determined by analyzing a teacher’s conduct relative to the broader educational community, unsatisfactory performance must be analyzed with an eye toward the teacher’s performance as evaluated by his or her employing school district. Section 44938 supports this proposition. Section 44938 requires a charge of unsatisfactory performance to be preceded by a written notice of unsatisfactory performance, and refers to section 44660 et seq., which in turn establish guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for discipline may be established if a certificated employee performs unsatisfactorily to his employing school district.

7. However, the purpose of the statute giving tenure to teachers is to insure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well. (*Bakersfield Elementary Teachers Ass’n v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1293, fn 20, citing 56 Cal.Jur.3d (2003) Schools, § 411, p. 757.) Therefore, a reasonable limitation is that an employing school district cannot be arbitrary or capricious in making decisions regarding whether a certificated employee has performed unsatisfactorily.

8. Section 44938, subdivision (a), provides that “[t]he governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized

representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

9. Section 44938, subdivision (b), provides that the governing board shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

(2) The governing board may act during the time period composed of the last one-fourth of the schooldays it has scheduled for purposes of computing apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. ...”

10. Here, although respondent’s conduct as alleged in Charge No.s 1, 2, 4, 5, 7, 8, 9, and 12 through 21 may have constituted unprofessional conduct or unsatisfactory performance, the District failed to provide respondent the required notice under section 44938, subdivisions (a) and (b), and an opportunity to correct or cure his unprofessional conduct or unsatisfactory performance after he received notice of such conduct. The evidence established that the District provided respondent a Notice of Unsatisfactory Acts or Services on March 20, 2013, and issued the Statement of Charges in this case on September 27, 2013. However, respondent was removed from his classroom and placed at one of the District’s administrative offices on March 22, 2012, where he remained until he received the Notice of Unsatisfactory Acts or Services and his Notice of Suspension on March 20, 2013. Consequently, respondent was not provided an opportunity to correct his faults and overcome the grounds for the charges giving rise to the causes for dismissal based on unprofessional conduct or unsatisfactory performance after receiving the March 20, 2013 notice. (See *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251; *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1446.) This jurisdictional defect is fatal to the District’s causes for dismissal on the grounds of unprofessional conduct and unsatisfactory performance.

II. IMMORAL CONDUCT

11. Cause exists to dismiss respondent for immoral conduct pursuant to section 44932, subdivision (a)(1), by reason of Factual Findings 4 through 14 and 20 through 31.

12. “Immoral conduct,” pursuant to sections 44932, subdivision (a)(1), and 44939, has been defined to mean conduct that is 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. It is sometimes used as synonymous with “dishonesty” or a high degree of unfairness. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Immoral conduct can be construed according to common usage. “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.” (*Palo Verde Unified School District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

13. The Commission 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, here the Commission, may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance*, *supra*, 189 Cal.App.3d at 1052.)

14. A preponderance of the evidence established that respondent’s conduct as alleged in Charge No.s 1, 2, 7, and 15 through 21 of the Amended Accusation constituted immoral conduct.

15. Respondent admittedly forged Dr. Yoon’s signature on multiple documents that he submitted to CSUDH for academic credit for an administrative credential. Dr. Yoon did not authorize respondent to use her signature or have any knowledge of his actions. Respondent’s unauthorized use and forging of Dr. Yoon’s signature was willful, flagrant and shameless and evidenced dishonesty and a moral indifference to opinions of respectable members of the community. (*Board of Education of the San Francisco Unified School District v. Weiland*, *supra*, 179 Cal.App.2d at p. 811.)

16. Respondent watched pornography on his personal laptop computer in the classroom, resulting in C ■■■■■ G. inadvertently seeing pornographic images. Although respondent denied that C ■■■■■ G. saw pornography on his laptop, C ■■■■■ G.'s version of this incident is found to be more credible than respondent's denial. Respondent refused to allow the District to inspect his personal laptop computer and discarded the computer before the District could complete the investigation of the incident. Evidence Code section 413 provides that the trier of fact may consider a party's willful suppression of evidence relating to a case and draw an inference from the evidence or facts in the case against the party suppressing such evidence. (See *Thor v. Boska M.D.* (1974) 38 Cal.App.3d 558, 567 ["that a party's . . . suppression of evidence by . . . spoliation . . ., is receivable against him as an indication of his consciousness That his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit].) Respondent's unwillingness to allow the District to inspect his personal laptop during the investigation into C ■■■■■ G.'s allegation that the student saw pornography on respondent's laptop allows an inference that the student's allegation was true. This inference, coupled with respondent's proven propensity for dishonesty as evidenced by his unauthorized use of Dr. Yoon's signature, severely damages respondent's credibility on this incident, which was witnessed by only he and the student.

17. Respondent also touched and spoke to R ■■■■■ D. in an inappropriate sexual manner on multiple occasions and treated her differently than other female students in his class. Respondent's conduct towards R ■■■■■ D. made her and other students in the class very uncomfortable. Although respondent claimed that he treated R ■■■■■ D. special because he was aware she was having difficulty with her sexuality, the evidence showed that respondent's discussion with R ■■■■■ D. about her sexuality occurred towards the end of March 2012. The evidence established that respondent rubbed R ■■■■■ D.'s back, spoke to her in sexual tones and treated her differently than he treated other students as early as November 2011. R ■■■■■ D. credibly testified that she became concerned about respondent's conduct in February 2012. Thus, respondent's explanation for why he treated R ■■■■■ D. "special" is not credible.

18. Respondent's conduct in allowing an inappropriate picture of a scantily clothed or naked female to appear on the classroom smartboard during the Christmas carol incident, his bringing a 3-31/2 inch locking blade pocket knife on school grounds on multiple occasions in violation of the LAUSD weapons policy, and making inappropriate gestures and statements to and in the presence of his students, was ill-advised, in poor judgment, and in violation of school policies. However, this conduct does not meet the definition of immorality as specified by the courts in *Weiland* and *Palos Verdes*. These actions were not flagrant, shameless, indecent, or corrupt or morally indifferent to respectable members of the community.

III. DISHONESTY

19. Cause exists to dismiss respondent for dishonesty pursuant to section 44932, subdivision (a)(3), by reason of Factual Findings 12 through 14.

20. “Dishonesty” has been defined as conduct that “connotes a disposition to deceive” and “necessarily includes the element of bad faith.” It means “fraud, deception, betrayal, faithlessness,” and “denotes an absence of integrity; a disposition to cheat, deceive or defraud; deceive and betray.” (*Midway School District v. Griffith* (1946) 29 Cal.2d 13.)

21. Respondent signed Dr. Yoon’s signature on multiple documents for purposes of obtaining an administrative credential and submitted to the documents to CSUDH without Dr. Yoon’s knowledge or authorization. This conduct clearly constituted dishonesty.

IV. EVIDENT UNFITNESS FOR SERVICE

22. Cause exists to dismiss respondent for evident unfitness for service pursuant to section 44932, subdivision (a)(5), by reason of Factual Findings 5 through 31, 37 through 47, 50 through 53, and 57 through 62.

23. Section 44932, subdivision (a)(5), provides that the District may suspend or dismiss a permanent employee for “evident unfitness for service.” “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445 (*Woodland*).) Evident unfitness for services requires that unfitness be attributable to a defect in temperament which “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.*)

24. Here, respondent committed multiple acts of misconduct which established that he is evidently unfit for service. In December 2011, C [REDACTED] G. observed respondent watching pornography on his laptop computer in the classroom and that same month, during the Christmas carol incident, respondent’s students were exposed to a pop-up image of a naked or scantily clothed woman on respondent’s classroom smart board, again while using his personal laptop computer. In December 2011, the District also discovered that respondent had forged Dr. Yoon’s signature on multiple documents submitted for academic credit for his administrative credential. The very next month, on January 19, 2012, respondent was discovered in possession of 3-31/2 inch pocket knife on school grounds in violation of the LAUSD weapons policy, which he admitted that he brought on school grounds on multiple occasions. On January 24, 2012, Dr. Martinez counseled respondent about forging Dr. Yoon’s signature and the knife incident. Thereafter, between March 2012 and October 2012,

respondent committed multiple acts of inappropriate conduct with students in his classroom. Respondent touched R■■■■ D. inappropriately and spoke to her in a sexual, whisper-like tone of voice, and made inappropriate statements and gestures to, and in the presence of, multiple other students in his class. These gestures and statements included: calling students “honey” and “sweetie”; staring at students in a weird and inappropriate manner; stating “decimal porn” in classroom; inappropriately exposing his body and underwear in class; and inappropriately touching his genitals in class. Respondent’s students described him as being perverted, creepy and weird, and they all expressed that they fearful, uncomfortable, nervous, and felt unsafe in respondent’s class.

25. Based on these multiple incidents of misconduct, the District has established that respondent suffers from a temperamental defect and inadequacy that connotes a fixed character trait that is presumed not remedial. Accordingly, the District established by a preponderance of the evidence that respondent is evident unfit for service.

V. APPLICATION OF THE MORRISON FACTORS

26. To terminate the teacher on grounds of immoral conduct, dishonesty, or evident unfitness for service, it must also be established that the conduct renders the teacher unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230.) The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance or persistent violation of school rules, laws or policies because such causes of action, by definition, have a direct nexus to teaching. (*Id.*, at pp. 227-230.) “[A]n individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” (*Id.*, at p. 235.) Thus, a determination of unfitness requires an analysis based on criteria set forth in *Morrison*.

27. In *Morrison*, the Supreme Court of California held that the determination of whether a person is fit to teach must be based on an objective and analytical approach, consisting of a review of the teacher’s conduct and an assessment of a variety of specific factors. “In determining whether the teacher’s conduct thus indicates unfitness to teach the board may consider such matters as 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.” (*Morrison v. State Board of Education, supra*, 1 Cal.3d at pp. 227-230.) In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all *Morrison* factors need

be examined, only the pertinent ones. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369, 384.) Moreover the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th at p. 1457.)

28. In this case, application of the *Morrison* factors demonstrate that respondent engaged in conduct that is related to teaching and render him unfit to teach as follows:

(1) The likelihood that the conduct adversely affected students or fellow teachers: The evidence showed that respondent's conduct adversely affected students in his sixth grade class at Burroughs. Several students expressed that they were uncomfortable and feared being in respondent's class as a result of his conduct towards R■■■■ D. and knowing that he watched pornography on his computer in the classroom. The students also were negatively impacted by respondent's inappropriate gestures and statements made to, and in the presence of, students in his classes.

(2) The degree of such adversity anticipated: Two students, R■■■■ D. and C■■■■ G. were removed from respondent's classroom because of his inappropriate conduct.

(3) The proximity or remoteness in time of the conduct: Respondent's conduct occurred between September 2011 and March 2012. Thus, it is not remote in time within the meaning of *Morrison*.

(4) The type of teaching credential held by the party involved: This factor has no application to this case.

(5) The extenuating or aggravating circumstances, if any, surrounding the conduct: Respondent's forgery of Dr. Yoon's signature on several documents that he submitted to CSUDH for an administrative credential shows that he is dishonest and untrustworthy. Respondent is entrusted with academic grading responsibilities for his students. His conduct in forging Dr. Yoon's signature raises serious doubt whether the District is able to entrust with such duties going forward. Respondent denied that he benefitted from the forged documents submitted to CSUDH. However, the evidence established respondent received academic credit from CSUDH based in part on the forged documents he submitted for his credential. Respondent also brought a prohibited weapon on school grounds on multiple occasions. Although the District initially determined that this conduct did not propose a threat to student safety, Dr. Kim testified that this threat assessment was based on the District's belief that respondent had brought the knife on campus on only one occasion. Respondent was not credible in asserting that the purpose he brought the weapon to school was to open test packages and boxes in the classroom. Respondent's conduct in bringing a weapon on school grounds in violation of school policy is an aggravating factor in this case. Respondent inappropriately touched R■■■■ D. on multiple occasions, and

spoke to the female student in a sexual, whisper-like tone of voice, which made her feel very uncomfortable. He asserted that he gave her special treatment because he was aware this student was having difficulty identifying her sexuality. However, evidence showed respondent committed multiple inappropriate acts with this student before he ever had any discussions with her about her sexuality. Finally, respondent watched pornography on his personal laptop in his classroom, inadvertently resulting in a sixth grade student seeing pornographic images. Respondent violated District policies when he did not register his personal laptop with the District for use in the classroom, and he refused to allow the District to inspect the laptop in connection with the into the C [REDACTED] G. allegations.

(6) The praiseworthiness or blameworthiness of the motives resulting in the conduct: Respondent's conduct is blameworthy and he attempted to establish legitimate motives for his actions, motives which were not found to be credible.

(7) The likelihood of the recurrence of the questioned conduct: It is highly likely that respondent would again engage in inappropriate activity in the future. Respondent accepted very little responsibility for his conduct, denying many of the charges and providing incredible explanations for other conduct.

(8) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers: This factor is not at issue. Respondent's conduct involved forgery, violating the District's weapons policy, inappropriately touching a female student, watching pornography in the classroom, and making inappropriate statements to, and gestures in the presence of, his sixth grade students. There is no constitutional right that would be adversely affected by the District imposing discipline for respondent's conduct.

VI. PERSISTENT VIOLATION OR REFUSAL TO OBEY SCHOOL LAWS OR REGULATIONS

29. Cause exists to dismiss respondent for persistent violation of or refusal to obey school laws or regulations pursuant to section 44932, subdivision (a)(7), by reason of Factual Findings 5 through 31, 37 through 53, and 57 through 62.

30. Persistent violation of or refusal to obey school laws or regulations under section 44932, subdivision (a)(7), requires that the violation be either "persistent" or "motivated by an attitude of continuous insubordination." (*Governing Bd. of Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.) Cases interpreting section 44932, subdivision (a)(7), require a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School*

Dist. v. Commission on Professional Competence (1985) 174 Cal.App.3d 1176, 1180-1181.)

31. Here, respondent was aware of the school policy prohibiting bringing a weapon onto school grounds. The evidence established that on multiple occasions respondent brought a 3-3 1/2 inch locking blade pocket knife onto school grounds and into the classroom. Even though respondent asserted he was unaware this knife violated school policy, it was established that the District's policies were disseminated to respondent annually, and well visible signs were posted at the entrances to the school grounds notifying respondent and others of the prohibition against bringing weapons on to the school campus. Respondent also inappropriately touched a female student on multiple occasions from November 2011 through March 2012, in violation of the LAUSD Code of Conduct with Students, the LAUSD Employee Code of Ethics, and the LAUSD Sexual Harassment Policy. Respondent also violated the LAUSD Code of Conduct with Students and the LAUSD Employee Code of Ethics on multiple occasions during the 20911-2012 school year by making inappropriate statements and gestures to, and in the presence of, his students in the classroom. Finally, respondent violated the LAUSD Acceptable Use Policy for the District's Computer System by storing multiple documents with Dr. Yoon's forged signature on the District's classroom desktop in respondent's class. Respondent also utilized his personal laptop in the classroom for instructional purposes in violation of the District's requirement that a teacher complete a LAUSD Property Registration Form before using personal computer equipment for instructional purposes or otherwise in the classroom.

Disposition

32. Respondent's conduct in this case is of particular concern to the District because of its severe nature. Respondent forged an administrator's signature on multiple documents, brought a prohibited weapon onto school grounds, inappropriately touched a female student, watched pornography in the classroom on his personal laptop, and made inappropriate statements and gestures to, and in the presence of, his students in his classroom. Respondent's students were adversely impacted by his conduct, ultimately requiring the removal of two students from his classroom. Although respondent had no prior history of disciplinary action prior to the charges alleged in this proceeding, respondent's conduct clearly shows that he is unfit to continue teaching with the District. Under these circumstances respondent's dismissal from the District is the appropriate disposition in this case.

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ORDER

The determination of the Governing Board of the Los Angeles Unified School District in the Amended Accusation to dismiss respondent Shane Carnival (760776) pursuant to Education Code sections 44932 and 44939 is upheld. Accordingly, respondent shall be dismissed as a certificated employee of the District.

DATED: June 10, 2016

DocuSigned by:
Michael A. Scarlett
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MICHAEL A. SCARLETT
Administrative Law Judge,
Office of Administrative Hearings,