

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

ERIC BURKE (EN 751285),
A Permanent Certificated Employee,

Respondent.

OAH No. 2015070081

DECISION

This matter was heard on November 30, December 1, 2, 4, 7-11, 14, 16-17, 2015, in Los Angeles, California, before the Commission on Professional Competence (Commission). The Commission consisted of John L. Davis, Kristi Harabedian and Eileen Cohn, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), State of California.

The Los Angeles Unified School District (the District) and was represented by Jonathan M. Lebe of Bergman Dacey Goldsmith.

Eric Burke (respondent) appeared and was represented by Daniel J. Kolodziej of Trygstad, Schwab & Trygstad.

Prior to presentation of the evidence, the parties conducted voir dire of the panel members and, as reflected in the record, over respondent's objections, the ALJ determined the panel members were qualified. The parties also made several motions in limine. The ALJ considered and ruled on those motions in limine, as reflected in the record. Oral and documentary evidence was received, and argument was heard. Prior to the conclusion of the hearing, the ALJ served the parties with a protective order sealing the exhibits and transcript of the proceedings. The matter was submitted for Decision on December 18, 2015.¹ The Commission on Professional Competence considered the matter in executive session on

¹ The ALJ marked for identification only complainant's hearing brief (ALJ 1) and closing argument powerpoint (ALJ 2). The record was re-opened for the joint submission of portions of respondent's deposition testimony which was referenced by counsel during respondent's examination at hearing. The deposition testimony was marked for identification only (ALJ 3) as an aid to reviewing the hearing testimony.

December 18, and 23, 2015 and March 24, 2016. After due consideration of the entire record herein, the Commission makes the following Factual Findings, Legal Conclusions, and Order.

INTRODUCTION AND STATEMENT OF THE CASE

The District seeks to terminate respondent for conduct which it contends demonstrates that he is unfit to teach middle school students. The District charges respondent with inappropriate physical contact with female students characterized by touching their shoulders, sides and in one incident, sliding his hand from a student's shoulder down her arm and side to her hip and thigh area. The District charges respondent's inappropriate physical contact with female students included grabbing a student's face under her chin, touching her cheek, remarking on the softness of her skin and exclaiming she was so cute.

The District charges respondent with making inappropriate sexual remarks to students beyond what was necessary to communicate health and science instruction; e.g., "flowers are nature's pornography," "when bees climax they explode," when both parents have brown eyes, the children have brown eyes, "unless the mailman was involved," among other statements.

The District charges respondent with inappropriate conduct when he carelessly projected pornographic images from his computer at the start of class instruction.

The District charges respondent with failing to respect boundaries between teacher and student when he accompanied one female student and her friend after school hours to the school boundaries, and took a photograph of another female student singing in a private music school's chorale group and e-mailed it to her.

Contrary to respondent's obligation to treat his students respectfully, the District charges respondent with failing to do so when he threatened a student by saying "I would slap you if I could."

The District charges respondent with failing to abide by school policies when he wore a Halloween costume after the school banned students from wearing costumes.

The District contends that it has met its burden of proof on all charges and causes in its Accusation including: immoral conduct, including egregious conduct; unprofessional conduct; dishonesty; unsatisfactory performance; evident unfitness for service; persistent violation or failure to abide by school rules or policies; and willful refusal to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the employing district. The District requested that the Commission dismiss respondent from employment as its permanent certificated employee.

Respondent disagreed with the District's characterization of his conduct. Respondent maintained that he was a hardworking and dedicated teacher with a long-standing exemplary teaching record whose conduct was either misrepresented, exaggerated or misinterpreted by a small cadre of his seventh grade students who, by their age and nature, were prone to gossip and hyperbole. According to respondent, the gossip surrounding the misrepresentations destroyed his reputation and resulted in his dismissal. Respondent claimed he was not aware of his students' reactions to his remarks or conduct, but when the Principal advised him of objectionable behavior during the 2013-2014 school year he corrected his behavior.

In his closing argument, respondent moved to dismiss the cause for unprofessional conduct. The District met its burden of proof on the cause for unprofessional conduct. Nevertheless, the motion was granted because the evidence established that the District failed to meet its procedural obligations and provide respondent an opportunity to remediate his conduct when it did not allow him to return to the classroom at any time after it issued its Notice of Unsatisfactory Conduct in September 2014. Complainant did not meet its burden for the cause for unsatisfactory performance. That cause was also dismissed because it required the same fidelity to the procedures set forth in Education Code section 44939 for the cause for unprofessional conduct.

Based upon the Factual Findings and Legal Conclusions, the Commission dismisses causes 3 and 5 for unprofessional conduct and unsatisfactory performance, on procedural grounds. The Commission finds that the District did not meet its burden of proof on cause 4, dishonesty, and cause 8, willful refusal to perform regular assignments without reasonable cause. The Commission sustains the Accusation and grants District's request to terminate respondent on causes 1 and 2, for immoral conduct, but not egregious conduct, cause 6, evident unfitness for service, and cause 7, persistent violation or failure to abide by school rules or policies.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Charges and Accusation were brought by Justo H. Avila, Chief Human Resources Officer for the District (complainant).
2. Respondent is a permanent certificated employee of the District. He last served as a certified employee at Paul Revere Middle School (Revere) during the 2013-2014 and 2014-2015 school years. Respondent taught middle school science and health.
3. On September 24, 2014, after the District initiated its investigation, respondent was removed from Revere and was re-assigned to Educational Service Center (ESC) West. (Exhibit 56.) As part of his reassignment he was directed to remain at home during the school day. Respondent was ordered to report to District Administrator, Janice Davis, and to refrain from entering any District campus, contacting District employees or students, or

performing any District work, except work that might be assigned to him by Janice Davis. There was no evidence that respondent performed any work on behalf of the District during his assignment to ESC. There is no evidence that respondent returned to Revere or any District classroom after September 24, 2014.

4. On January 20, 2015, Revere's Principal Christopher Perdigao met with respondent and served him with a Notice of Suspension (15 days) and Notice of Unsatisfactory Acts which contained the charges set forth herein. On February 23, 2015, respondent with his union representative met with the complainant to appeal the Notices. The complainant sustained the actions and denied the appeal.

5. On March 11, 2015, two days after complainant's administrative review meeting with respondent and his union representative, complainant provided respondent with written notice that he was immediately suspended without pay and would be dismissed unless he timely demanded a hearing. Respondent submitted a timely demand for a hearing.

6. The Statement of Charges, dated May 22, 2014, and the Accusation, dated July 10, 2015, recommended respondent's dismissal from the District for the following legal causes under Education Code sections 44932 and 44939: (1) immoral conduct, including egregious conduct; (2) immoral conduct; (3) unprofessional conduct; (4) dishonesty; (5) unsatisfactory performance; (6) evident unfitness for service; (7) 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 employing Respondent; and (8) willful refusal to perform regular assignments without reasonable cause, as described by reasonable rules and regulations of the employing district.

7. The parties have met pre-hearing jurisdictional requirements to proceed to hearing and jurisdiction exists for these proceedings.

Respondent's background

8. The 2013-2014 school year was respondent's first year at Revere. Respondent has a total of 14 years of teaching experience. Between 2010 and 2013 respondent taught science at another District middle school where he received positive reviews for his teaching skills and his establishment of a competitive after-school running team.

9. Respondent came to Revere with impressive academic and teaching credentials. Respondent obtained a Bachelor of Arts in environmental science, a Master of Arts in educational leadership, and credentials authorizing him to teach middle school science. He possesses a Clear Multiple Subject Teaching Credential and Administrative Services Credential, and National Board Certification for Science and Early Adolescence. During his tenure at Revere, respondent was also enrolled in a doctoral program in educational leadership at the University of Southern California (USC) where he excelled. In addition to his formal undergraduate and graduate education, respondent was awarded

fellowships from the Earthwatch Institute, Massachusetts Institute of Technology (MIT), and jointly from the University of Southern California (USC) and Mattel for science, technology, engineering and math (STEM) curriculum.

10. During the 2013-2014 school year at Revere, respondent was assigned to a homeroom period, three honors science classes, (first, second and sixth period), and two regular general education science classes, (fourth and fifth period). During the first semester of the 2013-2014 school year respondent also taught health, which included topics concerning human sexuality. Respondent excelled in technology and during the roll-out of the District's I-Pad program took a leadership role in training the teachers. Respondent also initiated a science fair which was scheduled during open house.

2013-2014 Reported Incidents and Conferences

November 7, 2013 informational conference

11. On October 31, 2013, early in the school year, Revere's Principal Fern Samoza observed respondent greeting his students wearing a Halloween "Frankenstein" costume which he accessorized with face paint (charge 26). The previous day, October 30, 2013, Revere issued an administrative directive barring students from wearing Halloween costumes and broadcast the costume ban during the fifth and sixth period. The goal of the policy was to avoid excessive distraction from school work which Principal Samoza observed began with costume planning and continued through the day of Halloween. Principal Samoza presented as a credible and candid witness and with little exception her testimony was given considerable weight in determining whether complainant met its burden of proof, and more weight than respondent's testimony, which was generally not credible.

12. On November 7, 2013, Principal Samoza convened an "informational conference" with respondent, a Revere Assistant Principal and respondent's union representative, to discuss Revere's Halloween costume policy. (Exhibit 27.) The policy did not expressly bar teachers from wearing costumes. According to Principal Samoza, although teachers were not formally restricted from wearing costumes, the policy clearly applied to teachers because they are role models. Revere's policy was in place for many years and the teachers, with few exceptions, understood the policy to apply to them. Principal Samoza considered it common sense for "adults" to be aware of a policy that pertained to everyone, especially since it was developed jointly by teachers, administrators and parents to ensure that Halloween did not interrupt the school day. Principal Samoza considered respondent's conduct insubordination and poor judgment. She directed respondent to review District policies, "Respectful Treatment for all Persons" and the "Code of Conduct with Students."

13. Respondent thought the policy was restricted to students because other policies, like the cell phone policy, were clearly directed to teachers and administrators, in addition to students. (Exhibit 27.) Respondent was accustomed to dressing for Halloween at his previous school. He also planned Halloween-themed science projects for Halloween that engaged his Revere students. In determining that respondent did not violate Revere's

Halloween administrative directive, the Commission gave great weight to the language of Revere's policy, respondent's status as a new teacher, his lack of previous experience with Revere's policy, and his development and implementation of engaging Halloween-themed curriculum.

14. Principal Samoza was concerned from respondent's attitude at the conference that he was not taking school directives seriously. District policies and school directives were available on the teacher web-portal. Although the Commission did not fault respondent for violating school policy by wearing a Halloween costume, the Commission considered respondent's narrow construction of the language of the policy directive as further evidence of his fixed personality trait.

March 3, 2014 investigative conference

15. On March 3, 2014, Principal Samoza held an "investigative conference" with respondent, Kim Uchida, respondent's union representative and Justin Koretz, Assistant Principal, to discuss respondent's inappropriate behavior and remarks to students on February 21, and during the week of February 24-28, 2014. (Exhibit 39.) The investigative conference addressed three incidents. About the time the incidents were reported, February 28, 2014, and during the time of her investigation, Principal Samoza suspended respondent with pay for a few days. Each incident was referenced in the charges.

16(A). Charge 19, incident one, concerned respondent's inappropriate touching of the face of female student, SD² prior to the seventh grade assembly, while remarking how cute she appeared. During the conference, respondent admitted to touching SD's face in the foyer of the auditorium surrounded by a small group of students. He admitted to pinching SD's cheeks, "like the other girl did." (Exhibit 39.) He did not recall remarking that SD was cute.

16(B). At hearing, witnesses elaborated on incident one. SD was walking to the auditorium with two other female classmates. One friend, SH, after accidentally touching SD's face, commented on the softness of SD's skin. The female students were not walking or conversing with respondent, but walking near him with the entire seventh grade, toward the auditorium. Respondent, upon hearing SH's remark about SD's skin, cupped his hand under her chin, touched her cheek, and repeated SH's remark that SD's skin was so soft. He also exclaimed that SD was so "cute." The students thought respondent's conduct was "very weird." Respondent made SD and her classmates uncomfortable. After entering the auditorium, SD and her classmates made sure to sit away from respondent. SH, not SD, made the initial report to Revere's administration. Principal Samoza removed SD from respondent's class to terminate an uncomfortable student-teacher situation that could potentially escalate.

² In this Decision, all names of students and their relatives are referenced as initials to protect their privacy.

17(A). Charge 20, incident two, occurred during the week of February 24-28, 2013 and concerned respondent's reaction to the conduct of JA and his classmate, WA, during a science experiment involving worms. Respondent was upset with JA and WA because he thought they were harming the worms by burning them with a magnifying glass. Respondent kept JA and WA after class and told JA he would "slap [JA] in the face if he could." During the conference, respondent denied making the statement.³

17(B). At hearing, student witnesses WA and CA, who participated in the experiment, clarified the incident and confirmed respondent's statement. WA denied he or JA intentionally abused the worms, initially remembering only that they picked them up with a stick. At hearing WA was unsure whether JA used a magnifying glass, but CA, their partner, was clear that JA was using a magnifying glass to burn the worms. WA sympathized with respondent, confirming that he was right to be upset if the worms were injured because he was a scientist and cared about animals. Nevertheless, he and JA were surprised by the vehemence of respondent's reaction and agreed to report respondent's statements. The reports of JA and WA contemporaneous with the incident corroborated the conference memo and WA's and CA's hearing testimony. WA generally liked respondent and appreciated him as a teacher who helped him improve his grade from an F to a B. He did not think respondent was wrong to reprimand students for inappropriate use of the worms. CA credibly described her classmates' wrongful use of a magnifying glass to burn the worms. CA clearly recalled respondent saying he would "slap you if I could" and she heard it as a threat. Neither WA or CA had reason to protect JA; they only knew him as a classmate, and were not friends.

17(C). At hearing, respondent claimed that his students mischaracterized his response. Respondent testified that he said what the students did was "a slap in the face to me," a statement his father made when respondent did something inappropriate in his youth. The Commission did not find respondent's testimony credible.

18(A). Charge 12, incident three, concerned student KM, a female student enrolled in respondent's homeroom and fourth period class, who reported on multiple occasions during period four respondent had inappropriately touched her hair, touched and rubbed her shoulders and back and would bring his hand down her body "near my bottom." (Exhibits 25 and 39.)

18(B). Prior to the March 3 conference, Principal Samoza referred KM's claims to the police for criminal investigation. Principal Samoza had also transferred KM from respondent's homeroom and science class and KM had no further contact with respondent. Principal Samoza transferred KM to prevent further problems occurring as a result of a damaged teacher-student relationship.

³ Although JA and another student, WA, reported respondent's complete statement to Revere's administration the day it was made, the District withdrew the, "kick him in the butt" and another quote from the charge.

18(C). Principal Samoza informed respondent of her referral and also told him that KM “recanted and declared her entire statement was untrue.” (Exhibit 39). During the conference, respondent denied touching KM’s hair, shoulder, rubbing or touching her back, allowing his hand to drift below her waist, or touching KM inappropriate in any manner.

18(D). Principal Samoza’s claim that KM recanted her report of respondent’s misconduct was not supported by the evidence. KM met with Principal Samoza approximately 10 times to discuss incident three, twice privately. KM felt intimidated by Principal Samoza, who pointedly told KM she was lying. Principal Samoza disputed calling KM a liar, but Principal Samoza’s otherwise credible testimony, was not persuasive with regard to her dealings with KM.

18(E). Principal Samoza’s statement in the March 3, 2013 conference memo that KM later declared that respondent only touched her “slightly” on the upper back was not supported by KM’s amended written statement or her later report to District investigator, Sandra Lopez-Magdaleno on October 24, 2014. (Exhibit 63.) KM’s hearing testimony was materially consistent with her February 28 amended written statement and her later statement to Ms. Lopez-Magdaleno. KM admitted to Ms. Lopez-Magdaleno that she clarified to the police officers that respondent touched her back and shoulders and not her buttocks, but she also informed Principal Samoza of respondent’s more extensive inappropriate touching.

18(F). KM told Ms. Lopez- Magdaleno, that respondent would approach her at her desk if she had a question, touch her side arm, near her breast, and then move his hands to her lower back and near her buttocks. (Exhibit 63.) In her last statement to the District she broke down his pattern of touching various parts of her body: her arm at least seven times; her inner arm near her breast, two times; running his hand down her arm to her upper thigh while sitting, approximately five times. (Exhibit 63.) Respondent only touched KM once on the lower back while she was standing. Respondent also would stand behind her with his hands on her shoulder looking at her work. He touched her on the top of her head a few times. About a month before her mother reported respondent’s conduct to Principal Samoza, while respondent was touching her, KM asked him what he was doing and he told her he was helping her with her work. (Exhibit 63.)

18(G). At hearing, KM was steadfast in her version of events and based upon her unwavering and assured testimony, sincere demeanor, the absence of bias or motive against respondent, and evidence showing respondent’s consistent pattern of inappropriate behavior, KM’s version of the incident was given great weight. The Commission found KM’s testimony to be more persuasive than conflicting testimony from respondent, Principal Samoza and Assistant Principal Justin Koretz. During her initial statement she estimated respondent had touched her upwards of 10 times. At hearing, two years later, her best recollection was that he touched her 18 times, including touching the top of her head a few times.

18(H). At hearing, both Principal Samoza and Assistant Principal Koretz maintained that KM did not demonstrate to them or to the police officers that respondent touched more

than her shoulders and upper back. Principal Samosa considered it important whether respondent touched KM's buttocks directly. When the police interviewed KM she did not show them that he touched her buttocks. Whether respondent touched KM's buttocks was important to Principal Samosa and the police investigating the matter. No evidence was introduced from the investigating officer or from a police report as to what the police considered criminal misconduct, but sections of the Penal Code expressly refer to the buttocks as an intimate part of the body supporting prosecution for sexual assault of a child.⁴

18(I). Principal Samosa was understandably concerned with the magnitude of KM's accusation against respondent. Principal Samosa was especially suspicious of the validity of KM's report after KM's classmate, NS, admitted she never observed respondent touching KM's buttocks.

18(J). NS had urged KM to report the incident and KM assumed NS had observed it. NS, without being asked, wrote the statement to support KM, but recanted it during Principal Samosa's investigation. NS testified about her poor judgment, mainly because she did not want respondent to lose his job due to her statement. NS was no longer friends with KM, but was firm in her expression of respect for KM as an outstanding student, and as a trustworthy and honest person.

18(K). At hearing, Principal Samosa, explained that she considered KM's report "shakey" and determined removing KM from the class would be an adequate response.

19. Respondent's inappropriate touching was not limited to the incidents set forth in the charges. When KM gave him a Christmas present, as she did all the other teachers, respondent gave her an extra tight hug, lifting her off the ground. Respondent's tight hug is relevant to the analysis of the *Morrison* factors below, and whether respondent has a temperamental defect which supports cause 6, evident unfitness for service.

20(A). Principal Samosa referred respondent to several District policies pertaining to appropriate student-teacher conduct and she and his union representative, Kim Uchida, reviewed and read the relevant portions of the policies with him. Respondent's actions violated District policies. (charge 28(b),(c) and (f).)

20(B). Principal Samosa referred respondent to Respectful Treatment for all Persons and the District's Code of Conduct. She referred respondent to the Code of Conduct with Students, BUL 5157.0, Section II, subsections, 3, 4, and 6 which expressly prohibits teachers from engaging in any behavior, directly or indirectly with students or in their presence which

⁴ Penal Code section 11165.1, subdivision (b) provides: Conduct described as "sexual assault" includes, but is not limited to, all of the following: (4) The intentional touching of the genitals or intimate parts, including the [...] buttocks, or the clothing covering them, of a child, [...] for purposes of sexual arousal or gratification..." This Decision is governed by the preponderance of the evidence, the standard applying to proceedings of this type. The standard of proof in criminal cases is beyond a reasonable doubt.

is unprofessional, unethical, illegal, immoral or exploitative; touching or having physical contact with students that is not age-appropriate or within the scope of the employee's individual responsibilities or duties. This policy was first adopted in 1988.

20(C). Principal Samoza reviewed with respondent the District's Sexual Harassment Bulletin 3349.0, Section III, which defines sexual harassment as either (1) verbal conduct, defined as using suggestive, derogatory or vulgar comments, sexual innuendo or slurs, unwanted sexual advances, invitations or comments, or (2) physical conduct, defined as unwanted touching, pinching, kissing, patting, or hugging, the blocking of normal movement; stalking; assault; and /or (3) physical interference with work or study directed at an individual because of the individual's sex, sexual orientation or gender. This policy was adopted in 2006.

21. At the time of this conference, Principal Samoza questioned respondent's judgment. She was concerned that respondent did not fully appreciate the District's policies, which were easily accessible on the District's teacher web-portal. She was especially concerned because this conference addressed multiple incidents, and at least one confirmed incident, involved his admission that he touched a female student's cheeks and called her "cute." She was surprised given all the District policies and directives that he would conduct himself in that manner. She considered his conduct contrary to a teacher's duty as a role model, and to have a substantial adverse impact on the community, because the conduct and the rumors of the conduct, upset parents and students.

22. Principal Samoza made her concerns known to respondent. In her conference memo, she also reminded respondent that failure to follow her advice and directives could lead to a disciplinary conference, a Notice of Unsatisfactory Service/Acts, suspension without pay, and possible dismissal from the District.

May 2014 informational conference

23. On May 8, 2014, Principal Samoza met with respondent alone in what she styled an "informational conference" to discuss student concerns regarding his statements in class which were reported by student SU's parent GK, to a Revere administrator on April 29, and May 6, 2014. Principal Samoza prepared a memorandum that day summarizing the conference. (Exhibit 40.) The incidents set forth in the memo, with the exception of an incident regarding the room temperature, were directly relevant to the charges. The incidents were corroborated by credible and persuasive student, teacher and parent testimony, and in certain instances, respondent.

24(A). Parent GK reported from her daughter, SU, the following statements made by respondent during the school year:

24(B). Charge 7(d), (Informational Conference, Statement 1(b)), "A flower is nature's pornography";

24(C). Charge 17, (Informational Conference Statement 2), at the end of the lesson on plant anatomy taught by science teacher, Lisa Asahina, stated in front of the students “Oh, I wish the story ended in sex”;

24(D). Charge 18(a), (Informational Conference, Statement 1(c)), “If your mother and father have brown eyes, you will have brown eyes unless the mailman is involved”;

24(E). Charge 18(b)), (Informational Conference, Statement 1(d)), “When bees climax they explode”;

24(F). Charge 18(c), (Informational Conference Statement 1(e)), “When romantic time happens, she has her legs in the air and is like, ah, ah;” and

24(G). Charge 18(d)), (Informational Conference Statement 1(f)), referring to a female student’s nickname, Huggy Bear, “Oh, I thought they called her that because it is the name of a prostitute.”

25. SU attended respondent’s second period honors class and witnessed statements 24(B) through 24(G). At hearing she provided straightforward testimony about what she heard and showed great care to provide her best recollection about the statements. SU was 11 years of age when she entered seventh grade and GK was concerned about the extent to which respondent referred to sex in the classroom, which did not appear to be necessary or, at times, connected to the lessons, despite health and sexuality being part of the fall curriculum. GK listened to her daughter’s reports throughout the year, but did not report them earlier because GK had always been very supportive of teachers and was hesitant to attack respondent. SU assured GK that respondent had not touched her and she would not be alone with him. When SU told GK about “romantic time” GK felt compelled to report it to Revere’s administrators. GK is a lawyer and reviewed SU’s testimony with her before the hearing, but there was no evidence that SU modified or changed her testimony at the advice of GK. On the contrary, it was evident to the Commission that SU was sincere and truthful about her observations, GK was an accurate reporter of her daughter’s concerns, and GK’s singular motivation in making her report was her well-considered opinion that respondent should not be teaching children. GK had a younger child who would attend Revere and she did not want him, or any other child, to be taught by respondent.

26. Respondent’s inappropriate statements started early in the school year, particularly the statement regarding the mailman. The statements about the flowers and bees occurred around or before January 2014. The remaining statements were made after January, with the “romantic time” statement made closest to GK’s report in late April and early May 2014.

27. SU had sex education in fifth grade. At the hearing she strongly protested when it was suggested her age had something to do with her reaction to respondent’s statements. Respondent referred to sex excessively throughout the school year (charge 7(e)). SU described her reaction to his various statements, as “scared” or “uncomfortable.”

SU could not recall every circumstance with precision, but she confirmed the statements and clearly remembered that respondent's statements were not necessary to the curriculum even though he taught health during the fall semester.

28. The phrase "ah, ah" used in the District's memos and charges relating to romantic time understated the loud moaning sounds SU made at the hearing when she was asked to repeat respondent's statement made to the class. SU found respondent's exaggerated vocalizations "gross."

29. SU was disturbed and angered by respondent's comments regarding her classmate EH's nickname, Huggy Bear.

30. SU was not the only student who heard respondent's sexual references. Many students who were interviewed or made reports recalled respondent's sexual references. SK, a first period student reported hearing respondent make his bees' climax statement; AC and RB, (first period students), SD and HI, (second period students), and SH, (a sixth period student) heard respondent refer to flowers as nature's pornography. HI was shocked by respondent's reference to pornography. SD also heard respondent's reference to EH's nickname.

31(A). Respondent either denied outright or disagreed with the context of his statements.

31(B). With regard to charge 7(d), (Informational Conference Statement 1(b)), respondent's statement that "flowers were nature's pornography," respondent admitted making the statement but insisted he was repeating and responding to a student who shared his brother's quote. He considered random statements like this to offer "teachable moments." The more persuasive testimony of student witnesses established that respondent initiated the statement. The lesson concerned the disbursement of pollen from the opening in the flower, the reproductive part of the plant. Even if respondent repeated the student's phrase, there was no credible evidence that this statement was necessary or appropriate to the curriculum.

31(C). With regard to charge 17, (Informational Conference Statement 2), respondent denied making a statement in response to Ms. Asahina's story that he wished the story ended in sex. He also maintained that if he made any statement he would have used the word reproduction instead of sex. SU's recollection was more persuasive.

31(D). Ms. Asahina, an experienced and credentialed teacher with 19 years of teaching experience in science and health, was responsible for the lesson regarding the parts of the plant. Ms. Asahina's lesson was not about sexual or asexual reproduction. The day of her lesson, she had exchanged classes with respondent to teach his students the parts of the plant. Respondent was teaching her students about plant reproduction. Ms. Asahina had developed a story to make it easier for students to remember the parts of plants. The story involved communications between a high school boy and girl which ended with a phone call.

The story ended without resolving their relationship. Ms Asahina had an unclear recollection as to whether respondent said “reproduction” or “sex.” The students appeared disappointed with the abrupt ending to the story, but Ms. Asahina could not tell whether they were grumbling because of respondent’s comments. Respondent’s comment at the end of the lesson was irrelevant to Ms. Asahina’s lesson on plant parts.

31(E). With regard to charge 18(a), (Informational Conference Statement 1(c)), in the conference respondent did not recall making the statement about eye color and the mailman. At hearing, respondent explained the eye color was wrong so he would never make that statement; however, respondent was contradicted by the more credible testimony of SU and persuasive evidence of his consistent pattern of sexual innuendo.

31(F). With regard to charge 18 (b), (Informational Conference Statement 1(d)), respondent explained the phrase “when bees climax, they explode” was taken from a video produced by Bill Nye. There was no evidence that respondent showed the video, or that the statement was material to the curriculum. In addition to SU, SK in respondent’s first period class reported the statement.

31(G). With regard to charge 18(c), (Informational Conference Statement 1(e)), respondent denied making the statement, but admitted he used “romantic time” instead of sex because some students were “disturbed with the word sex.” (Exhibit 40.) There was no evidence that the statement was material to the curriculum, and SU’s recollection was made more persuasive by respondent’s admitted practice of referring to “romantic time.”

31(H). With regard to charge 18(d), (Informational Conference Statement 1(f)), respondent admitted to initiating a discussion about EH’s nickname “Huggy Bear” which was printed on her sweatshirt. He claimed he was responding to student questions after they “googled” the name, where they found it used as the name of a pimp in an old TV show. After being asked what a pimp was, he also explained the word prostitute. At hearing, it was clear from respondent’s testimony that he initiated the discussion and invited the students to research the name. SU’s understanding of respondent’s statement was consistent with his initiation of a discussion about Huggy Bear based on his recollection that it was the name of a prostitute.

32(A). Respondent’s sexual references were not relevant or material to the science or health curriculum. Ms. Uchida, respondent’s union representative at the meeting, taught health and science for 26 years, and was a union representative for 10 years. She was extremely cautious and exacting in her testimony. It was clear by her demeanor she was taking great care to be accurate, and as a union representative, she did not want to damage a fellow teacher. Despite her apparent concern for respondent, and her written character reference in support of respondent’s retention, she provided persuasive testimony that respondent’s statements were not appropriate to, or part of, the health or science curriculum, and were counterproductive to the goal of effectively teaching middle school students.

32(B)). Ms. Uchida spoke of the need to carefully traverse the health and science curriculum in order to keep students focused on important health and science subjects, and not sidetrack their concentration by references to salacious and sexual matters. Ms. Uchida considered it important to avoid sexual references because in her experience young students would start thinking about sex, and stop thinking about the subject matter. Ms. Uchida capably testified about the science and health teacher's practice of discerning between curriculum and age-appropriate questions and personal questions best referred to students' parents.

32(C). Ms. Uchida did not find any of respondent's statements necessary or appropriate to the 20-week health curriculum, or the year-long science curriculum. Respondent's statement regarding eye color was not only inappropriate because it reminded students of their parents' sexual relations, and introduced a possible "third person," but it was wrong, because the genetics of eye color are more complicated than what respondent presented.

32(D). Respondent's comments about the mailman were consistent with student reports of his "birthday project," where students were to project back in time to their conception, and a related project where students used data from the Internet to isolate the most popular months for birth and conception. Respondent's project made students uncomfortable. The purpose of the assignment was unclear and confusing as it did not seem to provide practical or appropriate information to the students. Ms. Uchida considered it inappropriate to use teaching methods which required students to think about their parents' sexual relationships. Ms. Uchida offered that as an adult she did not want to think about her parents' sexuality. Ms. Uchida referred all personal questions students raised to their parents.

32(E). Ms. Uchida considered it inappropriate to make references to orgasms, bees exploding or climaxing, or using any language that was overly sexual, or unduly personalized the female anatomy.

33. At the time of this third meeting with respondent, Principal Samoza was becoming increasingly concerned, frustrated and worried, because of the number of incidents and warned respondent of her concerns. Principal Samoza had not received complaints about any other teacher making inappropriate sexual statements during health or science class.

34. Principal Samoza knew a technology coordinator position was being created which would require respondent to circulate to different classrooms to assist teachers and students with the I-Pad rollout. She considered this position ideal for respondent and a solution to his student conduct problems. Revere was a technology magnet and the position of technology coordinator was important to advance the school's mandate. The position had to be funded by Revere and as such, it was not known until after the 2013-2014 school year ended whether respondent could be promoted, but his name was circulated to the teachers for consideration.

35 Principal Samoza would have considered stronger action, if that is what was needed to address respondent's conduct. She did not start the formal suspension or termination process at the time of the May meeting because she was about to retire and handed the information about the investigation to her successor, Principal Christopher Pertigao.

Respondent's reputation as a teacher and peer

36. During the 2013-2014 school year respondent received positive reports from his peers and other adults. Principal Samoza did not conduct an instructional evaluation of respondent during the 2013-2014 school year. No teachers or administrators reported seeing respondent conduct himself inappropriately with any students. Although one administrator was disturbed by his sarcastic attitude, he did not observe anything inappropriate in respondent's class. Respondent was observed by his peers and adult one-on-one aides to have a structured classroom, where he engaged the students. Without knowing the details of the charges, his peers considered him a good teacher, and from testimony and character letters, respondent was well liked by his peers for his help with technology and his innovative use of technology in the curriculum. Respondent's colleague Lisa Asahina found him to be a kind and collaborative colleague. She considered him helpful with technology and an enthusiastic team member. Other colleagues provided character letters attesting to his collaborative spirit and contributions as a leader in technology innovation at Revere.

37. At the end of the 2013-2014 school year respondent was selected by his peers to be the technology coordinator for the 2014-2015 school year, a position he held until his suspension without pay pending this hearing.

38. Students reported respondent's overall teaching skills as average to excellent. Some students considered him a good and engaging teacher, a teacher who tries new and interesting things. Other students considered him average, or the class too easy, in part due to respondent's open book exams. Some students were annoyed with respondent's habit of keeping them longer than the class period and causing them to be late to their next class, or his projecting their problematic work to the class during instruction. Another student considered him strong in technology, but weak in science. One student reported he was "not a bad teacher" but he was "very" different than other science teachers and "his actions towards others were weird." (Exhibit 53.) Certain students did not observe the complained-of incidents or were not bothered by respondent's conduct. (E.g., Exhibit 66.) Some students who considered his conduct inappropriate still learned in his class and obtained good grades. JB thought respondent was a good teacher, into technology, but "still kind of sexual." (Exhibit 45.) HI stated "when on topic" he was a good teacher. (Exhibit 50.) Despite their varying views of his teaching skills, from his words and actions, respondent gained a reputation among students of being creepy, weird, or at the extreme, perverted.

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2014-2015 reported incidents and conferences

39. The technology coordinator position was funded for the 2014-2015 school year and respondent filled this roving position instead of teaching health or science.

40. Principal Samoza's investigation of respondent during the 2013-2014 was limited and did not completely address respondent's conduct during that year.

41. On September 15, 2014, student KP, respondent's former seventh-grade second period honors student, reported an incident which triggered a District-level investigation of respondent's 2013-2014 conduct. That day respondent made KP uncomfortable when he passed her in the hall and "winked, smiled and said hello." (Charge 6; Exhibit 79A.) KP clarified at hearing that after respondent passed her by she went to the restroom to cry. She thought she had moved on from last year, but when she saw respondent it brought back her experiences and observations from the previous year, which she did not report. That day KP filed a report with her counselor citing several incidents, including two from the previous 2013-2014 school year, which she recalled reporting to her counselor. However, there were no records of her earlier report. Her earlier report was never brought to the attention of Principal Samoza.

42. Principal Perdigao, the new principal, initiated the investigation and after consulting with District personnel referred the investigation to them. Assistant Principals Blakely Coe and Justin Koretz and conducted student interviews. Assistant Principal Coe interviewed KP. Coe had also received reports from some students that respondent asked the female students how many holes they had in their body. During Assistant Principal Koretz's interviews students reported respondent projected pornography from his I-Pad or laptop computer.

43. Principal Pertigao consulted with the District about Revere's investigation of respondent and the additional reports of respondent's misconduct. Based upon the additional reports, the District assigned Ms. Lopez-Magdaleno to direct a thorough investigation of respondent's conduct at Revere. Ms. Lopez-Magdaleno had substantial experience in human resource investigations, including many years as a union representative. She also had been a teacher and at one time taught health. She was familiar with the subject matter and could discern typical discomfort with the subject matter from atypical discomfort. During her 31 years with the District Ms. Lopez-Magdaleno had worked with middle school students and was confident from their demeanor, body language, expression and spontaneity that the students she interviewed were credible. Many honor students were interviewed and there were no "frequent flyers," students who repeatedly complained about teachers. From the number of students and incidents, Ms. Lopez-Magdaleno and the District found a widespread pattern of inappropriate conduct. In addition to the students who reported misconduct during the previous school year, Ms. Lopez-Magdaleno conducted systematic and randomized interviews of respondent's classes, and based upon these interviews, she was confident that her investigation accurately depicted respondent's conduct. She readily pointed out that not

all students complain about incidents they observe, but their lack of complaint does not signify the conduct did not occur or that it was not significant.

44. Ms. Lopez-Magdaleno retired in January 1, 2015, shortly after the investigation. Although she took great pride in her investigative skills, her demeanor did not suggest any personal bias against respondent. Ms. Lopez-Magdaleno provided credible testimony of her investigation, displaying a candor and sincere demeanor at hearing through her straightforward and direct answers, and clear recollection of the investigation. The evidence presented at trial corroborated the scope and fairness of the District's investigation. Respondent was given an opportunity to respond to the charges in an investigatory interview with Ms. Lopez-Magdaleno held on November 20, 2014. Respondent denied ever touching students inappropriately, using sexual innuendos during class, or projecting pornographic material.

45. On December 9, 2014, Principal Perdigao convened a conference with respondent to address several incidents raised by students against respondent which were made part of the charges in the Accusation. Brenda Olortegui, Staff Relation Field Director, also attended on behalf of the District, and United Teachers of Los Angeles (UTLA) Representative Michael Kaplan appeared on behalf of respondent. Respondent was directed to, among other things, cease and desist from touching students, making inappropriate comments, displaying pornographic images, and to adhere to District policies regarding ethics, respectful treatment, code of conduct with students, sexual harassment, and acceptable use.

46. The September 15, 2014 incident with KP (charge 6, respondent's actions passing KP in the hallway), occurred when respondent was with his wife and daughter. KP and respondent's daughter participated in the extracurricular program at the Colburn School (Colburn), a private music school not connected with Revere. They were not in the same choral group. Respondent's wife and daughter spoke with KP about Colburn.

47(A). Although one incident of winking, smiling and saying hello, may not have seemed significant by itself, KP had two additional incidents with respondent the previous year which upset her and triggered her emotional reaction to see respondent in fall 2014. (Exhibit 41.)

47(B). KP claimed respondent winked at her during the 2013-2014 school year (Charge 4(c)). She was disturbed by respondent's winking. At hearing, KP could not clearly recall when respondent winked at her. Respondent made her feel uncomfortable. As her teacher, KP thought respondent was paying an abnormal amount of attention to her. (Exhibit 62.) KP was unaware whether respondent winked at anyone else. (*Ibid.*) HI observed respondent winking at KP. (Exhibit 60.)

48(A). During District's 2014 investigation, KP reported during the previous school year she performed in the Colburn choral recital held in December 2013, and respondent sent a picture of her with her choral group to her school e-mail account (Charge 3). Respondent

was there with his wife to watch his daughter, who was singing with a different choral group. Respondent's daughter was not in the picture. KP thought it odd that he took a picture of her since his daughter was not in her group. He used his school-issued I-Pad to take the photograph and e-mail KP. With her photograph respondent also e-mailed a short note complimenting KP on her performance.

48(B). Respondent was surprised by KP's reaction because he thought he was being nice by sending a picture and did not understand why KP would be uncomfortable. Respondent maintained he was meeting his responsibilities as a teacher by encouraging extracurricular activities. After he was informed about KP's report, respondent reviewed the Facebook and Internet postings from Colburn and saw KP in other pictures which in his view confirmed that KP's reaction was unreasonable. Although he denied it at hearing, respondent's explanation to the District at the time he was notified of KP's report suggested that he also searched KP on the Internet to confirm she posted pictures of herself to demonstrate KP's reaction to his e-mail was unreasonable. According to Principal Pertigao, as KP's teacher it was inappropriate to use District e-mail for non-school purposes (charge 28). It was inappropriate to send a student a personal e-mail communication about a private event. Any comment about the event should have been made within the confines of the school setting. Respondent insisted he was unaware of the District's technology protocols, but given his expertise in technology, and his long tenure with the District, his position was not credible.

49(A). KP reported an incident which occurred during sexual harassment training. The training was conducted over a two-week period in respondent's class by two guest lecturers, not affiliated with Revere (charge 1). As part of the curriculum students were required to create a poster exemplifying sexual harassment. KP drew a picture of a man leering at a large breasted woman's cleavage where KP had drawn a large "X." Respondent held the picture close to his face as if leering down the cleavage, and exclaimed he would look down her shirt too. KP and her tablemates, including HI, were shocked by respondent's remark. All agreed respondent held the picture close. But the students differed in their description of what close meant, describing him holding the picture two inches to one foot from his face. There was disagreement about whether respondent laughed when he made the statement, or whether other students were laughing which was why respondent came to KP's table. When she made her report in eighth grade about what occurred a year previous, KP recalled respondent laughing "hysterically," but at hearing she clearly recalled him laughing. CA, sitting across the room, recalled students laughing, but the Commission gave greater weight to KP's testimony and to students who sat closest to her. HI, another student at KP's table, did not recall respondent or student laughter. Based on evidence of respondent's general pattern of familiar behavior with students, the majority of the Commission determined respondent laughed out loud while looking at the picture, although whether the respondent laughed or did not was not determinative of the appropriateness of his behavior.

49(B). Respondent denied leering at the picture, laughing, or making the statement. Respondent had informed students not to laugh at the presentations. Respondent had been circulating throughout the classroom and maintained he intervened when he observed

students laughing. Based on the more persuasive and credible testimony of KP and other students, the Commission determined that respondent leered and laughed at KP's picture.

50(A). KP had another incident with respondent which occurred about an hour after the school day ended while she was waiting on school grounds with her friend, GM, for her mother to pick them up (Charge 2). As respondent approached KP had just received a phone call from her mother to meet her off campus at a local market. Respondent asked whether he could survey them about the use of technology in physical education.

50(B). Respondent maintained that he intercepted and escorted the students to the edge of campus after school hours because they were not in a location sanctioned for student pickup, and he wanted to escort them safely off campus past a labyrinth of campus driveways. Respondent did not travel off campus with KP and GM, but it seemed to KP that he did because he walked a long way with them to the edge of the campus, and in KP's recollection it seemed that they had passed school boundaries. KP was frightened of respondent. She was so concerned respondent was going to follow them to the local market she asked him if he intended to accompany them. Respondent did not exchange any words with KP or GM which suggested they were in violation of school rules and should leave, nor did he refer them to the administrative office. Based upon the more persuasive testimony of KP, respondent's purpose for approaching and walking with KP and GM, was to obtain answers to a survey about the use of technology in physical education for his graduate school class paper. KP was uncomfortable answering questions and did so because she felt pressured, but her friend, GM, was a willing participant. There was no evidence that Revere authorized respondent to conduct a survey, or respondent had administered the survey to other students at Revere.

51(A). Ms. Lopez-Magdaleno's investigation uncovered a wide range of additional inappropriate student comments and touching which were included in the charges.

51(B). Respondent remarked to female student HI that she looked beautiful and looked inappropriately at HI (charges 4(a) and (b)). There was persuasive evidence that respondent told HI she looked beautiful and that he looked at her intently, from her shoes up, or "up and down." Respondent made student HI uncomfortable when during open house, accompanied by her parents, respondent looked at HI and remarked to her parents that she looked beautiful. HI wore higher-heeled shoes and a dress to the open house, a departure from her more casual school day outfit. Respondent denied looking at HI inappropriately and maintained he was being kind by making the statement to her parents; however, the Commission determined that HI's reaction was reasonable and respondent's conduct was not.

51(C). The Commission found persuasive the evidence from credible student witnesses, who had opportunities to observe respondent, which substantiated the charges that respondent inappropriately touched students.⁵ Respondent was observed to favor female students and unnecessarily and inappropriately touched their arms, shoulders and backs,

⁵ The Commission did not find persuasive evidence of charge 9 regarding GM who did not testify.

“tasered” them by grabbing them at their waists (charges 9, 12, 24, 25), touched rubbed their shoulders like a massage (charges (12(b), 22), stood in too close proximity to them as they sat at their desks (charge 14(a)), or stared at their breasts (charge 14(b)). Respondent was also stood too close to all students and got in their personal space (charges 9 and 23).

51(D). Respondent’s behavior of touching, rubbing and massaging students’ shoulders and upper back, (charges 9, 12(b), 22), was observed in his first period class by SK, who at first did not think much of it, but came to realize respondent’s overly-friendly and familiar conduct was “weird.” SU, observed respondent touching students, back, rubbing their shoulders and back. Respondent also touched SU on the back and shoulders, and rubbed her shoulders. She estimated the duration of his touch averaged three seconds each incident. Students in first, second and fourth period observed reported respondent’s conduct.

51(E). RB observed respondent touching girls a few times throughout the year with “side-hugs,” which he thought was weird, and by wrapping his arm around their waists. (Charges 9, 12(a).) RB was not disturbed about what he saw, mainly because it did not happen to him. NS in fourth period as well as KM reported respondent’s hugs. Other student observers, SD and KM, reported respondent touching the sides of their waists with his hands or “taser” their waists with his fingers. One student described the taser as tickling. Respondent did not taser male students in this manner.

51(F). Respondent stared at female students and the chests of certain female students. SU observed respondent stare at girls, not boys, on average twice a week. (Charge 14.) SU considered respondent’s staring inappropriate and “scary.” Respondent maintained he was looking across the room to check on students, or when at their table was looking over their shoulder and down at their work, which could have been mistaken for inappropriate staring. Persuasive reports from students confirmed respondent stared at his female students’ chests intentionally and inappropriately, not inadvertently. KM, his homeroom and fourth period student, observed respondent staring at her chest when he was at his desk or helping other students. Respondent would look up to her face from her chest area when he noticed she was watching. Other times she observed him staring at her chest when she was speaking with him at her desk. ZA, another homeroom student, corroborated KM’s testimony. She observed respondent place his hand on KM’s shoulder and stare at her breasts between five and 10 times. Assistant Principal Koretz suggested it was respondent’s responsibility to check for dress code violations, but there was no evidence of dress code violations.

51(G). Respondent had a practice of guiding students into his classroom by placing his hands on their middle or lower back, primarily to avoid their backpacks. In addition to other students, male and female, respondent guided KM about six times in this manner during the 20-week semester she attended his class. Respondent admitted he greeted students at the door and often guided students into the class after collecting their assignments in order to prevent them blocking the entrance. Respondent’s objectionable behavior was not focused on his general practice of greeting students at the door; it was his habit of touching

them while greeting them, a habit which was consistent with his excessive physical and close contact with students.

51(H). Respondent inappropriately breached his students' personal space (charge 22). Respondent maintained he was forced to squeeze through a tight aisle of student desks and students to circulate around the room, and any touching while he passed students was unintentional and appropriate considering the tight quarters. Student testimony established that respondent's class was typical in size to other classes, but respondent's behavior was atypical of other teachers who did not touch students or close their personal space. One student described his closeness as "breathing on you close." (Exhibit 66.) When students touched other students their peers called it "doing a Burke."

52(A). Ms. Magdaleno-Lopez's investigation also uncovered additional incidents that were not disclosed during the 2013-2014 school year pertaining to respondent's pattern and practice of oversexualizing class curriculum and excessively referring to sex.

52(B). Respondent stated, "[It] was fun to make babies." (Charge 7(a).) Respondent denied making the statement. The majority of the Commission determined that respondent made the statement. Persuasive testimony from KM, who was only in respondent's class one semester, established that he made the statement during health class. Respondent had assigned a "birthday project" where he required students to count back from their birthday to estimate their day of conception. Consistent with that statement, JB quoted respondent as saying when someone loses their virginity "they get happy." SH reported respondent also compared a vagina to chocolate, specifically a Snicker's bar, which gets spread around. There was no evidence that these statements were necessary or appropriate to the curriculum. Respondent made students uncomfortable with his statements.

52(C). Respondent asked female students, "How many holes [they had on their body]?", and then requested that they indicate the answer on their fingers. (Charge 7(c).) Respondent acknowledged asking his female students to count their "openings," not holes, because it was apparent that students were confused about the structure of the female reproductive system. Persuasive evidence was presented that respondent use the colloquialism "holes," not "openings." Respondent denied requesting only female students to raise their hand but the weight of the evidence confirmed reports that respondent made his request only to female students. The request disturbed his female students. There was no evidence that respondent's demand was necessary or appropriate to the curriculum.

52(D). After showing the class a picture of a cell, he said, that it looked "like a nipple." (Charge 7(b).) Respondent admitted making this statement during an exercise comparing form and function of animal cells. He stated he was addressing a statement made by a student; however, the weight of the evidence from student reports and testimony is that respondent initiated the statement. There was no credible evidence that his statement was necessary or appropriate to the curriculum.

52(E). Respondent used the word "sex" excessively. (Charge 7(e).) Students consistently reported respondent's excessive and random references to sexual matters which were not directly related or necessary to the teaching of reproduction or science. Respondent's statements had the effect of encouraging students to think about sex either directly or by innuendo. HI estimated respondent used the term sex unrelated to any topic at least once every two weeks. Students had not experienced any other teachers referring to sex in the manner respondent referred to sex, and respondent's references made them uncomfortable.

53(A). Ms. Magdaleno-Lopez's investigation confirmed reports to Assistant Principal Koretz that respondent had briefly projected an image of a naked gyrating woman from a pornographic web-site, www.bigblackbooties.com. (Charge 10.) Student witnesses AC and RB, in respondent's first period honor class, observed the image for about two seconds before respondent remarked "Let me get out of this." (Exhibit 67.) AC and RB clearly saw the reference to the web-site and saw the naked image. The image and the web-site were projected on a large whiteboard. Other students in respondent's first period honors class corroborated the AC and RB report of seeing pornography projected from respondent's computers for a few seconds, but recalled different images. MB recalled a picture of a "tan" male on top of a female with a play button. (Exhibit 65.) The students had never seen pornographic material before seeing it projected from respondent's laptop. There was no dispute that the web-site existed.

53(B). Respondent denied projecting pornography from a laptop and questioned the veracity of the students, mainly because it was suspicious that only a few male students noticed it in a room of over 30 students, and accessing a pornographic web-site would have been blocked by the LAUSD Internet. Student witnesses AC and RB were credible and persuasive. With over two years' time from the incident their recollection of the offending web-site was clear in their mind because they had never seen pornography before, even though their recollection of other incidents faded. The students reported the offending image was projected during "transition" when respondent was setting up the lesson and most students were reading. The veracity of the AC and RB observations were supported by other students. One student observed seeing two "tanned" people, one on top of the other, with an arrow over them to be pushed. Students observed respondent using different computer laptops. Respondent had access to many laptops assigned to his classroom, including an I-Pad, and computer laptops respondent personally upgraded. RB insisted respondent used a personal laptop that he removed from a bag. There were a variety of ways, respondent, an experienced computer technologist could have accessed the web-site. Respondent's insistence that the District's Internet access filters would block the web-site is not persuasive. It is unknown whether the pornography was pre-loaded on the computer, or whether respondent had alternative means of accessing the Internet other than using the District's Internet. In view of the persuasive testimony of students respondent clearly did access the pornographic web-site www.bigblackbooties.com at some point prior or during class, load images from the web-site onto his computer and projected the images during classroom instruction.

54. In the December 9, 2014 conference, the District also presented a student report that respondent projected violent images of South Africa on the day of Nelson Mandela's death. (Charge 11.) Respondent googled the word "apartheid" for his homeroom class in response to a school-wide recommendation to discuss Mr. Mandela's life. He did not screen the results from his Internet search before projecting them to the students. From the Internet search, images of extremely bloody violence against black South African civilians were projected to the students. Respondent was not a history teacher and his unfiltered display of extremely violent images demonstrated a lack of judgment because students were shocked and disturbed by the images. There was evidence that respondent displayed only static, not moving, pictures of violent images of apartheid in South Africa. The Commission did not find respondent's misguided attempt to respond to the school-wide commemoration of Nelson Mandela to violate any school policy or provide grounds for the other causes in the Accusation.

55(A). In the December 9, 2014 conference, respondent was notified again to adhere to several District policies, which were referred to in his previous conferences with Principal Samoza, or were in existence at the time of the incidents. Respondent's conduct violated District policies which were in effect during his tenure at Revere (charge 28).

55(B). Respondent's conduct violated District Board Resolution on Respectful Treatment "Commitment to the Respectful Treatment of All Persons." This District policy provided that students and adults be treated equally and respectfully by refraining from willful and negligent use of slurs against any person on the basis of sex, among other bases. This policy was initially adopted in 1988.

55(C). Respondent's conduct violated District Code of Conduct with Students, Bul 5167.0, sections 3, 5, 6 and 10, which prohibits (3) engaging in behavior that is directly or indirectly unprofessional or immoral; (5) making statements or comments either directly or in the presence of students which are not age appropriate, professional, or which may be considered sexual in nature, harassing, or demeaning; (6) touching or having physical contact with a student that is not age-appropriate or within the employee's responsibilities or duties; and (10) communicating with students in writing by phone/email/electronically, via internet, for any purposes not school-related. This policy was adopted in 2008.

55(D). Respondent's conduct violated District Employee Code of Ethics which provides for creating an environment of trust and avoiding harassing behavior; maintaining appropriate relationship with students which are positive and professional; and following District policies, procedures and rules. This policy was last revised in 2003.

55(E). Respondent's conduct violated District's Sexual Harassment Bulletin 3349.0, Section II and III which prohibits unwelcome verbal and physical conduct, such as suggestive derogatory or vulgar comments, use of sexual innuendo or slurs, touching, pinching, kissing patting or hugging, e.g., display of sexually suggestive objects, pictures, computer-generated images of a sexual nature; leering. This policy was adopted in 2006.

55(F). Respondent's conduct violated District Acceptable Use Policy (AUP) Bul-999.7, for District Computer and Network Systems which bars employees from using the computer network or Internet to access or transmit pornography of any kind. This policy was adopted on June 18, 2013. The policy was also reviewed on August 14, 2014, during a school-wide meeting.

55(G). In addition to these policies, charge 28 alleges that respondent violated the Child Abuse Policy. The weight of the evidence established that respondent did not violate the Child Abuse Policy.

56(A). On January 20, 2015, the District supervisory personnel, including Ms. Olortegui and Roger Scott, held a conference with respondent, where they discussed the allegations against respondent and served him with a Notice of Unsatisfactory Service and Notice of Suspension (15 days). The Notice contained the charges in the Accusation, and referenced the December 9, 2015 conference.

56(B). Principal Perdigao, relied upon the District's investigation. Although he was not familiar with respondent because he was not present during the 2013-2014 school year, Principal Perdigao read all the conference memos and interviews. Principal Perdigao concurred with the District that respondent should be terminated. His decision was influenced by the number of the complaints, the variety of complaints, the occurrence of the complaints throughout the school day, and the veracity of the complainants. After thoroughly reviewing the documentation about respondent's conduct, Principal Perdigao concluded respondent was not a good role model, lacked judgment and would not change. Principal Perdigao would not place his own daughter in respondent's class. Principal Perdigao was a credible witness, who provided direct, unequivocal, and sincere testimony.

57(A). Respondent was provided an opportunity to appeal the Notice and on March 9, 2015, an administrative review meeting was held to discuss respondent's possible dismissal and immediate suspension. District Administrator of Operations Jan Davis, District Staff Relations Field Director Brenda Olortegui, UTLA representative Kim McLaughlin and respondent were in attendance.

57(B). Respondent's additional information was not sufficient to reverse the District's decision. The District rejected respondent's appeal and restated its intention to terminate respondent. Based on respondent's timely request for a hearing, he was not terminated, but suspended without pay pending the hearing.

Witness credibility

58. Respondent's problematic conduct as a teacher was fully discussed in memos and meetings during the 2013-2014 and 2014-2015 school years. The Commission determined the majority of the charges were supported by the credible and persuasive testimony and reports of student witnesses, and evidence contrary to their testimony and reports, was given less weight.

59(A). Respondent appeared to be incapable of understanding the problems with his physical or verbal behavior, or students' perceptions of his conduct. With the exception of one instance, where respondent admitted touching SD's face in front of multiple witnesses before entering a school assembly room, respondent either denied the incident took place, the statement was made, or blamed others, including Bill Nye, for inappropriate statements which he was compelled to repeat as "teachable moments."

59(B). Respondent's trial demeanor and veracity were questionable, given his selective memory, and conflicting deposition testimony. With the exception of the Halloween costume rules, respondent's professed ignorance of certain District policies was disingenuous given the policies were posted on the web-portal, his pride in being technology savvy, and his tenure with the District. Respondent's reaction to KM's complaint of his inappropriate touching was to have her investigated, and his response to students' general discomfort, was to have a suggestion box so that he would be advised when and if they were offended by his conduct. He would have offered an apology to SD for touching her face if given the opportunity, but no one else.

60(A). Respondent offered the testimony of a few student witnesses in his defense. Student witness PK supported respondent position because of his positive experience in respondent's class, and PK's general belief that respondent was not capable of the conduct alleged. PK's testimony did not invalidate the testimony of other student witnesses who had the opposite experience and who corroborated the charges under oath. PK began in respondent's fifth period class and with respondent's encouragement switched to second period honors the second semester. He respected respondent as a teacher and thought respondent's class was well organized and fun. He did not witness the charges and he doubted they were true.

60(B). PK's steadfast refusal to believe respondent made the statements in the charges was based primarily on his assumption that a teacher would not behave in the manner alleged. PK refused to accept that respondent would use the word pornography, talk about "romantic time," refer to a woman's feet in the air, or state that a female student's nickname, Huggy Bear, was the name of a prostitute or pimp. The only rumor PK heard was "chatter" about respondent's comments about KP's picture of a woman's breasts during sexual harassment training. He did not have any reason to doubt KP's veracity, but he did not believe any teacher would make that statement. He had no reason to doubt SD, but he did not believe respondent would touch any student's face.

60(C). PK distrusted three peers, especially SU, but also AC and RB, who observed respondent's pornography image. He considered SU a "Drama Queen." He considered the other witnesses boastful. More recently, in high school he had a personal experience with SU where he thought she had lied.

60(D). Despite PK's disdain for certain peers on a personal level, the Commission found his peers' testimony honest, persuasive and unbiased. PK admitted he was not always in a position to hear and view everything that occurred in the classroom, and his assumption

that SU exaggerated respondent's statements, was not supported by the weight of the evidence.

60(E). Student witness WA, who was JA's worm partner, was in respondent's homeroom and fifth period. He appreciated his upbeat demeanor in the morning, learned a lot from respondent's science class, and would have respondent again as a teacher despite respondent's confrontation with him. He appreciated respondent's habit of shaking hands with students. He noted respondent's habit of touching students, mostly with pats on the back, guiding them into the room by touching their lower backs, and "high fives." He acknowledged respondent's reputation as being touchy. When students got touchy with each other, they were accused of "doing a Mr. Burke." WA observed only one incident and his testimony did not contradict reports of inappropriate touching. He did not remember students other than JA, his partner in the worm experiment.

60(F). Student witness NS described herself as an affectionate person who was not personally disturbed by respondent's touching students on the back as a way to say "good job." She thought she learned in respondent's class and considered respondent a good teacher. She regretted confirming KM's account of respondent's conduct because she did not witness it. She testified at hearing to make sure her previous statement did not affect the outcome of the hearing. Nevertheless she considered KM honest and did not dispute the veracity KM's report of respondent's inappropriate touching. When KM told NS what happened, NS urged KM to report respondent's conduct. At the end of the 2013-2014 school year NS went to hug respondent to say goodbye. Respondent told her he was not allowed to hug her, but decided to give her a side-hug anyway.

61(A). Respondent offered the testimony of two District administrators in his defense. Respondent's previous administrator, Principal Calderone credibly and candidly testified on respondent's behalf, enthusiastically proclaiming that he would welcome respondent back to his school without hesitation. However, Principal Calderone became more reticent after he was told respondent admitted to touching a female student's face and saying she was cute. Principal Calderone conceded respondent's admitted conduct demonstrated bad judgment.

61(B). Assistant Principal Koretz spoke positively of respondent's contribution to Revere, particularly in the area of technology education. Assistant Principal Koretz also testified about his suspicions about the veracity and seriousness of the student charges. Assistant Principal Koretz witnessed KM clarify her original statements regarding respondent's touching and, as a result, considered her allegations groundless, as did Principal Samoza. The Commission determined that KM's testimony was direct, honest and persuasive, and consistent with her previous written statements.

61(C). Assistant Principal Koretz's attempt to minimize the seriousness of respondent's conduct overall was not well considered. Assistant Principal Koretz's testimony conflicted with District policies. He was not familiar with science and health teaching standards. Ms. Uchida who was more familiar with respondent's teaching assignments. For example, Assistant Principal surmised that a teacher might be staring at a

student's chest to make sure they were not violating the dress code. He claimed that teachers stare or stand close to students to manage their behaviors. He asserted that it was permissible to touch students in a friendly manner as long as they had an understanding of their students' comfort level. There was no evidence that respondent's conduct was related to appropriate teaching methods. There was no evidence of dress code violations. There was no evidence that District policies allow teachers the discretion to touch students based on the teacher's assumptions about their students' comfort levels.

61(D). Ms. Asahina spoke favorably of respondent, but at hearing she admitted she was not in a position to know the circumstances or scope of the charges and was upset about being drawn into the dispute. She had limited involvement with respondent, mainly the lesson where respondent stated his disappointment that it did not end in sex. Ms. Asahina did not have a clear recollection of what respondent said, but acknowledged that some students appeared to be upset. Ms. Asahina testified with confidence about respondent's positive peer-to-peer relationships and enthusiasm, his understanding of technology, the science fair he initiated, and her observations of his lesson on plant reproduction.

62(A). The testimony of two adult student one-on-one aides did not tarnish the District's evidence, because the student aides did not have an opportunity to observe the incidents. They respected respondent and his ability to effectively teach their special needs students who were doing well in his classes. However, they were primarily responsible for individual students. The two adult one-on-one student aides were admittedly busy attending to their assigned students. Other than opining about some of the negative personality traits of middle school students, they did not offer any testimony which materially contradicted the specific charges. Further they provided no grounds for questioning the veracity of the individual students.

62(B). Debbie Hoskins was a one-on-one aide in respondent's second period honors class. She was responsible for taking notes on behalf of her student and making sure he was on task. She thought respondent was an excellent teacher and did not observe anything inappropriate. Ms. Hoskins knew witness HI from another class and considered HI honest and trustworthy; she had no reason to distrust HI's credibility. Ms. Hoskins did not know student witnesses AC and RB in his second period class, who witnessed pornography projected on the screen, and could not attest to their credibility. She expressed surprise when told respondent admitted to touching SD's face and calling her cute. She doubted respondent would project pornography, stare at female students' breasts, inappropriately touch them, make inappropriate sexual comments to the class, or otherwise behave inappropriately, but admitted the conduct or comments, if true, were inappropriate.

62(C). Lesley Sheen, a fifth period one-on-one aide, was also focused on her student. She did not observe any misconduct and was impressed with respondent's work with her special needs student, who was having trouble managing the I-Pad. The fifth period students tended to be louder because it was the end of the day. Ms. Sheen noticed that CA, a student witness had problems, but did not observe her problems to be related to the charge CA witnessed concerning respondent's statement to JA that "he would slap him if he could."

Ms. Sheen conceded that the students, not her, were in a better position to testify about respondent's statements to them. Ms. Sheen did hear respondent speak about the genetics of eye color, but she did not hear him make a statement about the mailman being part of the student's genetic mix. Ms. Sheen would be concerned if respondent did touch a female student's face and say she was cute. She thought respondent was a good teacher and did not think respondent should be fired, but she admitted that given her focus on one student, she might not have seen or heard everything.

*Specific charges in the Accusation*⁶

63. District established charge 1 by a preponderance of the evidence:

During the period commencing on or about August 13, 2013 and ending on about June 5, 2014, respondent, in the presence of students in 2nd period Science/Health class, did the following to student KP., when she turned in an assignment addressing sexual harassment which included a drawing of boys leering at a woman's cleavage, which KP had marked with a big cross over it:

- a. Said, "Oh, I would look down her shirt too."
- b. Laughed aloud.
- c. Held the homework paper close to his face as if he were leering down the cleavage.

64. District established charge 2 by a preponderance of the evidence, that respondent approached KP and GM after school and asked them where they were going and whether they would participate in a technology survey. Although respondent followed them to the edge of the campus, District did not establish by the preponderance of the evidence that respondent walked them off campus, or continued to walk with them off the campus.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent did the following to 8th grade student KP and 7th grade student GM., when he approached them after school and asked them if they would participate in a PE/technology survey:

- a. Asked, "Which way are you going?" when they stood up to leave campus.
- b. followed them off campus.
- c. Continued to walk and ask them questions while outside of the school campus.

⁶ District amended charges 3 and 4 and withdrew charges 15 and 16.

65. District established charge 3, as amended to conform to proof, by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on about June 5, 2014, respondent did the following to student KP:

- a. Took a photograph of her while she was singing at a school's choir concert.
- b. Sent the photograph to her [District e-mail].

66. The District established charge 4, (a) and (b) as amended to conform to proof, by a preponderance of the evidence. The District did not establish charge 4(c) by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent:

- a. Said, "You look beautiful" [or "gorgeous"] to student [HI].
- b. Looked at female student [HI] up and down
- c. Winked and smiled at [HI].

67. District established charge 5 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent:

- a. Looked at female student HI up and down.
- b. Discussed unrelated and inappropriate topics during instruction that made HI feel uncomfortable.

68. The District established charge 6 by a preponderance of the evidence.

During the period commencing on or about August 11, 2014 and ending on or about September 15, 2014, respondent winked, smiled, and said, "Hello" to student KP, causing her to feel "uncomfortable." This was witnessed by students, including HI and GM.

69. The District established charge 7 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent did the

following during instructional time and in the presence of his students, which made them feel uncomfortable:

- a. Stated, "[It] was fun to make babies."
- b. After showing the class a picture of a cell, he said, "[that it looked] like a nipple."
- c. Asked the female students in the class, "How many holes [they had on their body]?", and then requested that they indicate the answer on their fingers.
- d. While discussing plant reproduction, he stated, "that flowers were nature's pornography."
- e. He used the word "sex" excessively.

70. The District failed to establish the factual allegations in charge 8 by a preponderance of the evidence. GM did not testify.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent touched GM, on her back, winked and smiled at GM., and stood within close proximity of GM., all of which made her feel uncomfortable.

71. The District established charge 9 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent touched students on their backs and stood within close proximity of students, which made them feel uncomfortable.

72. The District established charge 10 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, during first period class, respondent projected a sexually explicit, pornographic, image that came from a laptop that was connected to the classroom projector.

73. The District failed to establish charge 11, that respondent "googled a video," by preponderance of the evidence, but did establish charge 11, that respondent googled apartheid and projected graphic images of people being "burned" and "hung," by a preponderance of the evidence

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent, upon mentioning the death of Nelson Mandela, "googled a video" on

apartheid that contained graphic images of people being "burned" and "hung."

74. The District established charge 12 by a preponderance of the evidence. The allegations in 12(a) were referred to as tasing, not grabbing, but respondent's conduct was the same.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, on several occasions, respondent did the following to his female students:

- a. Tickled and grabbed them by the waist.
- b. Touched their arms and shoulders.

75. The District established charge 13 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent, on at least one occasion during 4th period:

- a. Touched 7th grade student KM. on the inside of the arm close to her breast.
- b. Moved his hand to KM.'s lower back.
- c. Placed his hand on KM.'s shoulder.
- d. Ran his hand down KM.'s arm then touched her thigh.
- e. Said, "I'm trying to help you with your work" when KM questioned his touching.

76. The District established charge 14 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent.

- a. Stood within close proximity of female students as they sat at their desks.
- b. Looked down toward their chest area as he stood over them.

77. The District established the factual allegations of charge 17 by a preponderance of the evidence. District did not establish by a preponderance of the evidence that the statement happened on May 6, 2014, but the District did establish by a preponderance of the evidence that the statement was made in Spring 2014 and the report was made on May 6, 2014.

On or about Tuesday, May 6, 2014, respondent said, "Oh I wish this story ended with sex," in the presence of students after teacher, Ms. Asahina, taught a science lesson addressing different parts of a flower.

78. The District established the factual allegations of charge 18 by a preponderance of the evidence. The District did not establish that all the statements were made on or about April 29, 2014, by a preponderance of the evidence.

On or about April 29, 2014, respondent said to students, during instructional time:

- a. "If your mother and father have brown eyes, you will have brown eyes unless the mailman is involved."
- b. "When bees climax they explode."
- c. "When romantic time happens, she has her legs in the air and is like ah, ah."
- d. "Oh, I thought they called her that because it's the name of a prostitute," referencing a student's nickname.

79. The District established the factual allegations of charge 19 by a preponderance of the evidence.

On or about Friday, February 21, 2014, respondent did the following to 7th grade student SD as she entered the auditorium for a 7th grade assembly:

- a. Approached her from behind then touched and squeezed her cheeks with both of his hands.
- b. Said, "Your face is so soft" and "how cute."

80. The District established charge 20, as amended to conform to proof, by a preponderance of the evidence.

During the period commencing on or about February 24, 2014 and ending on or about February 28, 2014, In the presence of students, during a class science project with worms, respondent did the following to 7th grade student JA.

- a. Said, "I would slap you if I could."
- b. Asked JA to stay behind [...] after class and said that: He (respondent) was going to "slap [JA's] face."

81. The District established charge 21 by a preponderance of the evidence.

From the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, on at least one occasion, respondent opened up his projector and there were pornographic videos on the screen, which displayed a naked female shaking her buttocks and a URL address www.bigblackbooties.com.

82. The District established charge 22 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent rubbed girls' shoulders in class, like a massage.

83. The District established charge 23 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent got physically close to students and got in their "personal space."

84. The District failed to established charge 24 by a preponderance of the evidence. The evidence established that respondent's touched 7th grade students.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, an 8th grade student stated that respondent would "touch like the higher part of [her] arm."

85. The District failed to establish charge 25 by a preponderance of the evidence.

During the period commencing on or about August 13, 2013 and ending on or about June 5, 2014, respondent put his hand on student ZA's shoulder.

86. The District established charge 26, that respondent wore a Frankenstein costume and face paint as he greeted his students at the classroom door, by a preponderance of the evidence, but failed to establish charge 26, that he violated school announcements, by a preponderance of the evidence.

On or about October 30, 2013, in violation of school announcements made to the entire school that costumes, face paint, masks, or any other type of Halloween garb was not allowed on campus, respondent dressed in a Frankenstein

costume, wearing face paint and standing at his classroom door greeting students.

87. The District established charge 27, that respondent received annual training and was aware of the District's reasonable rules and regulations (by his tenure with the District and the availability of the rules and regulations on the web-portal), by the preponderance of the evidence. Based upon charge 27, the Commission determined that the District failed to prove by a preponderance of the evidence charge 27 that respondent's conduct supported (cause 8), a willful refusal to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the employing district.

Respondent has received training annually regarding the rules and regulations of the District including those with respect to the proper treatment of students. When respondent engaged in the conduct described above, respondent was aware of the District's reasonable rules and regulations and that his conduct violated these rules and regulations. Accordingly, respondent conduct constitutes a willful refusal to perform regular assignments without cause, as prescribed by the rules and regulations of the employing district.

88. The District established charge 28a, 28b, 28c, 28d and 28f, by a preponderance of the evidence, but did not establish the factual allegations of charge 28e and 28g, by a preponderance of the evidence.

The above conduct violated the reasonable rules and regulations of the District including, but not limited to:

- a. Acceptable Use Policy
- b. Code of Conduct with Students
- c. Sexual Harassment Policy
- d. Code of Ethics
- e. Child Abuse Policy
- f. Board Resolution To Enforce the Respectful Treatment of all Persons
- g. California Science Content Standards and Frameworks.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The "burden of proof"

means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; Evid. Code, § 115.) “The phrase ‘preponderance of evidence’ is usually defined in terms of probability of truth, e.g., ‘such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.’ (BAJI (8th ed.), No. 2.60.)” (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Education Code (Code) section 44932, subdivision (a),⁷ are established. In this case, the district seeks respondent’s dismissal based on subdivision (a)(1) immoral, including egregious conduct, (a)(2) unprofessional conduct, (a)(4) dishonesty; (a)(5) unsatisfactory performance (a)(6) evident unfitness for service, and (a)(8) 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 or by the governing board of the school district employing him or her. Complainant also seeks dismissal based upon immoral conduct and willful refusal to perform regular assignments without reasonable cause as prescribed by reasonable rules and regulations of the employing district pursuant to Code section 44939.

Witness credibility

4. It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

5. The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness

⁷ Code section 44932 was also amended effective January 1, 2015. While there were no substantive changes to any of the subdivisions relied upon by the District for discipline, many of the subdivisions were renumbered and thus vary from the operative pleading.

who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

The third cause for unprofessional conduct and fifth cause for unsatisfactory performance are dismissed.

6. Respondent's motion to dismiss the District's third cause for unprofessional conduct pursuant to Education Code (Code) sections 44932, subdivision (a)(2), and 44933 is granted. Respondent moved to dismiss the third cause for unprofessional conduct in his closing argument and did not refer to the fifth cause for unsatisfactory performance in Code section 44932, subdivision (a)(5). However, the District does not have jurisdiction to proceed with either cause unless it can demonstrate fidelity to the procedural requirements set forth in Code section 44938. Because the District failed to follow Code section 44938, subdivision (a), the third cause for unprofessional conduct and the fifth cause for unsatisfactory performance are dismissed.

7. The District and the Commission lack jurisdiction to proceed on the charges of unprofessional conduct and unsatisfactory performance because respondent was deprived of the notice and opportunity to remediate any unprofessional or unsatisfactory conduct on his part after receipt of the 45-day notice in Code section 44938, subdivision (a), along with a "Stull" evaluation. Code section 44938, subdivision (a) provides:

The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

8. In *Tarquin v. Commission on Professional Competence* (Tarquin) (1978) 84 Cal.App.3d 251, the court interpreting a prior version of section 44938, concluded that service of the notice and evaluation were jurisdictional, and that the claim could not be pursued before a Commission on Professional Competence if the notice and evaluation were not timely served. (*Tarquin, supra*, 84 Cal.App.3d at 259.) According to *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1446 (*Woodland*), "where a school district seeking the dismissal of a permanent certificated employee on charges of unprofessional conduct fails to comply with the notice provision of section 44938, subdivision (a), it lacks jurisdiction to proceed.

9. The District provided respondent the appropriate written notification and held a meeting as required. Nevertheless, the District failed to satisfy the notice requirements when it failed to provide respondent an opportunity to remediate any defects in his performance. District's technical adherence to the notice requirements by providing a written document setting forth the causes and charges was made meaningless by the District's actions. By failing to provide respondent an opportunity to exercise his rights under Code section 44938, subdivision (a), it was as if no notice had been served. Put another way, the District did not "furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (Ed. Code § 44938, subd. (a).) To allow the notice that was served in 2015 to suffice would be to place form over substance, which is disfavored in the law. (Civ. Code, § 3528; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 237 [purported budget plan deemed a reorganization plan, and voided on constitutional grounds].) Further, the District's previous conference memos to respondent, although inclusive of many of the same charges, were not Notices of Unsatisfactory Acts within the meaning of Code section 44938.

10. District maintains that respondent should be discharged for unprofessional conduct for charges 1-14, and 17-28. Assuming District was entitled to proceed with the Cause for unprofessional conduct for the charges, it would prevail after the application of the *Morrison* factors. "Unprofessional conduct," as used in section 44932, subdivision (a)(l), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) District met its burden of proof that respondent's conduct failed to meet the standards of the profession on the basis of charges which reference his display of pornography, verbal threat, and general pattern and practice of inappropriate physical contact and sexual innuendo, which were not necessary to the curriculum or appropriate to teaching middle school students.

11. The District also alleges that charges 1-14, and 17-28, support dismissal for unsatisfactory performance. Assuming District met its procedural obligations and could proceed with the cause for unprofessional conduct, it would not prevail after the application of the *Morrison* factors below. Unsatisfactory performance is not specifically defined in the Education Code or case law, but it is distinct from unprofessional conduct. Code section 44938, subdivision (c), specifies that unsatisfactory performance does not include any other cause for dismissal specified in section 44932. Whereas 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 as required by Code section 44600, et seq, which is referenced in Code section 44938. Code section 44600, et seq., establishes guidelines for how school districts should evaluate and assess the performance of their certificated employees. Thus, cause for unsatisfactory performance may be established if the District meets its burden of proof and shows that certificated employee performs unsatisfactorily to his employing school district based on standard evaluations and other objective measures which were not administered for respondent. Respondent's last formal

District evaluation was prepared at his previous school, and there were no formal observations or evaluations prepared at Revere. On the contrary, he was observed occasionally, informally, and his peers' and administrators' complimented his skills and classroom structure based upon their sporadic observations of him and their appreciation of his computer savvy. Respondent's students gave him mixed teaching reviews, but generally agreed he taught the curriculum, albeit with unnecessary sexual references and innuendo which was offensive, made them uncomfortable, and as Ms. Uchida confirmed, distracted them from the curriculum.

12. The *Tarquin* case makes clear that where a school district does not comply with section 44938, subdivision (a), it is not barred from pursuing other statutory grounds for termination. That analysis is supported by other cases, such as *Woodland, supra*. A pleading is sufficient and comports with due process when it provides the respondent with enough notice of the charge to enable him or her to prepare a defense. (*Dymont v. Board of Medical Examiners of State of Cal.* (1922) 57 Cal.App. 260, 265.) No prejudice will be found if it appears from the record that the respondent was in fact able to prepare a defense. (*Jaramillo v. State Bd. for Geologists and Geophysicists* (2006) 136 Cal.App.4th 880.). Accordingly, the causes against respondent for unprofessional conduct and unsatisfactory conduct are dismissed.

The first and second causes for immoral conduct

13. The District's first and second causes for dismissal are for respondent's alleged immoral conduct, including but not limited to, "egregious conduct" pursuant to Code section 44932, subdivision (a)(1). In its second cause it asserts that respondent should be terminated for immoral conduct pursuant to Code section 44939, which provides for the immediate suspension of a permanent employee for charges of immoral conduct.

14. Code section 44932 subdivision (a)(1) states:

(a) A permanent employee shall not be dismissed except for one or more of the following causes:

(1) Immoral conduct including, but not limited to, egregious misconduct. For the purposes of this chapter, "egregious misconduct" is defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 or 44011 of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code.

15. Penal Code section 11165.6, by referencing Penal Code section 11165.1, brings that latter statute into consideration in cases of this type, even though it was not directly referenced in section 44932, subdivision (a)(1). Penal Code section 11165.1, subdivision (b)(4), defines sexual abuse, as follows:

The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

16. The District did not meet its burden of proof by a preponderance of the evidence that respondent has committed egregious misconduct within the meaning of sections 44932, subdivision (a)(1), and 44010, subdivision (a). The District asserts that charges 13, 21 and 22 support respondent's termination for cause one, immoral "egregious conduct." The District failed to prove by a preponderance of the evidence that charge 13, respondent's inappropriate physical conduct with KM, and charge 22, rubbing his female students' shoulders like a massage, supported the cause for immoral egregious conduct, because respondent's conduct did not constitute touching intimate parts as defined by the Penal Code. The District failed to prove by a preponderance of the evidence that charge 21, respondent's unintentional projection of pornography in the classroom, supported termination for moral egregious conduct under any applicable provision of the Penal Code.

17. The District met its burden of proof by a preponderance of the evidence that the charges support respondent's dismissal for immoral conduct within the meaning of Code sections 44932, subdivision (a)(1), and 44939. The District asserted that the following charges supported immoral conduct: charge 1 (KP's sexual harassment drawing); charge 2 (approaching KP after school and having her participate in a survey); charge 3 (taking a photograph of KP and sending it to her); charge 7 (making sexual innuendos and talking about sex); charge 12 (tickling and grabbing female students by the waist and touching their arms and shoulders); charge 13 (touching KM inappropriately); charge 19 (squeezing SD's cheeks and saying her skin is soft and she is cute); charge 20 (telling JA he would slap him if he could); charge 21 (projecting pornography from www.bigblackbooties.com); charge 22 (rubbing/massaging female shoulders); charge 23 (invading students' personal physical space); charge 24 (touching the higher part of a student's arm) (which it failed to prove by a preponderance of the evidence) and charge 25 (which it failed to prove by a preponderance of the evidence).

18(A). The term "immoral conduct" has been defined to include 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. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811 (*Weiland*).) It is sometimes used as synonymous with "dishonesty" or a high degree of unfairness. (*Ibid.*) 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 (*Hensey*).)

18(B). A teacher is held to a high standard of morality. A teacher is a role model for students, as noted by several courts:

The calling (of a teacher) is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher’s selection and retention.

(*Weiland, supra*, 179 Cal. App. 2d at p.811-812, citing *Goldsmith v. Board of Education* (1924) 66 Cal.App. 157, 168.)

There are certain professions which impose upon persons attracted to them responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category.

As between a teacher and his student, “(a)n important part of the education . . . is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept.” (*Johnson v. Taft School Dist.*, 19 Cal.App.2d 405, 408, 65 P.2d 912.) And as our Supreme Court said in *Board of Education v. Swan*, 41 Cal.2d 546, at 552, 261 P.2d 261, at 265, “A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the (students) coming under [his] care and protection.”

(*Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 824-825; see also *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463-1464.)

19. The factual scenario in *Hensey* is also helpful in understanding the types of actions that can constitute “immoral conduct” and “evident unfitness for service” as bases to dismiss a teacher. In *Hensey* dismissal was justified for a junior college teacher who used

vulgar language and engaged in questionable acts in his classes. It was not necessarily each individual act or comment but, rather, the totality. The teacher in *Hensey* tore out a loudspeaker in his classroom. He referred to the school's bell system as sounding like a worn-out phonograph in a whorehouse and made numerous references throughout the year to whores and whorehouses. He warned Mexican-American students of super-syphilis in a town on the Mexican border. He stated that the district superintendent spent too much time licking up the board and simulated licking the classroom wall with his tongue. Although he explained that he meant "face licking," the expression "means in common parlance licking an entirely different portion of the anatomy" and was obviously so intended. He also referred to the school walls looking as though someone had peed on them and then smeared them with baby crap. The court stated "while it could be assumed that both male and female students of that age were familiar with the words used, a classroom, even on a junior college level, is not the time or the place for the use of such language." (*Hensey, supra*, 9 Cal.App.3d at 974, 975.) The different actions and statements were described as creating a dangerous situation (loudspeaker), bearing on his fitness to teach (whorehouse), humiliating and embarrassing to the Mexican-American students and showing a lack of restraint and a tendency to vulgarity and bad taste (super-syphilis), and disruptive conduct, an impairment of the teaching process, and not an example of the responsible dissent which should be fostered in the classroom (licking). "All of the incidents taken in the aggregate serve as a substantial basis for the trial court's determination that the charges of 'immoral conduct' and 'evident unfitness for service' were true and constituted cause for dismissal." (*Ibid.*)

20. The District referred the Commission to *Governing Board v. Haar* (1994) 28 Cal. App. 4th 369 (*Haar*) as guidance. In *Haar*, the middle school teacher was dismissed for immoral conduct based upon inappropriate touching and sexual innuendo. The Commission in that case determined that there was not sufficient evidence to support dismissal for immoral conduct. The Court of Appeal confirmed the Los Angeles Superior Court's reversal of the Commission's Decision. The teacher's conduct in the *Haar* case is not identical to respondent's conduct because the teacher in *Haar* had more instances where the teacher invited sexual contact and the invited contact was more intimate. Nevertheless there are substantial similarities between the situations that support respondent's termination for immoral conduct. The teacher in *Haar* dressed up as Santa Claus and in exchange for a raffle, invited female students to sit on his lap, and give him hugs and kisses, reached out and held the hand of a female student until she pulled away, rubbed a female student's thighs in circles with his hand, and told a female student she was "cute" and his "favorite." (*Id.*, at pp. 378-385.) Here, respondent engaged in a pattern of inappropriate touching, paying too much attention to particular female students like KM, HI, KP and SD. Respondent complimented HI in front of her parents, and regardless of her parents' presence, looked at HI in a sexual manner which disturbed her. He inappropriately touched his female students, touching KM close to her breast down the side of her body to her thighs, pinched SD's cheeks, while complimenting her soft skin and remarking she is so cute. Respondent massaged and rubbed the shoulders of his female students, and hugged female students. Respondent's pattern and practice of referring to sex either overtly or by innuendo was well established in the factual findings. Respondent's immoral character was confirmed when he projected pornography of a gyrating naked woman from the web-site bigblackbooties.com. Although not every student

was uncomfortable or disturbed by respondent's conduct toward the females in his class, his conduct did disturb many students, and caused great distress to certain female students who were the subject of his attention.

Dishonesty

21. The fourth Cause for dismissal for dishonesty was not established by a preponderance of the evidence within the meaning of Code section 44932, subdivision (a)(4). "Public service provides no hiding place for the dishonest and those lacking integrity." (*Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 364.) Dishonesty also suggests a deceitful disposition. (*Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718-19.) The definitions of "dishonest" and "dishonesty" (Webster's Seventh New Collegiate Dict. (1969) p. 239), include references to willfulness, intent and fraud such that it may be reasonably concluded that there can be no dishonesty where there is no intent to deceive.

22. The District failed to identify any charges in support of the fourth cause for dishonesty. The Commission found respondent's testimony less credible than that of his students due to a variety of factors, including the straightforward demeanor and clear testimony of the students, which starkly contrasted with respondent's demeanor, selective memory and conflicting deposition responses. Overall, the Commission's consideration of respondent's credibility affected the evidentiary findings related to the charges and causes, and is an aggravating factor under the *Morrison* factors below. However, the charges did not contain allegations that respondent committed dishonest acts as a teacher, and for this reason the fourth cause is dismissed.

Evident unfitness for service

23. The District established by a preponderance of the evidence the sixth cause for evident unfitness for service within the meaning of Code section 44932, subdivision (a)(6).

24. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland, supra*, 2 Cal.App.4th at p. 1444.) "'Evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*)

25. In this case, it was established that respondent possesses a fixed character trait rendering him unfit for service as a teacher of middle school students. The Commission's determination of respondent's fixed character remains unchanged after the application of the *Morrison* factors below.

26. Respondent's inability to discern between acceptable conduct and invasive conduct was clear. His well-established references to sex and sexual innuendos were unrestrained, unnecessary to the curriculum, and wholly inappropriate. His failure to

acknowledge he made certain statements is reflective of a fixed character that is incompatible with teaching young adults. When he admitted to a sexual reference, as for example, with the “flowers are nature’s pornography,” or when “bees climax they explode,” or EH’s Huggy Bear nickname, he explained the statements were either repeated from a student’s sibling, borrowed from a popular television personality, or provided teachable moments. He did not understand the inappropriateness of taking KP’s picture during a private extracurricular activity without her permission and sending it directly to her e-mail account. He did not have any respect for his young female students’ or fully appreciate their reactions to his comments or actions; e.g., when he grabbed SD’s face; when he touched KM inappropriately; when he followed KP through the school campus after the school day ended; when he asked his female students to count the number of holes, or when he made a point of talking about EH’s Huggy Bear nickname. He distrusted his female student’s complaints. He questioned the veracity of KP’s reaction to his e-mail by searching social media for photographs of KP to discredit her. Respondent’s fixation with sex was confirmed by his ready access to pornographic images on his computer and his careless projection of them in the classroom. His fixation was further confirmed by his offensive sound effects of a woman going “ah, ah” during “romantic time.” His fixation with sexual analogies in science was exhibited by his comparing a cell to a nipple and with his statements about bees exploding. His inflexible thinking and judgment was further demonstrated by his wearing a Halloween costume because the rules did not technically apply to him, and his unfiltered projection of violent images of apartheid to middle school students.

27. His fixed character was not remediated by the removal of two students from his class and his many conferences with administrators. His only concession to Principal Samoza was giving side-hugs instead of full-frontal hugs.

Persistent violation of laws or reasonable regulations

28. The District proved by a preponderance of the evidence the seventh cause for dismissal for 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 the District pursuant to Education Code section 44932, subdivision (a)(8). The District asserts that charges 1-14 and 17-28, support this cause. As set forth above not every charge, including charge 26 (Halloween costume), was proven by a preponderance of the evidence. Nevertheless, the charges that were proven by a preponderance of the evidence establish that respondent violated the reasonable rules and regulations of the District set forth in charge 28 a, b, c, d, and f. The Commission determined that the District failed to establish by a preponderance of the evidence that respondent violated the rules or regulations set forth in charge 28e (child abuse), and 28g (California content standards).

29. 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.) In order for a teacher to be terminated under Education Code section 44932(a)(7), for violations of law or school rules, the violations must be either “persistent” or “motivated by an attitude of continuous insubordination.” (*Governing Board*

of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal.App.3d 77, 81 (*Seaman*).) “The word ‘persistent’ is defined by lexicographers as ‘refusing to relent; continuing, especially in the face of opposition ... stubborn; persevering ... constantly repeated.’ And, in the judicial decisions of this, as well as other states, the word has been interpreted to mean ‘continuing or constant.’” (*Id.* at p. 82.) The subdivision pertains to unintentional as well as intentional transgressions, and hence the legislature, apparently to allow opportunity for correction, has decreed that a single violation is not sufficient to warrant dismissal. (*Id.* at p. 84.) It is the persistent disregard of school rules that the subdivision is designed to regulate.” (*Id.*)

30. The District met its burden of proof by a preponderance of the evidence that, respondent’s inappropriate conduct established a persistent violation of school rules. Principal Samoza’s concern that respondent did not fully appreciate school rules was well-founded. Before respondent arrived at Revere, respondent had been a teacher within the District, and as a District teacher was on notice of District policies governing teachers’ conduct. The District policies were also available on the District web-portal, and were reviewed in teacher conferences. Respondent’s various statements that he was unaware of the policies, or hadn’t seen them until much later, were not credible. As referenced in the factual findings, respondent’s conduct violated several District policies, including the code of conduct with students, sexual harassment, the code of ethics, and respectful treatment of all persons. In addition, respondent violated the acceptable use policy when he projected pornography, and when he distributed KP’s photograph from a private after-school event to her school e-mail using his school-issued I-Pad.

31. The commission found that respondent did not violate school policy when he wore a Halloween costume. The Commission found that respondent did not violate school policies by projecting images of apartheid. Nevertheless, his conduct in these instances demonstrated a fixed character trait for disregard for others and a lack of appreciation for age-appropriate instruction.

Willful refusal to perform regular assignments without reasonable cause

32. The District failed to establish by a preponderance of the evidence that respondent willfully refused to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district within the meaning of Code section 44939, subdivision (b). The credible and persuasive testimony of Ms. Uchida established that respondent inappropriately sexualized his health and science lessons and that his approach was counterproductive to teaching middle school students. . Students had varying views of his teaching skills, and were unduly distracted and disturbed by his comments and the classroom environment. However, there was insufficient evidence that in conducting himself inappropriately, respondent also failed to teach the required health and science curriculum.

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Analysis of the Morrison Factors

33. The Commission finds that respondent's misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. The *Morrison* analysis applies to causes for discipline involving unprofessional or immoral conduct, as well as evident unfitness to teach. (*Id.* at p. 227-230.) Not all "*Morrison* factors" need be present for the *Morrison* test to be satisfied. (*Haar, supra*, 28 Cal.App.4th at p. 369.) 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* (1992) 2 Cal.App.4th 1429, 1457.) In this case, the Commission finds as follows:

- (a). The likelihood the conduct may adversely affect students or fellow teachers. There was ample evidence of adverse effects, on students and on the administrators. Respondent's misconduct adversely affected his students. Although students learned and some, including PK and respondent's two special education students, benefited from respondent's instruction despite his conduct, respondent's conduct negatively affected his students, particularly his female students, and distracted them from the curriculum. Respondent was a poor role model and created a strained learning environment for many students. He exposed his classrooms to inappropriate physical and verbal behavior. He made certain female students and their witnesses extremely uncomfortable and his behavior compelled the administration to transfer two female students from his class. His pattern and practice of referencing sex was inappropriate to the curriculum, offensive and a distraction to his students.
- (b). The proximity or remoteness in time of the conduct. The conduct occurred recently, during the 2013-2014 school year and the fall 2015 school year.
- (c). The type of teaching certificate held by the party involved. Respondent's credentials allow him to work with middle school students, but the evidence established that respondent is not temperamentally suited to work with students of that age.
- (d). The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Respondent presented no mitigating facts that explained or justified his actions. Aggravating circumstances were established, namely, that respondent made other statements not contained in the charges, including referring to a vagina as a snicker's bar, hugging KM tightly, lifting her off the floor. There were numerous incidents establishing a pattern and practice of inappropriate physical and verbal conduct. Respondent demonstrated little insight into his behavior and, with the exception of SD, little responsibility. Respondent was not convinced his female students' reactions were reasonable, and recommended a suggestion box for their concerns. Respondent's credibility is considered an aggravating factor. The Commission found respondent to lack credibility in his responses to the District's investigation, and his testimony, where he had selective recall and his responses conflicted with his deposition testimony.

(e). The praiseworthiness or blameworthiness of the motives resulting in the conduct. There was nothing praiseworthy in respondent's conduct. Respondent elected to teach health and science using imagery that was inappropriate and unsettling to his students, and distracted them from the curriculum. Respondent elected to be physical with his students, showing particularly poor judgment with his female students. The Commission did not find respondent's photograph of KP at a private after-school event praiseworthy nor was his complimentary note. Respondent was KP's teacher, not family friend, and taking her photograph without her permission to her school e-mail was not appropriate. Respondent's motives were blameworthy. His physical and verbal conduct, notably, his careless projection of pornography, established he was motivated by sexual content not necessary or appropriate to the curriculum.

(f). The likelihood of the recurrence of the questioned conduct. The likelihood of the recurrence of the questioned conduct is high. Respondent demonstrated little insight into his behavior. Despite numerous conferences, memos, suggestions by administrators and respondent of actions that can be taken to reduce improper interactions and induce proper interactions, respondent's conduct persisted. The District removed SD after respondent grabbed her chin, stroked her skin and said it was soft and she was so cute. Principal Samoza removed KM from respondent's classroom and returned respondent to the classroom after her investigation of that incident due to her mistaken belief that respondent's poor judgment and conduct with students would not continue. She was wrong. Principal Samoza was concerned about his attitude. As set forth in the factual findings, respondent engaged in multiple incidents of misconduct that demonstrated a pattern and practice of inappropriate physical conduct, and unrestrained reference to sex or sexual innuendo not necessary to teaching seventh graders health or science.

(g). The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the person involved, or other certified persons. There was no credible evidence offered to establish that any constitutional right will be impacted adversely by this matter.

(h). The publicity or notoriety given to the conduct. Respondent's touching and physical proximity to students was observed by his students. Respondent elected to touch SD's face and make inappropriate comments in front of her friends, respondent's students, and many others waiting for a school-wide assembly to begin. Respondent's conduct was observed and otherwise noted, including the removal of two female students from respondent's class. Respondent made inappropriate sexual comments in the classroom. Given respondent's conduct, some notoriety among students in his class is inferred, but otherwise there was no substantial evidence that his conduct received schoolwide attention or notoriety.

Disposition

34. The Commission still has broad discretion to determine whether such discipline is actually warranted even where cause for dismissal has been established.

(*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.) The Commission finds that dismissal is warranted.

35. As described above, the District established by a preponderance of the evidence cause 6, evident unfitness for service, and after consideration of the *Morrison* factors, the Commission does not consider respondent temperamentally suited to be in the classroom with middle school students. Respondent demonstrated he possessed a fixed personality unsuited to teaching middle school students. Respondent demonstrated neither remorse nor contrition. He has not shown that he learned from these events. He had not benefitted from counseling or progressive discipline by the District, as he demonstrated his inability to refrain from sexual innuendo and inappropriate physical or personal contact with his students, particularly his female students. Overall, respondent did not show that he is willing to put the interests of his students over his own. Respondent gave the Commission no reason to put him back in the classroom.

36. The Commission dismisses cause 3 (unprofessional conduct) and cause 5 (unsatisfactory performance) on the grounds set forth in the above legal conclusions.

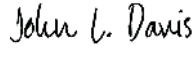
37. The Commission dismisses causes 4 (dishonesty), and 5 (willful refusal to perform regular assignments without reasonable cause) on the grounds set forth in the above legal conclusions.

38. The Commission affirms the Board's decision to terminate respondent's employment with the District. The District established that cause exists to dismiss respondent's employment for causes 1 and 2 (immoral conduct, but not egregious conduct), cause 6 (evident unfitness for service) and cause 7 (persistent violation of school laws).

ORDER

1. The Board of the District's decision to terminate respondent's employment with the District is affirmed.
2. Respondent Eric Burke is dismissed as a permanent certified employee of the District.


Dated: March 24, 2016

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JOHN L. DAVIS

Member
Commission on Professional
Competence


Dated: March 24, 2016

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KRISTI HARABEDIAN

Member
Commission on Professional
Competence

Dated: March 24, 2016

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EILEEN COHN

Administrative Law Judge
Commission on Professional
Competence