

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SIMI VALLEY UNIFIED SCHOOL DISTRICT
COUNTY OF VENTURA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CAROL CARLSON,
A Permanent Certificated Employee,

Respondent.

OAH No. 2015080498

DECISION

This matter came on regularly for hearing before the Commission on Professional Competence, Simi Valley Unified School District, County of Ventura, State of California (Commission), in Simi Valley, California, on May 2, 3, 4, 5, and 6, 2016. The Commission consists of the following members:

Samuel D. Reyes, Chairperson
Administrative Law Judge
Office of Administrative Hearings

Robert Jackson, Member

Amy Nash, Member

Robert Thurbon, Attorney at Law, represented the Simi Valley Unified School District (District).

Robert A. Bartosh, Attorney at Law, represented Carol Carlson (Respondent), who was present throughout the proceedings.

The District seeks to terminate Respondent's employment with the District on grounds of unsatisfactory performance and unprofessional conduct. Respondent disputes the factual allegations and argues that grounds for dismissal do not exist.

Oral and documentary evidence, and evidence by oral and written stipulation on the record, was received at the hearing. The record was left open for the submission of written closing

argument. Closing argument was received on June 6, 2016 (Initial), and on June 27, 2016 (Reply). The matter was submitted for decision on June 27, 2016.

FACTUAL FINDINGS

Jurisdictional Findings

1. Respondent is a permanent certificated employee of the District.
2. On June 2, 2015, Assistant Superintendent, Personnel Services, Dan Houghton (Houghton) recommended to the Governing Board of the District (Governing Board) Respondent's termination pursuant to Education Code¹ sections 44932, 44934, 44936, 44939, and 44941. The Governing Board approved Houghton's recommendation on the same date.
3. On June 3, 2015, the District filed Written Charges, Notice of Intent to Dismiss and Accusation (Accusation), seeking Respondent's dismissal. On June 26, 2015, Respondent filed a Request for Hearing and Notice of Defense.
4. All prehearing jurisdictional requirements have been met.

Respondent's Background and Employment With The District

5. Respondent has a Master's Degree in Language and Literacy. She holds a multiple subject credential, which allows her to teach all subjects in self-contained classrooms in preschool through adult schools, including grades one through six. She started teaching in 1991 in another school district, and was hired by the District in 2004. Her first assignment was as a third-grade long-term substitute. After teaching third grade students for two years, Respondent was assigned as an itinerant science teacher for fourth, fifth, and sixth graders in several elementary schools. In 2008, Respondent was assigned to teach fourth grade at Garden Grove IMPACT Academy (Garden Grove or School). She first taught first grade during the 2010-2011 school year.

District's Evaluation Process

6. The applicable evaluation requirements for district certificated employees, referred to as the professional accountability and evaluation process, is contained in Article XVI of the 2014-2017 Contract of Agreement between the District and the Simi Educators Association (Association or Union) (Collective Bargaining Agreement).²

¹ All further statutory references are to the Education Code.

² At its November 18, 2014 meeting, the Governing Board adopted Revised Board Policy and Administrative Regulation 4115, which provides, in pertinent part: "Evaluation of certificated employees shall be conducted in accordance with the procedures established in

7. District certificated employees are placed on an “assessment cycle.” Non-permanent employees are evaluated annually. Ten-year employees with above-average prior evaluations are evaluated every five years. All other permanent teachers are evaluated not less than every other year.

8. Subject to the supervision of the site principal, certificated teachers have four options in the formal, professional accountability evaluation program: administrative-mandated option, administrative-choice option, portfolio option, and partner option. Administrative-mandated option is for probationary, temporary, interns, or categorical (non-permanent) certificated employees and requires the teacher and administrator to jointly develop goals generated from analysis of a self-assessment of the Continuum of Teaching Practice. The administrative-choice option is one in which the certificated employee chooses to investigate student work, abilities, and behaviors in partnership with an administrator. In the portfolio option, the teacher develops a portfolio with reflections to validate professional development. The partner option is a peer coaching model in which teachers collaborate and coach each other to determine success of professional development goals. (Exh. GG, at pp. 72-73.)

9. a. “The primary purpose of assistance is to improve the quality of classroom instruction and promote higher student achievement. Any tenured unit member identified as performing below the Professional Standards by the Site Administrator or designee shall be placed on an Assistance Program.” (Exh. GG, at p. 73.) Assistance has two phases: Phase I or Pre-Assistance and Phase II or Assistance. The requirements for each phase are set forth in the Collective Bargaining Agreement.

b. The Pre-Assistance Phase is to last ten weeks. A written notice (form D-30, entitled “Pre-Assistance), is to be given to the teacher, setting forth the areas of concern, the date(s) the concerns were discussed, the desired behavior in relation to the Professional Standard, the recommendations and suggestions for improvement, and the next meeting date. The notice is followed up by additional observations and conferences. Three outcomes are possible: resolution of the problem and return to the existing evaluation option; placement on assistance; or continuing with observations and conferences.

c. The duration of Phase II is a minimum of 20 weeks, and includes placement as a Referred Teacher in the Peer Assistance and Review (PAR) program. The program is expected to last the entire school year, unless the teacher corrects the noted problems earlier. The PAR program is to provide guidance and support, including a written Assistance Plan, which, as required by the Collective Bargaining Agreement, must include a statement of the problem and existing conditions, specific objectives for the Referred Teacher, specific methods and resources which the Referred Teacher will use to remedy the problem,

this administrative regulation and applicable collective bargaining agreements. To the extent that any of this provisions conflict, the procedures in the collective bargaining agreement shall be implemented.” (Exh. DD, subexhibit B, at p. 1.)

and specific guidance that will be offered to the Referred Teacher. Consulting Teachers are to be permanent unit members, i.e., Respondent's peers, and chosen by the PAR Council, a five-member labor-management committee. If the certificated employee does not agree with placement on an Assistance Plan, the teacher can appeal to the PAR Council.³

10. The District has adopted the California Standards for the Teaching Profession (Standards) to measure teacher performance. The Standards were developed by the Department of Education, the Commission on Teacher Credentialing, and the New Teacher Center, and are composed of six specific standards (Engaging and Supporting all Students in Learning (Standard 1), Creating and Maintaining Effective Environments for Student Learning (Standard 2), Understanding and Organizing Subject Matter for Student Learning (Standard 3), Planning Instruction and Designing Learning Experiences for All Students (Standard 4), Assessing Students for Learning (Standard 5), and Developing as a Professional Educator (Standard 6)), with several elements under each standard.

2013-2014 School Year

11. Respondent taught first grade for the 2013-2014 school year, and had between 29 and 33 students in her class at different times of the year. She taught in room number 2.

12. The 2013-2014 school year was Martha Feinstein (Feinstein)'s first year as a principal. Feinstein started working for the District in 2002. She worked for one year as a resource specialist, before working for four years as a program specialist at District headquarters. From 2007 through 2012, she worked at the Ventura County Office of Education in the area of certification and development services. Feinstein returned to administrative duties with the District from April to August 2012.

13. During 2013-2014 school year, Feinstein conducted brief, approximately five minutes, informal observations to learn about her new staff. Starting in September, she tried to visit each classroom once or twice each week.

14. The 2013-2014 school year was Respondent's evaluation year. She and Doug White, another first grade teacher, partnered for the evaluation process, a process in which each was to observe and comment on the other's performance. On October 31, 2013, Respondent met with Feinstein to finalize her Professional Development Plan and to discuss the Standards Respondent would be working on in her evaluation. Respondent had chosen to work on Standard 5 (Assessing Students for Learning), Element 6 (Using Available Technologies to Assist in Assessment, Analysis, and Communication of Student Learning). Feinstein added Standard 6 (Professional Responsibility), Element 7 (Demonstrating

³ The PAR Council has not been active in the recent past due to lack of funding. The District and the Association had agreed to convene the Council as necessary, provided there was funding. No evidence was presented regarding the any specific attempt to convene the PAR Council to deal with Respondent's case.

Professional Responsibility, Integrity and Ethical Conduct) to the Professional Development Plan, as an element Respondent needed to address, and wrote on the document: “[Respondent] will turn in required documents to office on time. . . .” (Exh. 3, at p. 357.) .

15. Teachers at Garden Grove issue student grade progress reports just before the winter recess. The reports contain comments, and the School requires teachers to submit their draft comments for the principal’s review five days before the start of the break. Respondent turned in her draft comments to Feinstein on the last day of school.

16. Respondent met with Feinstein on January 16, 2014, for a discussion of her progress in the evaluation. Respondent presented a document entitled “Mid-Year Portfolio or Partner Observation – Consultation Reflection.” (Exh. 3, at pp. 358-359.) During the ensuing discussion, Feinstein raised concerns about the late submission of report cards for review before the winter break and advised Respondent to be prepared for the final evaluation meeting in April 2014.

17. Feinstein testified that she likes to conduct evaluation meetings early so that she can meet required deadlines. Feinstein therefore scheduled a meeting on March 7, 2014, to review work samples and to discuss progress toward the standards subject to the evaluation.

18. a. Respondent and Feinstein met on March 7, 2014, but did not conclude the evaluation process. On April 3, 2014, Respondent submitted a “Final Accountability Summaries,” discussing her progress toward meeting evaluation goals. Respondent and Feinstein held their final evaluation meeting of the year on April 16, 2014.

b. Feinstein concluded that Respondent had not met Standard 6.7, and decided to have Respondent repeat the evaluation cycle during the following school year, placing Respondent on what she referred to as “administrative mandated professional accountability cycle.” Feinstein set forth the reasoning behind her decision in a section of the “Final Accountability Self-Assessment” form entitled “Administrative Comments and Recommendations Related to the Goal”: “[Respondent] and I met on March 7. She brought work samples but was not prepared to discuss the two standards we agreed upon. She was to meet with me in 2 to 3 days to complete this conference. On March 7 we discussed the Continuum of Teaching Practice, self-evaluation, partner evaluation, and how to record evidence to determine her development along the [Continuum of Teaching Practice]. Carol was not prepared to meet in March. We have now scheduled our final conference for April 14. Carol missed the April 14 meeting and we rescheduled for April 16. We discussed that I have asked for her to be on the Professional Accountability next year to monitor Standard 6. We discussed if there was any additional assistance from the office she needed. This was her first time in first grade. She thought first grade was challenging. She met Standard 5.6 at the application level.” (Exh. 3, at pp. 365-366.)

c. In addition, Feinstein testified that as the year progressed she noticed what she termed “red flags” in Respondent’s teaching that she wanted to have addressed

through the formal evaluation process. For example, Feinstein testified she did not actually see teaching in progress during her informal “walkthroughs” of Respondent’s classroom because Respondent would ask the students to show the visiting principal a specific thing or to sing a song instead of continuing with the lesson in progress, a process Feinstein referred to as a “dog and pony show.” In addition, Feinstein was concerned about the timeliness of Respondent’s submission of students’ grades and thought Respondent’s room was very untidy.

19. As set forth in factual finding number 8, the administrative-mandated evaluation option is for probationary, temporary, interns, or categorical (non-permanent) certificated employees. Board policy, which incorporated the Collective Bargaining Agreement, required permanent certificated employees, as Respondent was at the time, who were believed by the site administrator to be performing below the professional standards, to be placed on the Assistance Program. Respondent was not placed on the Assistance Program or given the specific Assistance Program notice required by the Collective Bargaining Agreement. In order to use evaluation forms that referred to “administrative mandated” in Respondent’s off-cycle evaluation, Feinstein changed the evaluation forms intended for use in the administrative-mandated process involving non-permanent employees by whiting-out references to “non-permanent” teachers in three of the forms and by adding the word “mandated” to one of the forms.

20. Year-end report cards, with teacher comments, were to be sent home with students on the last day of school. Feinstein required submission of the grades to her by May 30, 2014, so that she may review the teacher comments before they were finalized. Respondent turned in her report cards to Feinstein on June 4, 2014. Feinstein made corrections that night, and Respondent incorporated them in her final report cards by June 6, 2014.

21. a. On June 6, 2014, the last day of school, Feinstein observed Respondent taking boxes in a red wagon from her current room to the room she was scheduled to use the following year. As it was instruction time, Feinstein asked Respondent about the children, to which Respondent replied they were in the classroom with the aide. Feinstein directed Respondent to return to the classroom, as the students needed to be with a credentialed instructor, and Respondent complied.

b. At the hearing, Respondent explained that it was the last day of school and that no instruction was taking place, as students were wrapping up and getting ready for summer. The aide had remained in the classroom with some of the students, and Respondent had brought one of the parents and some of the students with her.

22. During a conference on June 9, 2014, which was attended by two Union representatives, Ginny Jannotto (Jannotto) and Dale Gillick (Gillick), Feinstein issued the following directives to Respondent: materials that have a deadline must be turned in on time, such as grade level goals, report cards, and professional teacher development goals and

meeting notes; report card comments must be educationally relevant and not opinion; there must be a credentialed teacher in the classroom with students at all times; Respondent is to read emails in the morning and prior to lunch; Respondent will teach third grade in the 2014-2015 school year, in room 22, with a white board; Respondent will work at building herself up and becoming a stronger teacher versus making excuses for why she is disorganized and turning materials late; and Respondent will have substitute plans than can be followed up by the substitute. On June 11, 2014, Feinstein provided Respondent with a memorandum setting forth her concerns and directives.

First Graders Requiring Additional Assistance

23. In February 2015, Feinstein learned that some second grade students, 12 of whom had been in Respondent's first grade class during the 2013-2014 school year, were having difficulties in their second grade classes during the 2014-2015 school year. In the first grade, the students had below-grade scores on reading comprehension at some point during the school year, but their year-end progress reports showed that they were meeting first grade standards. The reading comprehension scores were issued by STAR, an accelerated reading computer program, which assigned scores based on the student's answers to questions about what they had read.

24. Respondent explained that she relied on the STAR scores to assign reading material, but that she assessed the students based on their overall work and her familiarity with them. It was also her understanding that at the end of the school year she had to rate students as meeting standards or not meeting them; "progressing toward the standard" was no longer an option at the end of the school year. In some cases, Respondent explained, she suggested some remediation to help the student even if she thought the student was meeting the standards.

25. Respondent referred students to a remediation team during the year as appropriate and she recommended retention of some. For instance, she concluded that student A.O., one of the 12 having difficulties in second grade, was not meeting standards and recommended retention in first grade. The family did not want to retain the student, and he was advanced to second grade. She also recommended retention of A.E., another of the 12 former first graders, and he was receiving special education services.

26. In light of the multiple variables involved, such as student maturity and life circumstances, and the passage of time, it was not established that Respondent's assessment of the children's progress was incorrect at the time she made the assessments.

Respondent's Assignment and Start of the 2014-2015 School Year

27. At the end of the 2013-2014 school year, Feinstein informed Respondent that she would be teaching third grade and that she would be in room 22. During the summer

break, Respondent prepared her materials to teach third grade, and prepared room 22 for the assignment. She was out of the State on vacation from July 29 to August 6, 2014.

28. During the summer, it became necessary for Feinstein to change Respondent's assignment and room. Respondent was assigned to teach sixth grade in room 11. Feinstein expected Respondent to work together with Kylie Donlon (Donlon), the other sixth grade teacher, who was very experienced in teaching the grade. Feinstein believed that Respondent's science background would complement Donlon's strength in math, and that the two would successfully teach the students as a team. Feinstein also hoped that placing Respondent with a strong teacher would improve Respondent's teaching.

29. Respondent learned about the change in grade assignment through an electronic message from Donlon just before the start of school. Respondent did not realize at the time that the room had also been changed.

30. Respondent first saw her new room on Friday, August 15, 2014, the first day for teachers to return to school. The room had apparently been used as a storage room, as it contained furniture, including 12 cabinets, school supplies, such as globes, and materials from the prior sixth grade teacher and from the teacher who had taught third grade the year before. The things Respondent had earlier moved to room 22 were also moved into room 11.

31. Room 11 presented an emotional challenge for Respondent. During the 2012-2013 school year, a teacher by the name of Malia Brooks (Brooks) had taught sixth grade in the room. Respondent had taught science in the room twice per week. Respondent's son was a student in the class. Brooks was relieved of her assignment after allegations of sexual abuse toward one of her students surfaced. Her son was not personally abused, but saw pictures that were very disturbing and required help to cope with the trauma.

32. Respondent attended a staff meeting on the morning of August 15, 2014, and started working on getting her room ready after the meeting.

33. Respondent asked Feinstein for help removing materials from the room, and was informed there was no storage room for all the items in room 11. Respondent placed some boxes outside the room, and took some items home.

34. Respondent made several trips to her home to store some items there. She did not obtain permission for leaving the school during the afternoon of August 15, 2014.

35. Respondent worked on her room for the next three days, Saturday, Sunday, and Monday, before the start of school on Tuesday, August 19, 2014. Some of the school custodians helped move items around, and Donlon and two other teachers helped by putting up some wall materials.

36. Donlon's room was adjacent to Respondent's. Respondent and Donlon agreed to a team teaching arrangement, whereby Respondent would teach science to the students in both classes and Donlon would teach math to all the students. They also agreed to divide students based on their reading test scores in the teaching of language arts, with Respondent taking a smaller group of children from both classes who required more assistance.

37. a. Respondent and Donlon agreed to work together in planning their activities. Before the start of the school year, the planning consisted primarily of Donlon helping Respondent get ready for a new grade and a new year. After school started, Respondent and Donlon engaged in planning about the subject matters to be covered. However, the planning decreased as the year progressed, and there were very few planning meetings by the end of September 2014. The planning meetings took place after school, and Respondent had to pick up her three children from other schools. After September 2014, planning often took the form of quick exchanges during the day about what they were each doing. In addition, toward the end of the first semester, Respondent had a student from her class photograph the agenda board on Donlon's class to get an idea about what Donlon was teaching.

b. Despite the decrease in planning activities, it was not established, as alleged in item 15 of the Accusation, that Respondent "refused and failed to prepare comprehensive lesson plans and workbooks for the team teacher's common students, refused to use the comprehensive lesson plans and workbooks created by her teammate, refused to teach from those fully prepared and comprehensive materials and failed to create her own lesson plans or workbooks." (Exh. 1, at p. 5.)

38. It was not established that "Respondent does not have adequate knowledge of subject matter, refuses to demonstrate adequate knowledge and to implement proper instruction for her students," as alleged in paragraph 9 of the Accusation. (Exh. 1, at p. 4). While Respondent admittedly faced a "learning curve" in teaching sixth grade material, she sought to implement proper instruction for her students.

39. Respondent recognized Donlon as a good teacher, with a lot of experience in sixth grade and was grateful for Donlon's assistance.

40. Respondent encountered difficulties at the start of the school year in accessing computer resources in her room. Initially, she did not have access at all, as the system was set up for the teacher who taught in the room the year before. She was eventually able to access one of the two computers in the room. Her Google email account had not been set up at the start of the year.

41. The District implemented a digital grading system, Aeries, for the sixth grade during the 2014-2015 school year. At the start of the year, Respondent's log-in identity was associated with a different group of students, not her sixth graders. She also initially lacked the "tool kit" containing information to access Aeries. Other teachers appeared to be having

difficulty with Aeries, and the Association and District administration met to resolve the issues related to the implementation of Aeries. District Director of Elementary Education Kathleen Roth (Roth) conceded there were some “bumps” in the Aeries roll out.

42. Respondent received training on Aeries, and was informed by the Association that she could hand-write her first progress reports for later entry into the system. Feinstein later informed Respondent that the progress reports had to be in Aeries by October 31, 2014.

43. The District had been providing training in common core standards for math and language arts, and the new standards were implemented for the sixth grade during the 2014-2015 school year. At the start of the year, Respondent did not have the current common core books for sixth grade language arts or math.

44. The District employs a classroom behavioral management program called CHAMPS. The program includes visual aids to model appropriate behavior. Respondent had employed the program while in first grade, but did not have the materials for the sixth grade at the start of the school year. She requested the materials from Feinstein on September 5, 2014, and Feinstein offered a compact disc (CD) for Respondent to copy the necessary materials. Respondent did not create visual materials from the CD and did not fully implement CHAMPS.

Homework Assignments and Grades in the 2014-2015 School Year

45. Respondent and Donlon planned to assign the same amount of homework to both sixth grade classes. However, as the year progressed, Respondent was not assigning the same amount of homework as Donlon. Respondent explained she fell behind in the homework assignments because she was going through her own learning curve, and it would take her longer to complete the material. Respondent’s practice was not to grade homework, but to review the answers and concepts in class.

46. Respondent also planned to administer the same tests as Donlon. As with homework, Respondent fell behind in her testing. Respondent was also slower in grading tests, a process hampered in part by the absence of answer keys. Respondent keep student work in folders she planned to share with the students and their parents at meetings during the year.

47. Respondent assigned grades for an August 19, 2014 assignment entitled “Pendulum Swing,” which grades did not all correctly reflect student performance.

48. Early in the year, Donlon became concerned that Respondent was not providing timely feedback on the work her students were performing in Respondent’s class. Donlon had to routinely remind Respondent to grade the work of her students, and Respondent provided the grades and other feedback.

49. The Aeries grading system contained a parent portal through which students' parents could see progress reports and other grades during the year.

50. Progress reports were to be posted in the Aeries computer system between October 10 and 17, 2014, for parents to access before teacher parent conferences during the week of October 20, 2014. Respondent missed the October 10-17, 2014 window to post the progress reports online. She prepared written progress reports to discuss with parents, and provided a copy to Feinstein.

51. As early as mid-September 2014, some parents complained to Feinstein that their children were not receiving enough homework. Feinstein relayed the concern to Respondent. Two parents met with Respondent to express their concerns.

52. Related to the lack of homework complaints, some parents also complained to Feinstein that they were not seeing enough feedback or assessment about their children's progress. Some of the complaints were in writing, but parents did not want their written complaints given to Respondent, and did not want to discuss the matter with her. Feinstein periodically told Respondent about the nature of the complaints. One of the parents who testified at the hearing, D.D., expressed concern that Respondent had only provided a general statement that his daughter was doing "fine." Two parents who testified at the hearing, D.D. and F.T., were dissatisfied at not being able to look at progress reports online before parent conferences in October 2014.

53. It was not established, as alleged in paragraph 17 of the Accusation, that Respondent misrepresented the progress of students to their parents.

54. Respondent entered the progress reports in the Aeries system on October 31, 2014. Feinstein noticed discrepancies between the handwritten comments Respondent had provided, and what she saw online. Feinstein met Respondent at approximately 2:39 p.m., and, in the presence of Jannotto, directed Respondent to correct the discrepancies by 4:00 p.m., when the window for corrections closed. Respondent made the corrections with the assistance of Jannotto.

55. a. Respondent failed to timely record student progress reports and grades, as set forth in factual finding numbers 15, 20, 46, 48, and 50.

b. However, it was not established, as alleged in paragraph 6 of the Accusation, that Respondent "has no rational understanding of the requirement, value and importance of preparing report cards." (Exh. 1, at p. 4.)

2014-2015 School Year: Evaluation of Respondent's Performance: August to October 31

56. Feinstein testified that she started observing Respondent's classroom on the first or second week of the 2014-2015 school year. She conducted "many" observations,

approximately two to three per week when Respondent was in school, staying from 10 to 45 minutes. Feinstein further testified that she discussed her observations with Respondent five or six times between August and October 31, 2014, and that she suggested resources for improvement, including other teachers. Feinstein provided general testimony about Respondent's perceived deficiencies. These included criticisms that Respondent did not use her classroom time efficiently, that she did not use the proper classroom management system, CHAMPS, that she was not teaching to the expected sixth grade common core standards, that she did not provide instruction which differentiated between the more advanced and the less advanced students, and that she did not check her students for understanding of the material. Feinstein took notes during some of her observations, and presented Respondent with memoranda summarizing some of her concerns.

57. The first formal meeting of the 2014-2015 school year to discuss Respondent's performance occurred on September 8, 2014. Roth, Feinstein, Respondent, Jannotto, and Gillick were present. Feinstein counseled Respondent about leaving school on August 15, 2014, and about posting pictures of room 11 on Facebook. Feinstein discussed her expectations for the upcoming school year. Respondent expressed concerns about Feinstein not providing assistance in the move from room 22 to room 11, about her placement in Brooks' room, and about teaching sixth grade for the first time.

58. Feinstein observed Respondent's classroom on September 23, 2014, and observed an activity that involved cups of different sizes and the sound they made. On a second day, Feinstein observed Respondent ask students to prepare Venn diagrams to chart the information obtained from the cup activity.

59. On September 26, 2014, Feinstein met Respondent and Julie Deitz (Deitz), another teacher at the School, who acted as Respondent's Union representative. Feinstein expressed her view that the cup activity was not aligned to the Common Core standard, and was not satisfied with Respondent's explanation about the scientific purpose of the activity. On October 3, 2014, Feinstein provided a memorandum to Respondent outlining her concerns in this regard, and setting forth her expectations for Respondent to align her curriculum to common core standards and for Respondent to turn in grade level goals for the school year with baselines for all students.

60. Respondent provided grade level goals documents to Feinstein on October 3 and 10, 2014, and they were discussed. Respondent also reported on materials she still did not have.

61. On October 15, 2014, Respondent met with Feinstein to discuss the 2014-2015 evaluation process. She was presented with the same "Professional Accountability Status 'On Cycle' Teachers" Form that had been used for the 2013-2014 school year, except that the box "Admin. Mandated" was checked. A new Professional Development Plan set forth under the "Goals" section, the standard Respondent would be working on, number 6, and the Element, 6.6 (Managing Professional Responsibilities to Maintain Motivation and Commitment to all

Students.” (Exh. 3, at p. 367.) In the “Assessment of Progress” section Feinstein wrote: “Report cards [¶] Getting grades to partner teacher [¶] Grade book set up but grades not entered yet [¶] Lesson Plans up to date with [sic].” (*Ibid.*)

62. In mid-October 2014, the District brought in Peggy Noisette (Noisette) to work with Respondent. Noisette is a retired teacher and consultant with extensive training and experience in peer assistance and peer review. Feinstein did not regularly observe Respondent after Noisette was retained, but received reports from the consultant.

63. In mid-October 2014, Noisette met with Respondent, Feinstein, Jannotto, and Gillick, to explain her role. Feinstein opened the meeting by detailing her concerns about Respondent. Noisette explained that she would observe Respondent in the classroom, and give her feedback to address Feinstein’s concerns.

64. a. On October 22, 2014, Noisette conducted her first observation of Respondent’s teaching. The visit was unannounced, and Respondent was participating in a joint, or “buddy,” project involving her class and a Kindergarten class. Noisette concluded that Respondent’s interaction with the students was positive. Respondent got down on her knees so she was on level with the students. She asked questions about what they were doing. She spoke to one or more of the students in their native Spanish language.

b. Noisette concluded that Respondent had applied Standards 1.2 (Using Knowledge of Students to Engage Them in Learning), 1.4 (Using a Variety of Instructional Strategies, Resources, and Technologies to Meet Students’ Diverse Learning Needs), 1.5 (Promoting Critical Thinking Through Inquiry, Problem Solving, and Reflection), 1.6 (Monitoring Student Learning and Adjusting Instruction While Teaching), 2.1 (Promoting Social Development and Responsibility Within a Caring Community Where Each Student Is Treated Fairly and Respectfully), and 2.3 (Establishing and Maintaining Learning Environments That Are Physically, Intellectually and Emotionally Safe.)

65. As was her practice, Noisette prepared a detailed observation note, describing the sequence of events and noting specific times for her observations. She met with Respondent to discuss the observation and to provide suggestions for improvement.

66. a. Noisette’s next observation occurred on October 29, 2014, and lasted about one hour. Noisette entered the room while Respondent was teaching a science lesson. Approximately twenty minutes into the class, students from Donlon’s class rotated into Respondent’s class, and a new science class commenced. Noisette had both positive and negative comments about Respondent’s performance. On the positive side, Respondent had an understanding of the curriculum and used some good teaching strategies. Of concern, Respondent did not seem to use her time efficiently. She did not seem to be checking for understanding of the lesson she was teaching. Respondent seemed to be calling on primarily five or six students in the very front tables. Respondent asked a question of a student at the

end of the class. Instead of answering the question, the student said it was time to go, and all students picked up their books and left.

b. During the post-observation meeting, Noisette spoke to Respondent about the students leaving at the end of the class, and provided suggestions to prevent the students from dismissing themselves. Noisette also made suggestions for better use of “equity sticks” to call on more students during class. Respondent explained to Noisette that she had emotional problems with the room that prevented her from concentrating on her lesson planning and grading. Noisette suggested that Respondent rearrange the furniture and do as much planning and grading outside the room as possible.

Respondent’s Leave of Absence

67. Respondent was absent from work on November 3, 2014. She went to the doctor, who subsequently placed her on leave, which Respondent referred to as stress leave.

68. During the leave of absence, Roth decided to move Respondent from Brooks’ former room, as recommended by Respondent’s doctor. Feinstein assigned Respondent to room 12, and assigned the teacher in room 12 to room 11.

69. In early January 2015, before Respondent returned to school, Donlon informed Respondent that she would no longer participate in team teaching. At the hearing, Donlon explained that it was too much work dealing with Respondent and rotating students into her class and that it was easier for her to remain on her own.

January 2015

70. Respondent returned from her leave of absence on the first day of school in the next semester, January 5, 2015.

71. a. On January 9, 2015, Feinstein called another conference with Respondent and Jannotto to continue the evaluation process. Respondent and Jannotto asked for the process to commence in February since Respondent was just back from a leave of absence. Feinstein agreed to the request, but expressed the following non-negotiable expectations: Respondent was to align her classroom work, homework, and tests to common core standards; Respondent was to have better communication with parents, which would include timely grading and posting of grades; and Respondent was to meet all school and District deadlines.

b. During the meeting, Feinstein inquired about any materials Respondent may need. Respondent stated that she did not have math books that correlated to common core standards. Feinstein informed Respondent that the materials did not exist, and directed Respondent to a District resource to create her own materials.

72. Respondent had not taught math to sixth grade students based on the common core concepts the District was using, and did not have a teacher's edition math book with which to teach the students. Donlon had been teaching a math pilot program, and had created her own materials. Respondent eventually obtained materials and assistance from the District's math teacher on special assignment, Matt Guzzo.

73. On January 18, 2015, D.O., the mother of one of the students in Respondent's class, A., requested that her son remain with Donlon for math and language arts. Respondent, Feinstein, and D.O. held a conference on January 21, 2015. Respondent did not object to the parent's request, stating the student, who was an advanced student, would be better off with a more experienced teacher in a classroom and with better access to internet resources (students in Donlon's class had individual laptops and those in Respondent's did not.) A. was transferred to Donlon's class, effective January 26, 2015.

74. a. On January 15, 2015, Noisette conducted an observation of Respondent's language arts and math classes, from 10:05 a.m. until 12:06 p.m. Noisette noted some positive developments. Respondent incorporated the suggestions regarding proper dismissal of students. When the students started to leave as they had on October 29, 2014, Respondent said, "No, wait," and gave proper dismissal instructions. Respondent had a warm relationship with the students. She was also tying math lessons to real world skills.

b. There were also areas on which Noisette suggested further work. Respondent was still not using classroom time efficiently. For instance, Respondent took 36 minutes to explain the first math problem, and it took over one hour to work through the first three problems. Respondent was accepting student responses, and was not clarifying concepts or checking for understanding.

75. Feinstein conducted two observations, on January 16 and January 20, 2015, and had concerns about Respondent teaching students Common Core standards for sixth grade.

76. On January 20, 2015, Noisette discussed her January 15, 2014 observation with Respondent. Noisette made suggestions for improvement, and provided input for a lesson Noisette planned to observe the following day. Respondent was receptive to the suggestions. Noisette asked to see student tests, and Respondent provided a blank copy of the test and the students' scores.

77. As planned, Noisette returned for a classroom observation on January 21, 2015. Noisette observed a math class for about two hours. As suggested by Noisette, Respondent started the class by clearly explaining that two sides of an equation must be equal, using visual tools to explain the concept. After giving the students a problem to work on, Respondent walked around the room to check their progress, as Noisette had also suggested. However, she failed to assist students who appeared to have difficulties with the problem or to explain why a student had arrived at an incorrect answer. When working with a particular student, Respondent did not always keep her eyes on the rest of the class. By the end of the class,

there were several students off task. On a positive note, Respondent followed another suggestion from Noisette to differentiate instruction, giving more advanced students a more difficult task.

78. A meeting was scheduled for January 22, 2015, at 3:30 p.m., to discuss Noisette's January 21, 2015 observation with Respondent and Feinstein. Noisette arrived ten minutes earlier to review the observation with Feinstein.

79. Upon arrival to the conference, Respondent overheard Noisette tell Feinstein inside the principal's office that she always sides with the principal, which gave Respondent concern about Noisette's objectivity. Noisette denied making the statement and explained that she was just updating Feinstein on her observations of Respondent's performance, as she had told Respondent she would. In light of Noisette's contrary testimony and the absence of corroboration, Respondent's testimony is insufficient to establish that Noisette made the statement attributed to her by Respondent.

80. At the January 22, 2015 conference, which was also attended by Deitz, Noisette presented her comments about the January 21, 2015 observation. Respondent expressed concerns about being assigned to sixth grade, about not having the necessary materials, and about not having sufficient support from administration or parents. In an effort to focus on the future, Noisette made further suggestions to address the areas of concern observed on January 21, 2014. For example, Noisette suggested that when explaining a problem Respondent should go beyond explaining what to do and how to do it, but also explain why it is done this way and why it works this way.

81. Noisette next observed Respondent's classroom performance on January 27, 2015, during another math class. She concluded that Respondent was meeting teaching standards in some respects and that she was not meeting them in others. On the one hand, Respondent improved on her classroom efficiency. Classroom management was good. As she presented the first problem, Respondent used appropriate questions to focus the students on the task. However, she was still having difficulty checking for understanding. She asked general questions about who was having difficulties, instead of focusing on specific students and posing specific questions. She walked around the room, but did not comment on any of the students' work or speak to any individual about the work. Some of the students who raised their hands were ignored. She did not check student homework assignments before beginning work based on the homework.

82. It was not established that "Respondent has persistently exhibited poor judgment in managing her classroom," as alleged in paragraph 7 of the Accusation. (Exh. 1, at p. 4). Students were observed off-task on certain occasions and Respondent did not always manage her time efficiently. However, Respondent made improvements in these areas following Noisette's suggestions. For instance, concerns about the dismissal of students on October 29, 2014, were corrected following suggestions by Noisette. Noisette observed on January 27, 2015, that Respondent's classroom management was good.

Administrative Leave and Remediation Plan

83. On January 27, 2015, the District placed Respondent on administrative leave. On January 28, 2015, Houghton provided Respondent with a letter, which stated, in part: “This letter confirms the substance of our conference. You are hereby immediately placed on paid administrative leave. The District continues to receive a substantial number of complaints pertaining to your performance as a classroom teacher. I have reviewed your previous performance history, discussed the situation with your site principal at length and determined that at a minimum the District needs to prepare a comprehensive remediation plan to assist you, and require you to improve your performance as a classroom teacher to a satisfactory level. I am in the process of continuing to review the information available from several sources to determine the precise requirements of the remediation plan. . . .” (Exh. 1D, at p. 178.)

84. On March 4, 2015, Houghton presented Respondent with a “Ninety (90) Day Notice of Unsatisfactory Performance; Forty-Five (45) Day Notice of Unprofessional Notice (90/45 Notice).” (Exh. 1C, at p. 24.) The document detailed Respondent’s alleged deficiencies, and advised Respondent that “You will have 90 days to satisfactorily participate in a remediation program, and demonstrate through your participation and the results of your actions in the next 90 days that you have the requisite skill and ability to immediately improve your performance to at least a satisfactory level in all aspects of your classroom teaching assignment. If you fail to accept responsibility for your own satisfactory performance and your deficiencies, or otherwise do not perform satisfactorily during the 90 day remediation period, the district will, on June 5, 2015 issue a notice of intent to dismiss you from your employment with this district.” (Exh. 1C, at p. 29.)

85. Houghton asked Ross to develop a remediation plan for the rest of the year to enable Respondent to return to the classroom for the 2015-2016 school year. Ross developed what she described as a dynamic plan to enable Respondent to draw from various District resources while continuing to work with Noisette. The plan contained the following provisions:

“Beginning March 23, Respondent will meet with [Noisette] every Monday and Thursday morning from 8-10 am at the district office. [Noisette] will provide instruction and resources to include, but not [be] limited to, the following topics: lesson planning, classroom management, differentiated instruction for all levels of learners, other best teaching practices, formative and summative assessments, Common Core implementation, targeted and integrated English Language Development, collaboration with Special Education teachers and accommodations for special education students, etc.

“[Noisette] will assign [Respondent] practicums that will be completed at home and turned in at the beginning of the next session or when [Noisette] indicates the assignment is due. [Noisette] will review the assignments with [Respondent] and ask [Respondent] to

reflect on the assignments and/or suggest additional work o the assignments as [Noisette] deems necessary.

“[Roth] will assign [Respondent] to attend appropriate conferences and trainings. Registration costs and travel expenses will be covered by the district.

“[Respondent] will be assigned to shadow/observe [teachers on special assignment] and other exemplary teachers at school sites to be exposed to model lessons and best teaching practices. [Respondent] will be required to keep a journal with notes/reflections following each observation, which [Noisette] will discuss with her at their next weekly meetings.

“[Respondent] will be assigned to participate in online webinars and other online trainings that inform her about best teaching practices or current topics relating to elementary education. A one page written summary will be required following such online webinar/training and reviewed by either [Noisette] or [Roth] within one week of the viewing.

“There is an expectation that [Respondent] will be timely in attendance to all required appointments and in turning in all assignments and other required paperwork.

“If [Respondent] does not follow through on the meetings/assignments/requirements outlined above, a conference will be held with district staff and documentation/conference summary to follow (which will be placed in [Respondent’s] personnel file). [Respondent] will be asked to sign the conference summary and may provide a written rebuttal if she is not in agreement with what is documented in the conference summary. As always, [Respondent] may ask for [Association] representation to be present.” (Exh. 14C, at p. 918.)

86. The remediation plan was presented to Respondent on March 16, 2015.

Compliance with the Remediation Plan

Meetings with Noisette and Written Assignments

87. The first meeting between Respondent and Noisette took place on March 23, 2015. Using a California Standards for the Teaching Profession booklet, Noisette reviewed several standards and elements within a standard. Noisette gave Respondent an assignment involving standard 3 (Understanding and Organizing Subject Matter for Student Learning) to be completed before their next meeting, and provided instruction on what she expected for completion of the assignment.

88. Noisette did not recall if Respondent completed the first assignment, but testified that Respondent often did not complete the assignments at home. At times Respondent had not done any work on the assignments, and Noisette could not remember Respondent completing an entire assignment before the meeting in which the assignment was due.

89. Respondent agreed she did not complete all homework assignments, and attributed her failure to being scared and paralyzed about the whole process. Respondent worked on the assignments with Noisette during their meetings.

90. Respondent attended all but two of the scheduled biweekly meetings with Noisette, on March 23 and 26, April 13, 16, 20, and 27, May 19, 21, and 28, and June 1, 2015. She missed a meeting on April 23, 2015, because of an emergency involving her son's glasses and one on April 30, 2015, because her car was leaking fluid. Respondent did not call Noisette to cancel the April 23, 2015 meeting prior to Noisette's arrival at the District's office. Respondent did not inform Roth she would be unable to attend the April 30, 2015 meeting.

91. The meetings covered the subjects required by the remediation plan. Noisette provided instruction and materials, and Respondent completed the homework assignments in Noisette's presence.

92. As Noisette and Respondent agreed in their hearing testimony, Respondent was engaged during the biweekly meetings. Respondent was pleasant, cooperative, attentive, actively engaged, and eager to understand and add ideas to her repertoire. On occasion, Respondent expressed her view that the work she was doing with Noisette did not address the real problems of lack of materials and lack of support from the administration.

93. At the conclusion of her meetings with Respondent, Noisette concluded that there were still deficiencies in Respondent's teaching, as she had noted during her classroom observations. However, Noisette could not assess the level of Respondent's progress because Respondent had not demonstrated, by completing all of her homework, that she had internalized all of the concepts covered during their meetings.

Observation of Other Teachers and Remediation Journal

94. Cori Orlando (Orlando), English Language Arts Teacher On Special Assignment, invited Respondent to observe her class on several occasions. Respondent missed two of the opportunities because she was meeting with Noisette. Respondent could not attend one of the demonstrations because of her daughter's emergency illness, and Respondent notified Orlando that she could not attend. Respondent observed Orlando's classes on April 17, May 12, and May 13, 2015. Respondent observed Guzzo's sixth grade math class on May 22, 2015. Respondent also observed experienced teachers on May 14, May 18, and May 19, 2015. On May 14, 2015, she observed multiple teachers during a two-hour period, during which Noisette accompanied her.

95. Respondent maintained a "Remediation Journal," and the 212-page document was received in evidence. It contained documents provided by Noisette, notes generated during the meetings with Noisette, homework assignments, notes of observations of other teachers, and Respondent's reflections and ideas.

96. a. Noisette saw Respondent working on her journal during their meetings, but did not ask to see the document, believing it was Respondent's private document.

b. Respondent testified that she brought the journal to every meeting with Noisette, but that Noisette never asked to see it. During their meetings, Noisette told Respondent to view the journal as a reference tool to help her in the future. Based on the conversations between Noisette and Respondent, it is concluded that both expected Respondent to return to the classroom the following school year to implement the techniques being discussed.

Participation in Online Webinars

97. Roth recalled giving Respondent three to four webinars to watch. In an April 29, 2015 email, Roth asked Respondent to register for a May 20, 2015 Family Engagement Webinar. On April 29, 2015, Roth sent Respondent an email asking her to register for a May 20, 2015 Family Engagement Webinar.

98. Respondent signed up for four webinars and watched three of them, Data-Driven Conversations and Decision Making, Family Engagement, and Rigor for Instructional Leaders. She failed to watch one webinar because she did not realize its starting time was based on Eastern Daylight Savings Time. Respondent informed Noisette about the webinars she watched, but did not make notes or enter reflections in her journal.

Notice of Non-Compliance

99. On May 8, 2015, Houghton gave Respondent a "Progress Report and Notice of Non-Compliance with Remediation Plan and Continuing Unsatisfactory Performance, Unprofessional Conduct and Unfitness for Service." (Exh. 1F, at p. 180.) In part, the document stated: "You are now more than 2/3 of the way through your ninety (90) day remediation period and I have received written reports, as well as some oral reports. . . . These documents demonstrate that you have substantially failed to participate in the remediation program as designed, that you have not accepted responsibility to effectively participate in the remediation plan. . . . [¶] We will continue to offer, and require your participation in this specific remediation program for the balance of the ninety (90) day period. As I made clear in my original notice to you, your participation in this program is not optional. Your participation is required. I have scheduled a meeting with you, your representative and assigned consultants and me, on Monday, May 18, 2015 at 9:00 a.m. in my office to revisit the remediation program for the balance of the ninety (90) day period." (Exh. 1F, at pp. 181-182.)

100. In late May or early June 2015, Houghton concluded that Respondent had not made sufficient progress in her remediation, and recommended her dismissal.

*Respondent's Fitness to Teach*⁴

101. As set forth above, Respondent engaged in conduct that raises concerns about her fitness to teach. Thus, she failed to submit grades and progress reports in a timely manner (factual finding numbers 15, 20, 46, 48, 49, 50, and 55a); on June 6, 2014, she left some students in the classroom with an aide, not a certificated professional (factual finding number 21); during the afternoon of August 15, 2014, she left the School without permission while taking materials from her room to her home (factual finding number 34); she assigned grades for an August 19, 2014 assignment that did not correctly reflect student performance (factual finding number 47); and, she failed to fully implement CHAMPS (factual finding number 41).

102. In addition, as primarily established by the testimony of Noisette, with corroboration from Feinstein and partially from Respondent herself, there are shortcomings in Respondent's teaching performance.⁵ Thus, Respondent at times failed to efficiently use her classroom time (factual finding numbers 66 and 74), to check that her students were understanding the material being taught (factual finding numbers 66, 74, and 81), to equitably call on students in class (factual finding numbers 66 and 81), to give guidance to students (factual finding number 77), and to properly dismiss her students (factual finding number 66).

103. In terms of the pertinent *Morrison* factors, Respondent's conduct is related to her fitness to teach. The conduct set forth in factual finding numbers 101 and 102 has likely adversely affected students, although the degree of such adversity varies. Lesser adverse impact is likely from the conduct set forth in factual finding number 101. For instance, while Respondent did not meet deadlines to provide preliminary comments to the principal and miss computer windows to

⁴ Courts require evaluation of a teacher's alleged misconduct in terms of its impact on fitness for service utilizing the following criteria first enunciated by the Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*): the likelihood that the conduct may have adversely affected students or fellow teachers; the degree of such adversity anticipated; the proximity or remoteness in time of the conduct; the type of teaching certificate held by the party involved; the extenuating or aggravating circumstances, if any, surrounding the conduct; the praiseworthiness or blameworthiness of the motives resulting in the conduct; the likelihood of the recurrence of the questioned conduct; and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. Not all factors may apply in each case and only the pertinent ones need to be examined. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777; *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 384 (*Haar*).) The determination of fitness for service required by *Morrison* is a factual one. (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3 (*Jack M.*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d. 208, 220-221 (*Fontana*); *Haar* (1994), *supra*, 28 Cal.App.4th at p. 384).

⁵ Noisette's testimony has been found most credible and reliable, as she was detailed, systematic, and balanced in her observations of Respondent's performance.

upload grades, she did issue final grades. Even though she left students without certificated employee supervision on June 6, 2014, Respondent did not leave them unsupervised and no instruction was actually taking place on the last day of school. Deficiencies impacting actual teaching performance can have a more significant impact, particularly if not remediated.

The conduct at issue occurred in the relatively recent past.

In terms of extenuation or aggravating circumstances, there were more of the former. Respondent faced a last-minute assignment change into a grade she had never taught. She was initially placed in a room that presented emotional challenges for her. Issues with technology, equipment, and materials also adversely impacted Respondent's ability to teach and impacted her learning curve.

In addition, remediation was intermittent and less than optimal. The remediation efforts were interrupted by Respondent's leave of absence and by her placement on administrative leave. While not much evidence was received at the hearing about the reason(s) for Respondent's leave of absence, it appears to have been medically-related. Before her leave, and following her work in the classroom with Noisette in January 2015, Respondent was addressing her shortcomings. While she still had work to do, Respondent was making progress and was prematurely pulled from the classroom.

In aggravation, Respondent did not complete all the assigned homework assignments. On the other hand, she completed the assignments in class, obtaining the benefits of the lessons, and was otherwise cooperative with Noisette. Respondent was engaged in the remediation program, and substantially complied with its requirements.

With respect to likely recurrence of the conduct in question, some of the conduct set forth in factual finding number 101, such as the incident in which she left the students with her aide, the August 15, 2014 absences, and implementation of CHAMPS, was isolated and not likely to recur. Whether issues relating to correct and timely assignment of grades or to teaching to professional standards will recur cannot be fairly assessed, as Respondent was not permitted to complete the 2014-2015 school year in the classroom where she would have had opportunities to grade student work and apply teaching concepts discussed with Noisette.

The type of certificate held, the praiseworthiness or blameworthiness of motives for the conduct, and the extent to which disciplinary action may have a chilling effect upon the constitutional rights of teachers are neutral factors.

In these circumstances, it was not established that Respondent is unfit to teach.

Concluding Finding

104. Except as set forth in this Decision, all other allegations in the Accusation were not established at the hearing by credible evidence.

LEGAL CONCLUSIONS

1. Section 44932, subdivision (a)(2), permits dismissal of a permanent employee for “unprofessional conduct.” Unprofessional conduct has been defined as conduct, measured by the *Morrison* factors, which indicates unfitness to teach. (*Jack M.*, *supra*, 19 Cal.3d 691 at pp. 696-697; *Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1173-74.) Section 44938 requires written notice of unprofessional conduct before an employee can be terminated for unprofessional conduct.

2. Respondent argues that the Commission lacks jurisdiction in this matter because the District failed to give Respondent the notice required by section 44938, subdivision (a). Alternatively, Respondent argues that the District deprived her of due process in not affording her an opportunity to remediate the alleged deficiencies.

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.”

Respondent relies on *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251 (*Tarquin*), which construed section 13407, the predecessor to section 44938 which contained the same pertinent language. In *Tarquin*, the district gave a teacher two notices of unsatisfactory performance, and transferred him to a nonclassroom assignment. The court concluded that the commission was without jurisdiction to act because two of the notices did not include required performance evaluations, one notice was untimely under section 13407, and the school district’s transfer of the employee to a nonclassroom assignment deprived him of the opportunity to correct his faults.

However, subsequent courts have concluded that only the notice requirement of section 44938, i.e., the 45-day requirement, is jurisdictional, not the language that pertains to the opportunity to correct behavior. Instead, the lack of opportunity to correct deficiencies may be considered in evaluating the evidence. (*Blake v. Commission on Professional Competence* (1989) 212 Cal.App.3d 513 (*Blake*); *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334 (*Crowl*).) In *Blake*, the notice of unprofessional conduct was both timely and complete, but the teacher was absent for much of the time the notice was in effect. The court stated “Although there is no jurisdictional defect here which precluded [c]ommission action, we are nonetheless concerned about the fairness of dismissing a teacher who was allegedly unable to take advantage of her last opportunity to remedy unacceptable behavior because of extended illness. . . .” (*Blake*, *supra*, 212 Cal.App.3d 513, 518.) The court proceeded to examine the evidence and concluded that the teacher’s own

actions, including unexcused absences, prevented him from having the opportunity to remediate his deficiencies.

The March 4, 2015 notice given to Respondent was timely, and the Commission has jurisdiction to hear the matter consistent with the rulings in *Blake* and *Crowl*. Nevertheless, the fact that Respondent was not permitted to demonstrate her remediation in a classroom has been considered in determining whether cause exists for dismissal.

3. Respondent also argues that cause for dismissal does not exist because the District failed to follow its evaluation procedures. She relies on *Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309 (*Pasadena USD*) in support of her argument. In *Pasadena USD*, the district involuntarily transferred a teacher in violation of its policy governing such transfers and sought to dismiss her for her subsequent failure to report to the new assignment. The involuntary transfer policy required notices of involuntary transfer to be given by May 15th, absent an emergency. The notice was given on September 10, 1974. The commission and the superior court concluded that no emergency existed for the failure to give proper notice of the involuntary transfer and that, therefore, cause for dismissal did not exist. The California Supreme Court affirmed the Superior Court's determination. The District counters that it followed all required procedures. As with respect to the opportunity to remediate her deficiencies, the process through which Respondent was evaluated has been considered in determining whether cause exists for her dismissal.

In this case, the District failed to follow the requisite evaluation procedures. Once it concluded that Respondent had performance deficiencies, the District was required to place Respondent on a 10-week Pre-Assistance period, which has specific requirements regarding notices, observations, and conferences. It was only after Respondent's failure to successfully resolve problems in the Pre-Assistance Phase that the District could properly place Respondent on the Assistance Program. The Assistance Program also has specific requirements and protections, such as a minimum 20-week remediation period, a written assistance plan, assistance from peers, and appeal to a labor-management committee, the PAR Council. These protections were not afforded to Respondent. Instead of following the required evaluation process, the District placed Respondent on another evaluation cycle, an administrative mandated professional accountability cycle typically reserved for temporary and probationary employees.

The argument that it actually placed Respondent on the Pre-Assistance and Assistance evaluation process is not supported by the evidence and is not persuasive. The process followed by the District did not resemble that outlined in the Collective Bargaining Agreement, and Respondent was never told about critical components of the sanctioned process. Thus, Feinstein informed Respondent that she was on a full-year assessment cycle, not on a Pre-Assistance process that could be resolved in ten weeks. Nor was Respondent ever told that she was part of the Assistance Program, with its recourse to peer mentors and the PAR Council.

4. It was not established that Respondent engaged in unprofessional conduct, by reason of factual finding numbers 6 through 103 and legal conclusion numbers 1 through 3.

5. Section 44932, subdivision (a)(5), permits dismissal of a permanent employee for “unsatisfactory performance.” While the District established that Respondent’s performance needs improvement in some respects, it failed to establish that she engaged in unsatisfactory performance, by reason of factual finding numbers 6 through 103 and legal conclusion numbers 2 and 3. In this regard, the District failed to follow the required evaluation procedures, which afforded Respondent the opportunity of peer participation and a shorter formal Pre-Assistance Phase. Moreover, removal from the classroom in the existing circumstances deprived Respondent a meaningful opportunity to remediate performance shortcomings.

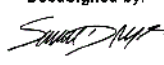
6. Cause for dismissal was not established, by reason of factual finding numbers 6 through 104 and legal conclusion numbers 1 through 5.

ORDER

Respondent Carol Carlson shall be retained as a permanent certificated employee of the Simi Valley Unified School District.

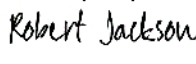
COMMISSION ON PROFESSIONAL COMPETENCE

DATED: September 30, 2016

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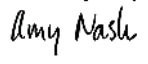
SAMUEL D. REYES, Chairperson
Administrative Law Judge
Office of Administrative Hearings

DATED: September 29, 2016

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ROBERT JACKSON
Commission Member

DATED: September 30, 2016

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AMY NASH
Commission Member