

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND THE
COMMISSION ON PROFESSIONAL COMPETENCE FOR THE
ANAHEIM UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

TU HOANG,
A Permanent Certificated Employee,

Respondent.

OAH No. 2016060721

DECISION

The Commission on Professional Competence (Commission) heard this matter on October 18-21, 2016, March 2-3, 2017, and March 9, 2017, in Anaheim, California. The Commission members were Laurie R. Pearlman, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), State of California, Melissa Chan-Nauli, and Persida Torres. ALJ Pearlman presided.

Daniel R. Shinoff and Arthur M. Palkowitz, Assistant General Counsel, represented complainant Brad Jackson, Assistant Superintendent of Human Resources for the Anaheim Union High School District (District).

Daniel D. Sorensen, Attorney at Law, represented respondent Tu Hoang.

Six motions in limine were argued and denied, for the reasons stated on the record. Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted for decision on May 9, 2017.

FACTUAL FINDINGS

Jurisdiction and Parties

1. The District's Governing Board (Board) is the duly elected, qualified and acting governing board of the District, organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. At all times relevant, respondent was a permanent certificated employee of the District.

3. On April 12, 2016, complainant, in his official capacity as the District's Assistant Superintendent of Human Resources, filed with the Board an Amended Statement of Charges against respondent, alleging factual and legal grounds for respondent's immediate suspension without pay and termination of his employment with the District.

4. Respondent was timely provided with notice of all hearing dates before the Commission.

5. Respondent holds a Pupil Personnel Services School Counselor Credential. He is employed at Sycamore Junior High School (Sycamore) as a certificated employee in the position of counselor.

Complainant's Charges Against Respondent

6. In the Amended Accusation and Statement of Charges against respondent, complainant alleges the following causes to dismiss respondent from his employment as a permanent certificated employee of the District:

- a. Immoral conduct, under Education Code section 44932, subdivision (a)(1);¹
- b. Dishonesty, under Education Code section 44932, subdivision (a)(4);
- c. Evident unfitness for service, under section 44932, subdivision (a)(6);
and
- d. Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him, under section 44932, subdivision (a)(8).

Bases for Dismissal from Employment

7. Respondent was placed on administrative leave effective January 22, 2016, based upon a determination that he had persistently violated the provisions of the Education Code, as well as rules, policies and regulations, as follows:

(a) Respondent did not follow proper protocol for his profession or the District procedure in handling a suicidal student;

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

- (b) Respondent placed a student at greater risk by leaving him unattended;
- (c) Respondent placed a student at greater risk by allowing the student to run from school;
- (d) Respondent acted unprofessionally;
- (e) Respondent used a raised voice with his lead counselor after the student incident referenced above;
- (f) Respondent used profanity with his lead counselor;
- (g) Respondent was dishonest and not forthcoming with accurate information regarding the details and nature of the incident.

Suicide Intervention and Prevention Protocol

8. In late Spring 2015, a two-hour training was provided by Patricia Lockhart, Director of Guidance and Student Support Services at Sycamore, and Program Administrator Adela Cruz, regarding the District's Suicide Intervention and Prevention Protocol (Protocol). (Exhibit 20). The training was part of a day-long professional development training provided to the District's counselors, who deal with students' social, emotional and academic needs. Respondent was in attendance.

9. The Protocol had recently been updated, but did not substantially differ from the previous version. It provided that "everything else stops" while a suicide assessment is conducted by either the school psychologist or the school counselor. Doing the assessment is "the priority focus."

10. The first step of the assessment is to determine whether the student is at risk of suicide by asking specific questions set out in the Protocol and completing a written "screening instrument" which involves checking off boxes on a form. If the student is determined to be at risk, the second step is to determine the level of risk (i.e., low, moderate or severe.) The third step is to determine a course of action.

11. If a student is determined to be at greater than low or moderate risk for suicide, the Orange County Healthcare Agency's Centralized Assessment (CAT) team must be called. The CAT team then carries out its own assessment to determine whether psychiatric hospitalization is required.

12. The school counselor or psychologist doing the assessment must stay with the student until the student is either hospitalized or released to a parent. The student cannot be left with staff who have not been trained in the Protocol.

13. On September 24, 2015, Lockhart sent an email to all of the District's counselors, including respondent, entitled "Suicide Intervention and Prevention." A copy of the Protocol was attached. Lockhart's email stated:

I also am restating what we went over in our meeting, at the end of last [school] year, when we discussed the [Suicide Intervention and Prevention] process.

(a) If a student comes to you and may be suicidal, drop everything and use the protocol and forms to complete a suicide assessment.

(b) Do NOT pass them off to another person. If you have a meeting, let someone know you cannot attend. That child came to you, and their life is worth more than anything.

(c) If a student is with an intern (either school counseling or social work) and they need to conduct a suicide assessment, a counselor must sit with them during the process. Because they are interns, they, and the student, will need your expertise.

I know most of you already follow this procedure.

However, several people asked for clarification so here it is.
(Exhibit 27).

14. On an unspecified date after the Spring 2015 Protocol training, respondent stated to Sycamore's Lead Counselor, Monica Pineda, that the school psychologist is responsible for assessing a student who may be suicidal. Pineda told respondent that the psychologist is not at Sycamore on a daily basis. Therefore, while respondent can consult with the psychologist when performing an assessment, it is also the counselor's role to conduct an assessment in accordance with the Protocol.

15. On September 18, 2015, respondent sent an email to Sycamore's counselors expressing his "narrow and jaded view of the role of a school counselor."

Respondent's Inappropriate Handling of Student DOE on January 21, 2016

16. On Thursday, January 21, 2016, Sycamore teacher Anthony Barber followed up with a 13-year-old student (DOE)² about an assignment which posed self-discovery questions. In response to a question about his life goals, DOE wrote, "To be dead before I'm

² The student's name and that of his mother will not be used in order to preserve their privacy.

50.” One question asked, “Who are you?” DOE wrote, “[I am] a no good asshole who can’t seem to want to live.” (Exhibit 23.) Barber asked DOE if he always felt that way and he replied, “Yeah, I feel that way every day.”

17. Barber “takes suicide extremely seriously” and has “dealt with that issue in the past.” He was concerned that DOE might harm himself. Barber asked the boy whether he “would be comfortable talking to someone, his counselor?”³ DOE said he would be comfortable speaking with respondent, who was his assigned counselor. Barber escorted DOE to his next class where Barber felt he would “be supervised.” Barber told the teacher that he or respondent may come back to retrieve DOE from the class. Barber then went to look for respondent.

18. At approximately 12:45 p.m., Barber “ran into” respondent, who was returning from lunch, and apprised him of DOE’s situation. Respondent asked Barber if it was a matter for the psychologist to handle. School psychologist Anita Baldison had been meeting with DOE for 30 minutes each week pursuant to his Individualized Education Program (IEP)⁴ to address coping skills and stress management. He had not previously indicated to her any desire to harm himself. Baldison was not on campus on January 21, 2016, as she was working at another school that day.

19. Barber told him DOE’s counselor should handle the matter first and then could choose to involve the psychologist or the CAT team. Respondent agreed to have security “pull” DOE from class and bring him to the counseling office where respondent would speak to him. Fifteen or twenty minutes later, Barber spoke to Pineda, as lead counselor, to inform her about the situation with DOE and his discussion with respondent.

20. Laura L. Munoz is the only secretary in Sycamore’s counseling office, where she handles clerical tasks. Munoz also interprets for counselors and Spanish-speaking parents, when asked to do so. She has never received training in handling suicidal students. Munoz did not see campus security bring DOE into the counseling office on January 21, 2016.

21. Security brought DOE to respondent’s office at 12:40 or 12:45 p.m. Respondent contends that he spent 30 to 35 minutes asking DOE questions and verbally performing the screening and suicide assessment. DOE said he “would choke himself with his own hands or burn himself” but did not have a “specific plan” as to how he would carry this out. DOE had several key stressors, but respondent concluded that the main one was the

³ Sycamore had three counselors, including the lead counselor. Each counselor is assigned part of the alphabet based upon the students’ last name.

⁴ An IEP is a written document developed for each public school child who is eligible for special education.

boy's fear "of a male figure in the house." Respondent assessed DOE's risk for suicide to be moderate to severe.

22. At about 1:15 p.m., respondent came out of his office with DOE. He telephoned the CAT team while the boy waited outside on the couch in the lobby. Respondent spoke to the dispatcher and asked him whether he should call DOE's parent. Respondent was told not to do so at that time, and that the CAT team would call him back.

23. Respondent then left the counseling office to attend a one-hour "Junior High 101" planning meeting with Sycamore's Principal Gary Brown to discuss an upcoming orientation for sixth grade students.⁵ As he was leaving the counseling office, respondent gestured to Munoz. DOE was seated on the couch in the lobby of the counseling office, outside of respondent's office. Respondent pointed to his eyes, pointed to DOE, and stated to Munoz, "I'm going to a meeting." Respondent did not say anything to Munoz about DOE being suicidal, nor did he tell her that he was expecting a call from the CAT team. Munoz continued with clerical work, glancing at DOE "once in a while."

24. Pineda entered Brown's office at the start of the meeting and informed those present that respondent would not be joining them because he was working with a student. Shortly after, respondent entered Brown's office and stayed for the entire meeting. Pineda assumed respondent's attendance at the meeting meant that he had spoken to DOE, had quickly assessed the situation, and had determined that there was no identifiable suicidal ideation and no threat of suicide.

25. The meeting concluded at approximately 2:10 or 2:15 p.m. As he left, respondent stated that he "still needed to do an assessment."

26. After the meeting concluded, respondent went to a classroom where he conversed with a teacher for a few minutes. He then returned to the counseling office where DOE was still seated on the couch in the lobby outside of respondent's office. Respondent had left DOE with Munoz for 45 to 48 minutes. Respondent took DOE into his office for two or three minutes and then brought him back out to the couch.

27. Respondent asked Munoz to telephone DOE's mother, who is Spanish-speaking. Munoz told respondent she would do so after doing some filing. Respondent told DOE to sit down again on the couch outside his office.

28. Respondent went back into his office and closed the door just before the bell rang at 2:20 p.m., signaling the end of the school day. When the bell rang, DOE got up from the couch. Munoz asked him where he was going, but DOE left without responding.

⁵ There was conflicting testimony as to whether the meeting began at 1:00 p.m. or 1:30 p.m.

29. Munoz immediately knocked on respondent's office door, but got no answer. She knocked again and when he opened the door, Munoz told respondent that DOE had left. Respondent ran out of the counseling office in pursuit of DOE, but lost him in the crowd of students exiting the school grounds.

30. Respondent paged DOE on the school's public announcement (PA) system. As soon as Pineda heard the announcement, she went to respondent's office to find out what was going on.

31. Respondent informed Pineda that DOE had run off. Respondent became agitated and told Pineda that according to the Education Code it is not the counselor's role to carry out an assessment. He repeatedly stated that it is the school psychologist's responsibility to assess the student since she sees DOE on a weekly basis. Pineda stated that she disagreed and told respondent that if a staff member asks a counselor to speak with a student who may be suicidal, it is a counselor's role to do so.

32. Respondent began yelling at Pineda. He stated that he had motioned to Monica Munoz, the counseling department's secretary, to indicate that she should keep an eye on DOE when he left for the meeting in Brown's office. Pineda told respondent that is not the secretary's responsibility to watch a suicidal student and insisted that respondent should not have attended the meeting if he still had a suicide assessment to do.

33. Respondent told Pineda that he had attended the meeting because he was waiting to hear back from the CAT team. Pineda explained that if respondent had been waiting for the CAT team, then he should have been available to speak with them, rather than attending the meeting. As Pineda gave respondent suggestions as to what he should have done, respondent continued to yell that he had not left DOE unattended and that none of what had occurred was his fault. Respondent was pacing back and forth in his office, visibly upset. He then slammed his office door and left.

34. Pineda went to Brown's office and informed him of what had transpired. Brown instructed Pineda to telephone respondent on his cell phone to ascertain whether he had carried out an assessment or contacted DOE's parent and police. Pineda spoke to respondent by cell phone. She then returned to Brown's office and told him that respondent refused to take directives from her.

35. Respondent subsequently came to Brown's office visibly upset. Respondent stated that "it wasn't [his] fault" and that he is "not allowed to touch a student [to prevent him from leaving campus]." He asked Brown, "I'm not going to get written up for this, am I?"

36. While respondent was searching for DOE, Barber saw respondent out near the athletic field. Respondent was "flustered" and told Barber, "Thanks a lot for getting me into this [situation with DOE]."

37. The police were contacted by respondent and/or Brown, and arrived at Sycamore within 15 minutes. At 3:38 p.m., respondent called DOE's mother on his office telephone.

38. At 7:15 p.m., the Anaheim Police located DOE, who was unharmed. His mother believed DOE had gone to a fast-food restaurant with friends.

January 22, 2016 Meeting

39. On January 22, 2016, respondent attended a meeting with Kelly Wilson, Sycamore's Assistant Principal, Brown, and his union representative. Respondent was informed that he could either wait for an investigation to be conducted by Human Resources or he could respond to the incident at that meeting. Respondent chose to respond, stating that he had had a conversation with Barber regarding DOE, had performed the suicide assessment, had telephoned the CAT team and had been told by the dispatcher to await further instructions. Respondent stated that he had asked the dispatcher whether he could attend a scheduled meeting, and was told that any school staff member could monitor the student in his absence while he attended the meeting.

40. During the January 22, 2016 meeting, respondent stated that when he returned from the meeting in Brown's office, DOE was still present in the counseling office. He claimed that the CAT team telephoned him, and as he was reaching for the telephone on his desk, DOE ran out the door. Respondent called the CAT team and was directed to call the police. He stated that DOE left his office at approximately 2:30 p.m. Respondent stated he would have to check his notes to determine what time he called the police. Respondent also stated that:

- (a) "I strongly believe I followed what needed to be done."
- (b) "I can't place my hands on him."
- (c) "The CAT team told me not to call anybody."
- (d) "What can I do?"
- (e) DOE "was there when I got back."
- (f) "I feel I do [sic] my best this year."

41. Following the meeting, the District placed respondent on administrative leave.

January 25, 2016

42. On January 25, 2016, Baldison met with DOE on his first day back at school. She did not have any written assessment by respondent. DOE told her about his suicidal ideation. Baldison "dropped what [she] was doing" and spoke to him for five to 15 minutes

to perform a suicide assessment. Baldison assessed DOE as being at moderate to severe risk of suicide, but stated that she found him to be “closer to severe.” Baldison informed Pineda of the assessment and contacted the CAT team. Baldison remained with DOE until the CAT team arrived at Sycamore “within the hour.” Based on the information provided to them, the CAT team decides “whether to come and how quickly.” The CAT team performed an assessment and took additional action.

43. It was not established by a preponderance of the evidence, as alleged in the Charges, that on January 28, 2016, Baldison spoke with Juan Bonillas from the CAT team, that Bonillas confirmed that a call was made to the CAT team regarding DOE on January 21, 2016, at approximately 3:00 p.m., and that no other telephone calls to the CAT team regarding DOE were logged at that time. No member of the CAT team testified, no statements or other documents from the CAT team were admitted into evidence, and none of the witness testimony established those allegations.

March 7, 2016 Meeting

44. Darrick Garcia, Director of Human Resources, conducted an investigation of the events of January 21, 2016. On March 7, 2016, Garcia and Brown met with respondent and his union representative to give respondent an opportunity to explain what had transpired on January 21, 2016. It took three attempts to arrange the meeting because respondent had not provided the District with updated contact information. At the meeting, respondent stated that he was “frustrated” because DOE was sent to him for an assessment, rather than to Pineda or the school psychologist.

45. At the March 7, 2016 meeting, respondent stated that after lunch on January 21, 2016, Barber came to him with DOE. Respondent said that around 1:30 p.m., respondent performed a Risk Assessment, finding DOE to be at moderate to severe risk for suicide. Respondent then called the CAT team on his cell phone. Respondent stated that he did not have proof of that because he had recently deleted the record of calls from his cell phone, but that he would provide paper records of his cell phone calls.⁶ He asked the dispatcher whether he should call DOE’s parent and was told the team would call him back.

46. Respondent explained that he then went to the Junior High 101 meeting in Brown’s office, which he termed “an important meeting.” Garcia asked respondent, “What meeting could you go to that was more important than attending to a student that has a moderate to severe risk of harming himself? Is there such a meeting?” Respondent responded, “What was I supposed to do? I cannot touch a student.” Garcia stated, “Make sure the student is safe to the best of your ability.” Respondent replied, “I see that now, you are right.”

⁶ The cell phone records later produced by respondent in connection with the hearing showed three incoming calls from the CAT team at 3:02 p.m., 3:26 p.m., and 3:37 p.m. There was no record of an outgoing cell phone call from respondent to the CAT team.

47. At the March 7, 2016 meeting, respondent emphasized that when he returned to the counseling office at approximately 2:20 p.m., DOE was still there. Respondent talked to DOE in his office and told him “we have to figure this out.” As respondent “grabbed the phone” DOE ran. Respondent pursued him and called on the radio for help. About five minutes later, respondent paged DOE on the PA system, without success.

48. Respondent told Garcia that Pineda then came to his office and told him that he should have supervised DOE at all times. Respondent was “panicked” and acknowledged that he acted inappropriately and unprofessionally by speaking to Pineda with a raised voice. Respondent was frustrated with Pineda and went to speak with Brown for advice.

49. Respondent told Garcia that the CAT team called him on his cell phone around 3:00 p.m. and he told them DOE had left. Respondent asked the CAT team whether he should contact DOE’s parent and was told to call her and the police. Respondent told Garcia that he called DOE’s mother and left a message.

Unprofessional Behavior to Employee

50. Respondent was hired as a counselor at Sycamore two weeks before Pineda. He and Pineda worked together as counselors for ten years. Their relationship soured when Pineda became lead counselor in the 2015/2016 school year. As lead counselor, Pineda is the department chair, attends meetings, is part of the school leadership team, and serves as the liaison between the District and Sycamore’s counselors. However, Brown is respondent’s direct supervisor and provides his evaluations. At the hearing, respondent emphasized that it is not Pineda’s role to give the other counselor’s directives or assignments.

51. On October 21, 2015, Pineda received an email from Sycamore’s attendance clerk, stating that respondent was not to be near the clerk’s work area due to some animosity between them. At the end of that work day, Pineda met with respondent to discuss the email. Respondent became extremely upset that the email had been sent to Pineda. Respondent raised his voice, used obscenity, and became combative and hostile. Respondent told Pineda that he would “find a way to retaliate.”

52. Pineda became concerned about respondent’s “explosive and unstable demeanor” and was upset and “worried about what [respondent] might do next.” Pineda went to the office of Sycamore’s Assistant Principal Sean Pfeiffer to ask where she could file a complaint about respondent. Pineda was frustrated and angry, telling Pfeiffer that respondent did not want to work and would only do things under the direction of “admin or Mr. Brown.” Pineda requested an escort back to her office and then to her car.

53. Pfeiffer then went to respondent’s office. Respondent was clearly agitated and stated, “She’s fucking crazy.” Pfeiffer told respondent, “you can’t threaten her and curse” and told him that he should have come to an administrator if there was a problem.

54. Pfeiffer instructed respondent to stay in his office with the door closed. Pfeiffer then went with Pineda to her office to get her belongings. When they arrived at the office, Pineda stated, “I’ll call the fucking cops. . . . I’m sick of his shit.” A majority of the panel deemed Pineda’s conduct to be a deliberate attempt to provoke respondent. Pineda was then escorted to her car.

55. Pfeiffer returned to respondent’s office and observed him standing in front of his desk, visibly shaken and agitated. Respondent had red eyes and was tearful. Pfeiffer followed respondent to the parking lot where he entered an Uber car.

56. In October 2015, Brown held a conflict mediation in his office with respondent and Pineda. Brown directed both of them to work together, conduct themselves in a professional manner and not use profanity in the workplace. Both respondent and Pineda had acted unprofessionally and used profanity.

57. On November 9, 2015, respondent received a verbal warning and a written memorandum from Brown regarding his unprofessional behavior with Pineda on October 21, 2015, and its detrimental impact on the school. (Exhibit 16.)

58. On February 9, 2016, Pineda met with Brown to express her continuing concerns about respondent stemming from their interaction on January 21, 2016. Pineda stated that respondent had become increasingly unstable in his conduct with her, creating what she deemed to be a hostile work environment.

Excessive Absenteeism

59. District policy requires that employees provide a note from a medical professional for absences of five days or more. District employees may request a leave of absence if they will be out for an extended time period. A substitute counselor can be obtained if an employee notifies the school that he will be out for an extended period and a leave of absence request is approved. Most of respondent’s absences were reported that same morning, which made it impossible to arrange for a substitute counselor.

60. Respondent was absent 39 days between August 26, 2013 and April 11, 2014. This represented 28 percent of the work days in that time period. The majority of respondent’s absences occurred between December 6, 2013, and April 11, 2014, when respondent was absent as many days as he was present.

61. Respondent was informed he was not fulfilling his obligation as a counselor due to his pattern of poor attendance. The District alleged, but failed to prevent sufficient evidence to establish that excessive absenteeism, and respondent’s failure to communicate with the school about his situation or promptly provide medical verification and seek a leave of absence, caused the following problems:

(a) Parents were unable to meet with their child's assigned counselor. Appointments were scheduled and then cancelled or rescheduled due to respondent's absences.

(b) Students were unable to access counseling services for extended periods of time.

(c) Students had to be assigned as teacher aides to receive grades.

(d) Staff and teachers were unable to rely on respondent to carry out his assigned tasks.

(e) It was a hardship for counseling and administrative staff to fill-in during respondent's absences, contributing to decreased effectiveness and low morale.

62. Respondent stopped coming to work on December 6, 2013. After he was contacted by the District on December 16, 2013, he provided a medical authorization and requested a retroactive leave of absence, which was granted, effective December 6, 2013.

63. Respondent was absent from March 20, 2014, to April 16, 2014, without requesting a leave of absence or providing a medical verification. On April 7, 2014, Judy Bright, Coordinator of Personnel Services, sent a letter to respondent regarding these absences. On April 16, 2014, respondent and Bright met. Respondent told Bright that he had returned from his December 2013 leave "too soon," had "been yelling at kids" and "needed help." Respondent requested, and was granted, a retroactive leave of absence, effective March 20, 2014.

64. Respondent was given a verbal warning about excessive absences on April 21, 2014. (Exhibit 18.) He received a written warning about the same absences on April 29, 2014. (Exhibit 19.)
Progressive Discipline

65. The District has a progressive discipline policy designed to provide employees with notification of an issue and an opportunity to correct the problem before the District takes disciplinary action. The policy provides for a verbal warning, followed by a written warning, and finally a written reprimand. (Exhibit B.)

66. If an issue is severe, the District is not required to carry out progressive discipline prior to imposing discipline. An employee may file a grievance if the District fails to comply with its progressive discipline policy.

67. The District contended that it followed its progressive discipline policy by providing respondent with a verbal warning about excessive absences on April 21, 2014, followed by a written warning on April 29, 2014. (Exhibit 17.) The panel concluded that the evidence presented did not establish justification for providing the written warning only eight

days after the verbal warning in that respondent was not given an adequate opportunity to conform his behavior to District expectations.

68. On October 23, 2015, respondent was given a verbal warning regarding unprofessional behavior with Pineda on October 21, 2015. (Exhibit 16.)

69. At the hearing, respondent contended that no progressive discipline was implemented following the January 21, 2016 incident. Due to the potential for harm to students, the District did not implement progressive discipline prior to placing respondent on administrative leave after the January 21, 2016 incident. No grievance was filed by or on behalf of respondent for the District's failure to utilize progressive discipline. The evidence presented did not establish that the District violated its progressive discipline policy in placing respondent on administrative leave for the January 21, 2016 incident.

Respondent's Evidence

70. Respondent has been credentialed for ten years. Respondent earned a bachelor's degree from California State University, Fullerton in 2003 and a master's degree from Chapman University in 2006. At Sycamore, respondent received an evaluation every other year, all of which indicated that his job performance was satisfactory.

71. Respondent is 37 years-old. He was born in Vietnam and came to the United States with his family when he was 13 years-old. As the eldest child, there are cultural responsibilities he is expected to fulfill. Respondent's absences in 2013-2014 were due to the stress he was under as a result of his mother's illness and death in late 2012. His mother had been respondent's "best friend" and after her death, his father suffered a heart attack and continues to be in poor health. Respondent delayed grieving for his mother, had "no chance to cope" and was diagnosed with depression. Respondent "tried [his] best to make it to work" or call in if he was going to be out, but he wasn't "strong." A majority of panel members found this assertion to be credible. Respondent sought "help for depression" and has "now worked through those issues."

72. Although respondent and Pineda initially had a good relationship, respondent asserts that Pineda "became more of a micro-manager" after she became lead counselor. She wanted respondent to report directly to her although Brown was his direct supervisor.

73. On October 21, 2015, Pineda came to respondent's office at the end of the workday to tell him there had been a complaint against him by a school staff member. He asked Pineda for more information, but she refused to provide it. Their behavior "mutually escalated" and respondent matched Pineda's volume and intensity. He denied that he made any threats, as that is "not in [his] nature." Respondent stated that he no longer trusted Pineda after the October 21, 2015 incident. After Brown conducted a mediation session, respondent collaborated with Pineda on work that needed to be done, but otherwise "kept a professional distance."

74. Respondent attended the Protocol training in Spring 2015, which he termed a “new District protocol.” He received “dozens of emails” each day, and does not recall getting the September 2015 email regarding the Protocol. Respondent disagreed that the Protocol required him to “be in the same vicinity of the student at all times” so long as the suicidal student was left with another adult. However, respondent acknowledged that the Protocol did provide that the suicidal student “should not be passed off to another.” Respondent had called the CAT team on other occasions, “but not a whole lot, less than five times in a year.”

75. As a school counselor, respondent addressed students’ academic, personal, social, and career issues. On September 18, 2015, respondent sent an email to Sycamore’s counselors stating that he did not know his role as a counselor because it “wasn’t clearly defined.”

76. On January 21, 2016, Barber approached respondent as he was returning from lunch and told respondent that “it would be beneficial for [DOE] to speak with someone” because “he didn’t want to live anymore.” Respondent “said [he would] take care of it” but he thought Baldison was “better equipped to assess [DOE] since she was seeing him twice a week.” Respondent emphasized that he was not “avoiding work.” He felt that “someone more qualified or trained” than he was should conduct a suicide assessment. Barber told respondent he would “contact” Pineda to let her know about the situation.

77. DOE was assigned to respondent’s caseload and he knew DOE. The boy’s mother had requested meetings to address DOE’s disobedience and respondent had provided her with some referrals, which was part of his job. He and DOE did not interact with “high frequency”, but respondent had met with DOE approximately once per month, and had met with DOE’s mother two or three times before January 21, 2016. Respondent was aware that Baldison had sessions with DOE pursuant to his IEP.

78. Respondent testified that he did perform a verbal suicide assessment before leaving for the meeting in Brown’s office. A majority of panel members found this assertion to be credible. Respondent assessed DOE’s risk for suicide to be “moderate, approaching severe.” He did not fill out a written suicide assessment “screening instrument” as required by the Protocol. Respondent testified that he “was going to come back and fill out the form” later, but did not explain his failure to do so.

79. Respondent contended that DOE told him he planned to go with friends to a fast-food restaurant after school that day, which led respondent to believe the suicide risk was closer to moderate. At the hearing, respondent could not recall whether he told the police that DOE might have gone to a fast-food restaurant when school ended. This would have been very important information to share with police, who were searching for DOE. Therefore, respondent’s contention that DOE had told him about his after-school plans during the assessment lacks credibility.

80. Respondent contended that he discussed a “safety plan” with DOE in that, at some point that afternoon, he told DOE that if he had “more suicidal thoughts, he should talk to mom.”

81. Respondent asserted that the Protocol did not require him to call the CAT team, but that he did so because he is “cautious.” Respondent testified that he called the CAT team from his office telephone at 1:30 p.m.⁷ A clinician/dispatcher answered and respondent related the information he had gleaned from the assessment. Respondent testified that he asked the dispatcher whether he should contact DOE’s mother and was told “to hold and not do anything” until the CAT team called him back. Respondent gave the CAT team his cell phone number “in case [he] stepped out.”

82. DOE was waiting on the couch outside respondent’s office while he made the call to the CAT team. Respondent asked Munoz “to keep an eye on [DOE]” through a hand gesture, stating that “body language is a huge part of human communication.” Respondent contended that “adequate supervision was provided” to DOE when he left the counseling office to attend the meeting in Brown’s office.

83. Respondent described the Junior High 101 meeting as “critical.” That assertion was not supported by Brown or any of the other attendees. Respondent testified that he announced to those in attendance that he was waiting for a telephone call and might need to leave, but this was not corroborated by any other witnesses. Neither assertion was deemed to be credible.

84. Respondent admitted that as he left the meeting, he “might have mistakenly said that [he] has an assessment to do.” He contended that he “misspoke” and meant that he needed to “fill out the paperwork.”

85. Respondent initially testified that when he returned to the counseling office after the meeting, he took DOE into his office and the boy ran out as he picked up the telephone to call DOE’s mother. This conflicts with his testimony that the CAT team dispatcher had told him not to contact the boy’s mother. When reminded that Munoz had testified that DOE was seated outside respondent’s office and ran off when the bell rang, respondent stated that it was possible that he had “misremembered.” He then concurred with Munoz’s version of events.

86. Respondent admitted that, while searching for DOE, he ran into Barber and said, “Thanks a lot for getting me into trouble.” Respondent testified that it “was perhaps a poor choice of words” due to respondent being “anxious to find the kid.”

⁷ At the March 7, 2016 meeting, respondent stated that he had made the initial call to the CAT team from his cell phone. That assertion was not supported by respondent’s cell phone records. Nevertheless, a majority of the panel found respondent’s contention that he called the CAT team at 1:30 p.m. to be credible.

87. Respondent returned to his office to “try to figure out the next step” when Pineda entered. She addressed respondent in what respondent described as a “scolding accusatory voice” and wanted him to stay and rehash what had transpired in his handling of DOE. After approximately seven minutes, respondent left in order to “deescalate” the situation and continue to search for DOE. On the way back from searching, respondent went to speak with Brown. He did admit that he asked, “I’m not going to be disciplined for this, am I?”

88. At 2:55 p.m., Pineda called respondent on his cell phone and relayed Brown’s directive that respondent contact the police and DOE’s mother. At 3:02 p.m., the CAT team called respondent on his cell phone and told him to call police and the boy’s parent. Respondent stated that he subsequently made these calls from his office telephone. Respondent told the police that DOE is off-campus, but did not recall whether he had told them that DOE planned to go to a fast-food restaurant. Police officers arrived at respondent’s office between 3:30 p.m. and 3:45 p.m.

89. Respondent spoke to the CAT team again by calling them from his office telephone. He received return calls from the CAT team on his cell phone at 3:26 p.m. and 3:37 p.m. These incoming calls to respondent’s cell phone were documented on a bill from AT&T, which includes a log of cell phone calls (Exhibit A.)⁸

90. Respondent testified that during a 5:45 p.m. telephone call, he asked the CAT team retroactively whether it was acceptable for him to have left DOE with a school staff member while he attended a meeting. He contends that the dispatcher told him that was not inappropriate. Even assuming that is true, respondent did not tell the CAT team that he had already determined that DOE was at moderate to severe risk of suicide. Moreover, respondent’s actions were not in conformity with the Protocol or the September 24, 2015 Lockhart email, which specifically addressed that scenario. (Exhibit 27.)

91. Respondent contended that the suicide protocol was new and complicated and had only been presented in a one-hour training. However, he did not seek additional training or clarification of the Protocol. At the hearing, respondent contended that his “experience and training did not qualify him to do the full spectrum of possible suicide situations that may come [his] way.” Moreover, respondent did attend one or two-hour suicide assessment trainings which were presented to counselors seven or eight times over a four-year period.

92. Respondent asserted that he simply misunderstood what actions he was required to take when DOE was brought to him. Respondent testified that he “followed the Protocol to the best of [my] knowledge at the time.” Contrary to the Protocol, respondent never performed a written suicide assessment “screening instrument” because of “interruptions” and the fact that “the school sent [respondent] home [after the school day

⁸ The District does not maintain a record of calls made to or from Sycamore’s office telephones.

ended on January 21, 2017.]” Respondent did not offer any explanation as to why he did not subsequently prepare a written assessment.

93. Respondent attempted to shift blame onto Barber, Pineda and Baldison. He contended that Barber mishandled the situation with DOE by taking DOE to his next class and leaving him there without informing the teacher of any suicide concerns. Respondent argued that Pineda should have conducted the suicide assessment. And respondent also asserted that since the school psychologist had been meeting regularly with DOE, she should have been the one who dealt with the situation on January 21, 2016.

94. As for the delay in setting up the March 7, 2016 meeting due to respondent’s failure to provide his updated contact information to the District, respondent contended that both he and the District “co-share responsibility” for ensuring the information is current.

95. Respondent purchased paint and donated a couch “to spiff up the [counseling] office” and “help make it a better place for the kids.” In 2012, he received Congressional recognition for his role in a gang reduction program.

96. DOE’s mother testified at the hearing. She first met respondent in approximately October 2015, when she contacted him regarding her concerns about her son’s disobedient behavior and absences from school. Mother found respondent to be “very helpful.”

LEGAL CONCLUSIONS

Jurisdiction

1. The Commission has jurisdiction to proceed in this matter under section 44944. (Factual Findings 1 through 7.)

Burden of Proof

2. The District has the burden of proof in this matter, since it is seeking to dismiss respondent from employment as a certificated employee. The District must prove its case by a preponderance of the evidence. (*Gardiner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1040.)

Statutory Grounds for Dismissal

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), or section 44939 are established. In the Amended Notice of Charges to Dismiss Certificated Employee, the District alleged four of those causes: immoral conduct, dishonesty, evident

unfitness for service, and persistent violation of or refusal to obey school laws or regulations. (Factual Finding 6.)

4. The District's Amended Notice of Charges to Dismiss Certificated Employee charged respondent with various acts to support the four statutory grounds for dismissal. The Commission examined each charged act to determine whether it was proven. For each charged act that was proven, the Commission considered whether the charged acts violated one or more of the alleged statutory bases for dismissal.

5. The Commission determined that the District established by a preponderance of the evidence that respondent did not follow proper protocol for his profession or the District procedure in handling a suicidal student (Factual Findings 8-49 and 74-93.)

6. The Commission determined that the District established by a preponderance of the evidence that respondent placed a student at greater risk by leaving him unattended (Factual Findings 8-49 and 74-93.)

7. The Commission determined that the District established by a preponderance of the evidence that respondent placed a student at greater risk by creating a situation would enabled the student to run from school by leaving him on a couch in the lobby of the counseling office while respondent stayed in his office with the door closed (Factual Findings 8-49 and 74-93.)

8. The Commission determined that the District established by a preponderance of the evidence that respondent acted unprofessionally. (Factual Findings 8-49 and 74-93.)

9. The Commission determined that the District established by a preponderance of the evidence that respondent used a raised voice with his lead counselor after the student incident on January 21, 2016, but a majority of the panel deemed his behavior to have been provoked. (Factual Findings 8-49 and 74-93.)

10. The Commission determined that the District established by a preponderance of the evidence that respondent used profanity with his lead counselor, but a majority of the panel deemed his behavior to have been provoked. (Factual Findings 50-58 and 70-94.)

11. The Commission determined that the District established by a preponderance of the evidence that respondent was dishonest and not forthcoming with accurate information regarding the details and nature of the January 21, 2016 incident. (Factual Findings 8-49 and 74-93.)

12. Cause for dismissal of respondent exists under section 44932, subdivision (a)(1), based on immoral conduct, as set forth in Factual Findings 8-49 and 74-93 and Legal Conclusions 16 through 18.

13. Cause for dismissal of respondent exists under section 44932, subdivision (a)(4), based on dishonesty, as set forth in Factual Findings 8-49 and 74-93 and Legal Conclusion 19.

14. A majority of the panel concluded that cause for dismissal of respondent does not exist under section 44932, subdivision (a)(6), based on evident unfitness for service, as set forth in Factual Findings 8-96 and Legal Conclusions 20 through 23.

15. Cause for dismissal of respondent exists under section 44932, subdivision (a)(8), based on persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him, as set forth in Factual Findings 8-96 and Legal Conclusions 28 through 34.

Immoral Conduct

16. “Immoral conduct” has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or, it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (Board of Education of the San Francisco Unified School District v. Weiland (1960) 179 Cal. App.2d 808, 811 (Weiland).)

17. The seminal case for teacher dismissals is Morrison v. State Board of Education (1969) 1 Cal.3d 214. There the Supreme Court held that where charges of immoral conduct are raised in teacher dismissal cases, the applicable standard is whether the person is fit to teach.⁹ The phrase “immoral conduct” within the meaning of the Education Code denotes conduct of the teacher that renders the teacher unfit to teach. (Id., at 225.)

18. “Immoral conduct” is not confined to sexual matters. It includes an inconsiderate attitude toward good order and the public welfare. It is sometimes synonymous with “dishonesty” or a high degree of unfairness. (Board of Education v. Weiland (1960) 179 Cal.App.2d 808, 811.)

Dishonesty

19. Dishonesty “connotes a disposition to deceive” and “necessarily includes the element of bad faith.” It means “fraud, deception, betrayal, faithlessness,” and “denotes an absence of integrity; a disposition to cheat, deceive or defraud; deceive and betray.” (Midway School District v. Griffith (1946) 29 Cal.2d 13.) Not every falsehood constitutes

⁹ This reasoning is applicable despite the fact that respondent is a counselor, rather than a teacher. The terms “teacher” and “counselor” shall be used interchangeably herein.

“dishonesty” within the meaning of Education Code section 44932, subdivision (a). For that reason, dishonesty must also be evaluated in light of the Morrison criteria. (Fontana Unified School District v. Burman (1988) 45 Cal.3d 208, 220, fn. 12).

Evident Unfitness for Service

20. A majority of the panel concluded that it was not established by a preponderance of the evidence that respondent is evidently unfit for service as a counselor, pursuant to section 44932, subdivision (a)(6), as set forth in Factual Findings 8-96.

21. “Evident unfitness for service” as used in section 44932, subdivision (a)(6), properly means “clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” Unlike “unprofessional conduct,” “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. (Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal.App.4th 1429, at 1444.)

22. The Commission should look at the proven conduct in the aggregate. This applies also to its determination of unfitness for service. The Woodland court found that it was not necessary to determine if each and every act demonstrated unfitness for service. Rather, it was proper to examine the totality of the offensive conduct. “When the camel’s back is broken we need not weigh each straw in its load to see which one could have done the deed.” (Woodland at p. 1457.)

23. The applicable standard or determinative test in teacher discharge cases is whether the person is fit to teach. “Fitness to teach” is a question of ultimate fact. (Board of Education Commission on Professional Competence (1980) 102 Cal.App.3d 555, 560-561.) A majority of the panel concluded that the evidence presented did not establish that respondent is unfit to be a counselor based upon an unremediable or fixed character trait.

Analysis of the Morrison Factors

24. Dismissal for immoral conduct, dishonesty, and evident unfitness for service was assessed utilizing criteria 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. These criteria are commonly referred to as “the Morrison

factors.”¹⁰ The *Morrison* court held that “an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” (Id. at p. 235.)

25. It is settled that not all “Morrison factors” need be present for the Morrison test to be satisfied. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 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 District*, supra, 2 Cal.App.4th at p. 1457.)

26. Applying the Morrison factors, respondent’s acts, as established by the evidence, constituted immoral conduct and dishonesty as grounds for dismissal, although a majority of the panel concluded that the evidence presented failed to establish evident unfitness for service as a ground for dismissal. (See, e.g., *Bd. of Ed. v. Swan* (1953) 41 Cal.2d 546, 553 (unprofessional conduct); *Woodland Joint Unified School Dist.*, supra, 2 Cal.App.4th 1429 (evident unfitness).)

27. In this case, we find as follows:

(A) The likelihood the conduct may adversely affect students or fellow teachers: it was likely that respondent’s conduct on January 21, 2016 could have adversely impacted the student and his parent, the school and the District.

(B) The degree of such adversity: respondent’s conduct had the potential to significantly have an adverse impact on the student and his parent, the school and the District in that it could have resulted in the death or attempted suicide of a student.

(C) The proximity or remoteness in time of the conduct: respondent’s conduct was proximate in time, as the incident with DOE occurred on January 21, 2016.

(D) The type of teaching certificate held by the party involved: as a school counselor, respondent addresses students’ academic, personal, social, and career issues. His conduct in carrying out this role has a major impact on students who rely on him to assist them in these important concerns.

(E) The existence of extenuating or aggravating circumstances, if any, surrounding the conduct: aggravating circumstances include respondent’s steadfast refusal to acknowledge his serious lack of good judgment in leaving DOE in order to attend a meeting,

¹⁰ The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance or for persistent violation of laws and regulations (*Morrison*, supra, 1 Cal.3d at pp. 227-230); it is presumed that such conduct is related to fitness to teach.

the fact that respondent continues to defend his mishandling of a dangerous situation and his attempt to shift blame to others.

(F) The praiseworthiness or blameworthiness of the motives resulting in the conduct: respondent's motives for his conduct are unknown.

(G) The likelihood of recurrence of the questioned conduct: it is highly likely that respondent will engage in the same activity if the situation arose in the future given that he refuses to acknowledge his serious lack of good judgment and to defend his mishandling of the situation with DOE.

(H) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers: no evidence was presented to establish that any disciplinary action against respondent would have an adverse impact or chilling effect upon his constitutional rights or upon the rights of other teachers.

Persistent Violation of School or District Rules or Laws

28. It was established by a preponderance of the evidence that respondent persistently violated or refused 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 Board of the District, within the meaning of section 44932, subdivision (a)(8).

29. Cases interpreting section 44932, subdivision (a)(8), require a "showing of intentional and continual refusal to cooperate." (San Dieguito Union High School District v. Commission on Professional Competence (1985) 174 Cal.App.3d 1176, 1196.)

30. In order for a teacher to be terminated under section 44932(a)(8) for violations of law or school rules, the violations must be either "persistent" or "motivated by an attitude of continuous insubordination." (Gov. Board of Oakdale Union School District v. Seaman (1972) 28 Cal.App.3d 77, 81.) A single violation of a school board's rules is not of itself cause for dismissal; it is the persistent disregard of school rules that the subdivision is designed to regulate. (Seaman, p. 84.)

31. 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." (Governing Board of the Oakdale Union School District v. Seaman (1972) 28 Cal.App.3d 77, 82.)

32. The subdivision pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; "it is the persistent disregard" of school rules that the subdivision is designed to regulate. (Id. at.84.)

33. The District must establish that the employee's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (San Dieguito Union High School District v. Commission on Professional Competence (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered "persistent." (Bourland v. Commission on Professional Competence (1985) 174 Cal.App.3d 317.)

34. Respondent's acts constituted persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the governing board of the school district employing him, or willful refusal to perform regular assignments without reasonable cause, as set out in Factual Findings 8-94.

35. The panel unanimously concluded that the District presented sufficient evidence to establish cause for dismissal based upon respondent's inappropriate handling of student DOE on January 21, 2016, as well as his dishonesty as to his actions on that date. Moreover, this constituted a persistent violation of school or District rules. (Factual Findings 8-49 and 70-94.)

36. A majority of the panel concluded that the District presented insufficient evidence to establish cause for dismissal for unprofessional behavior in respondent's interactions with Pineda. They deemed that Pineda deliberately provoked respondent and that both respondent and Pineda engaged in unprofessional behavior and used profanity in the workplace. However, the panel unanimously agreed that respondent's continued unprofessional behavior and use of profanity in his interactions with Pineda constituted a persistent violation of school or District rules. (Factual Findings 50-58 and 70-94.)

37. A majority of the panel concluded that the District presented insufficient evidence to establish cause for dismissal for excessive absenteeism. However, the panel unanimously agreed that respondent's repeated failure to seek a leave of absence constituted a persistent violation of school or District rules. (Factual Findings 59-64 and 70-94.)

Disposition

38. Even where cause for dismissal has been established, the Commission has broad discretion to determine whether discipline is warranted. (Fontana Unified School Dist. v. Burman (Fontana) (1988) 45 Cal.3d 208, 220-222.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction. [Citing Fontana, supra, 45 Cal.3d at pp. 220-222.] '[A] disciplinary discharge often involves complex facts and may require a sensitive evaluation of the nature and seriousness of the misconduct and whether it warrants the grave sanction of dismissal.' [Citation]." (Cal. Teachers Assn. v. State of Cal. (1999) 20 Cal.4th 327, 343-344.)

39. The Commission unanimously agreed that dismissal is necessary to protect students, school employees, or others or to further deter respondent from engaging in similar conduct in the future.

ORDER

Tu Hoang is dismissed from employment with the Anaheim Union High School District.

DATED: June 16, 2017

DocuSigned by:
Laurie R. Pearlman
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LAURIE R. PEARLMAN
Administrative Law Judge
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

DATED: June 16, 2017

DocuSigned by:
Melissa Chan-Nauli
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MELISSA CHAN-NAULI
Commission Member

I concur with the Decision and Order set forth above:

DATED: June 16, 2017

DocuSigned by:
Persida Torres
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PERSIDA TORRES
Commission Member