

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
OF THE RIPON UNIFIED SCHOOL DISTRICT  
SAN JOAQUIN COUNTY, STATE OF CALIFORNIA

In the Matter of the First Amended  
Accusation Against:

THERESA MESSICK,

A Permanent Certificated Employee,

Respondent.

OAH No. 2006080465

**DECISION**

This matter was heard before a Commission on Professional Competence (Commission) of the Ripon Unified School District (district) in Ripon, California, from June 7 through June 10, 2010. Commission members are Davina M. Keiser, Russell K. Sperling, and Chairperson Marilyn A. Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Marleen L. Sacks, Atkinson, Andelson, Loya, Ruud & Romo, represented the district, whose Superintendent Dr. Louise Bennicoff-Nann was present throughout the hearing.

Thomas J. Driscoll, Jr., Driscoll & Associates, represented respondent Theresa Messick, who was present throughout the hearing.

Oral and documentary evidence was received and the parties presented oral closing arguments on June 10, 2010. Due to time constraints, the district was given until June 11, 2010 to file a reply brief to respondent's closing argument. The reply brief was timely received and marked for identification as Exhibit 12. On June 14, 2010, the Commission reconvened and deliberated the charges set forth in the First Amended Accusation and First Amended Statement of Charges that Cause Exists to Dismiss a Permanent, Certificated Employee. The record was then closed and the matter was submitted for final decision on June 14, 2010.<sup>1</sup>

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<sup>1</sup> On June 10, 2010, the parties stipulated that the record would close when the Commission completed its deliberations.

## ISSUE

Did respondent engage in unprofessional conduct, persistent violation of or refusal to obey reasonable regulations of the district's governing board, and/or demonstrate evident unfitness for service within the meaning of Education Code section 44932, sufficient to justify her dismissal, based upon her: (1) repeated failure to sign a commitment form agreeing to complete a supplemental English Language Learner teaching certification (EL certification) and/or (2) failure to complete the district's EL certification requirement?<sup>2</sup>

## FACTUAL FINDINGS

### *Jurisdiction/Procedural History*

1. On May 9, 2006, the district's former Superintendent Leo Zuber, in his official capacity, made and signed a "Statement of Charges That There Exists Cause to Dismiss a Permanent Certificated Employee" (Statement of Charges) against respondent, which was approved by the district's governing board (board) on May 10, 2006 (Resolution No. 05-07). The Notice of Intent to Dismiss was served on respondent on May 11, 2006. On July 6, 2006, the district served its Notice of Accusation, Accusation, Statement of Charges, and Notice of Intent to Dismiss with supporting documents on respondent. On July 20, 2006, respondent filed her Notice of Defense denying and objecting to the Accusation and raising affirmative defenses.

2. On August 15, 2006, the district filed its Notice of First Amended Statement of Charges and First Amended Statement of Charges. On September 25, 2006, the district filed its Notice of First Amended Accusation and First Amended Statement of Charges.<sup>3</sup>

3. On January 2, 2007, Administrative Law Judge Sarli ordered the dismissal of the district's First Amended Accusation and First Amended Statement of Charges. In her dismissal order, Judge Sarli concluded, *inter alia*, that "there is nothing unprofessional about respondent's maintaining that the District has no right to require her to obtain supplemental certification. She is correct in arguing that the

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<sup>2</sup> Unless otherwise indicated, all further statutory references are to the Education Code. The following are different types of authorizations to teach English Language Learners: CLAD [Cross-cultural, Language and Academic Development], BCLAD [Bilingual, Cross-cultural, Language and Academic Development], Bilingual Credential or SDAIE [Specially Designed Academic Instruction in English] certificate]. For ease of reference, unless otherwise indicated, these certifications will be referred to collectively as EL certification.

<sup>3</sup> Paragraph IX of the First Amended Accusation erroneously references a "Second Amended Statement of Charges" as setting forth cause for respondent's dismissal. This was a non-prejudicial error by the District.

CTC [Commission on Teacher Credentialing] and the Legislature hold the authority to dictate the requirements for credentialing and teaching. Likewise, respondent is not “unfit” for duty because she refused to obtain additional certification not mandated by the legislature or the CTC.” Judge Sarli also found that the district’s agreement with the Ripon Unified District Teacher’s Association (RUDTA) was not a reasonable regulation under Education Code section 44932, and that the agreement violated Government Code section 3543.2, “which limits the scope of permissible bargaining between a teachers’ union and a school district.”

4. On March 23, 2007, the district filed its Petition for Administrative Mandamus in San Joaquin County Superior Court seeking to overturn Judge Sarli’s decision. Superior Court Judge Thomasson granted the district’s petition and, on March 27, 2008, judgment was entered in San Joaquin County Superior Court. On April 28, 2008, respondent filed a Notice of Appeal of this decision.

5. On September 29, 2009, the Third District Court of Appeal issued its decision affirming Judge Thomasson’s decision. (*Governing Board of the Ripon Unified School District v. Commission on Professional Competence* [Theresa Messick, Real Party in Interest] (*Ripon*) (2009) 177 Cal. App. 4th 1379.) The Court held that the district has the authority to require teachers to become certified to teach English learners (ELs) and that respondent failed to establish that the district’s broad authority was preempted by conflicting state laws. Consequently, the district had lawful grounds on which to initiate termination proceedings against respondent based upon allegations of her persistent refusal to comply with the certification requirement. Further, the Court rejected the argument that the EL certification requirement was outside the permissible scope of bargaining between the district and RUDTA. In doing so, the Court noted that the district was not required to negotiate with the union about the EL certification requirement; however, it chose to do so “instead of imposing the requirement outright under its reserved authority...” (*Id.* at 1391.)

6. On December 1, 2009, the Court of Appeal’s decision in *Ripon* was final and the Remittitur was issued. OAH then set the matter for prehearing conference and hearing. On May 24, 2010, the undersigned ALJ issued an order denying the district’s motion to dismiss the case in light of the Court of Appeal’s *Ripon* decision. The district’s alternative motion to preclude respondent from putting on any evidence at hearing was also denied. Thereafter, in June 2010, the evidentiary hearing commenced and concluded.

### *Background*

7. Respondent has a Bachelor of Arts degree in music. In 1978, she obtained her preliminary teaching credential. In August of 1981, respondent was hired by the district as a certificated employee. On July 8, 1985, respondent was issued a single subject “life” teaching credential in music, which authorizes her to teach preschool through adult classes, with no restrictions. At no time during this

proceeding has respondent been certified to teach students with limited English proficiency, known as “English-Language Learners” or “English Learners” (ELLs or ELs). She has never signed a commitment form indicating her willingness to be a “teacher in training” pending completion of an EL certification.

Respondent was employed by the district for approximately 29 years. For the past 12 years, respondent has worked exclusively as a music teacher at the district’s Ripon High School, where she typically taught six periods a day with 220 to 250 students. Respondent’s classes have included concert choir (a non-auditioned choir), music ensemble (an advanced choir), music appreciation and concert band. During the time period at issue, in addition to her teaching activities, respondent was actively engaged in extracurricular activities with students, pursuant to agreements with the district for additional stipend payments. These positions obligated respondent to produce two theatrical performances (generally one musical and one play) and four musical performances (two each for chorus and band) each year. In addition, the concert band generally performed at football games and in parades. At times, respondent’s students participated in field trips to Disneyland and engaged in additional performances.

Respondent was laid off by the district at the end of the 2009-2010 school year. She will not be employed by the district during the 2010-2011 school year due to the district’s reduction in force and her seniority relative to the district’s other music teachers. Accordingly, the dismissal action will only impact her right to be rehired by the district.

#### *EL Certification Requirement*

8. *Coordinated Compliance Review by California Department of Education (CDE)*: In May of 2002, CDE conducted a compliance review of the district. In its May 8, 2002 Notification of Findings (Findings), CDE determined that the district was noncompliant in its program for English Learners at one of its four elementary schools and at its only high school. Specific to Ripon High School, CDE found that “students with designated English learner identification needs are placed in classrooms which do not have CTC authorized ELD/SDAIE instructors and students are not offered a structured English immersion setting.” In addition, “documentation indicates that not all students who have a designated need for SDAIE instruction ...have been placed with teaching staff who hold the required authorization.” Parenthetically, CDE’s findings noted that “not all teachers at the elementary and high schools who have English Language learners placed in their classes have completed the training or have a letter on file indicating that they will complete the training in a timely manner.” The district was required to resolve the identified noncompliance issues or face the possibility that CDE would initiate fiscal sanctions, such as withholding funds or terminating contracts.

9. On June 11, 2002, the district filed its Proposed Resolution of Noncompliance Findings with CDE (Proposed Resolution), including the following:

The district will provide in house staff development and require teachers who have students with EL identification in their classrooms to enroll in this training or other authorized training. The district will obtain a letter from each teacher indicating they will complete the training in a timely manner. . .

10. The district developed a commitment form which provided that “teachers assigned to teach limited English proficient (LEP) students” are required by federal and state law to possess appropriate EL certification, but that teachers without the proper authorization “may teach LEP students as long as they have been designated by the school district as ‘teachers in training.’” By signing the commitment form, teachers “agree to be designated as a ‘teacher in training’ and will complete the necessary requirements” to obtain the EL certification.

11. Despite the language of the commitment form, the district did not limit its EL certification requirement to those teachers who had EL students actually enrolled in their classrooms. Superintendent Zuber testified that the district decided to require all certificated staff to complete EL certification, based upon the concerns CDE raised in the compliance review and the district’s belief that eventually every teacher would have to obtain EL certification.

In the fall of 2002, in response to the compliance review, the district undertook actions to ensure that its certificated staff obtained EL teaching authorization and signed the commitment form while they completed their training. A series of memoranda was sent to all certificated staff informing them of this requirement. For example, on September 27, 2002, Director of Curriculum and Instruction Lisa Boje informed certificated staff who did not have EL authorization about training options to obtain CLAD/BCLAD/SB395 EL certifications, through classes offered at the County Office of Education (COE) or a university. The district agreed to pay for the SB395 and CLAD courses. This letter indicated that the “commitment letter must be signed and returned to your site administrator by Friday, October 4, 2002.” On October 31, 2002, Ms. Boje wrote to certificated staff about changes in CLAD requirements. She prefaced this memorandum: “as you know the District is requiring all staff who do not possess an authorization to teach English Language Learners to obtain authorization through SB 395 or CLAD training. The District will pay for this training if it is completed through the county...”

12. Superintendent Zuber worked with Ms. Boje to develop a plan to advise all certificated staff that the district and the union had come to an agreement about the EL certification requirement.

On November 15, 2002, a memorandum jointly authored by Superintendent Zuber, Ms. Boje, and RUDTA President Rod Wright was sent to all certificated staff. In pertinent part, the memorandum provided:

The district has been meeting with RUDTA and we have come to an agreement regarding the CLAD/BCLAD and SB 395 training. The agreement is that all staff will complete the necessary training by December 30, 2005. . .

At this point it is up to each individual to select the type of training they will take... The district realizes the importance of this authorization and has agreed to pay for SB 395 and CLAD courses taken through the county. . . Teachers who enroll in classes but do not finish will pay the district back for the expense of the training. In addition, (if the training is incomplete) the employee may be released from his or her current position. (Underline original.)

The memorandum also referenced an attached “commitment letter or letter of retirement [which] must be signed and returned to your site administrator by Tuesday, November 26, 2002.” The district later agreed to pay a \$400 stipend to teachers once they timely completed the training.

13. Respondent refused to sign and return the commitment form. On November 25, 2002, respondent sent a memorandum to her principal Mr. Handel explaining why she would not sign the form, stating: “I am uncomfortable signing a letter saying that I will take courses to get certified in CLAD. I am afraid that I might not be able to follow through with this promise. I am not planning on retiring within 5 years, therefore I cannot sign the form.”

14. The district continued its efforts to have respondent and other teachers complete the commitment form and engage in training. On February 28, 2003, Superintendent Zuber drafted a letter to certificated staff who had not yet returned their signed commitment forms. He advised them that the compliance review had placed the district “on notice that this certification process had to be completed or the district risks loss of state and federal funding. Discussions with RUDTA have resulted in an agreement that the certification can be a requirement of continuing employment.” He further advised that “continued failure to secure the necessary training and certification may be grounds for transfer and loss of employment...”

15. On April 2, 2003, CDE informed Superintendent Zuber that the district’s Proposed Resolution “resolves all non-compliant issues related to the English Learners Program.” No sanctions were ever imposed on the district based upon its non-compliance with the EL program.

16. The district's agreement with RUDTA about the EL certification requirement was never contained in a collective bargaining agreement. Respondent was unsure about its binding effect and discussed the requirement with her union representatives.

On August 25, 2003, respondent sent an email to various union officers expressing her concern that, if she signed the commitment letter but did not finish the certification, the district would have grounds to fire her. She also posed questions about what effects her failure to obtain EL (CLAD) certification would have on the district's state funding, on her teaching credential, and on her permanent employment with the district.

On August 26, 2003, respondent forwarded a copy of this email to Mary Machado at the high school.

17. On August 27, 2003, respondent received an email message from RUDTA's chief negotiator Charles H. Carley, expressing his understanding of the informal agreement reached between the district and RUDTA on EL certification. Mr. Carley indicated:

My understanding is: This was a negotiated agreement and you have no option. The District can choose to release you from your contract and hire someone who is CLAD qualified. The Office of Civil Rights could come to Ripon if a parent of a second language student complains. According to the CTA, this has happened all over the state.

Respondent did not accept Mr. Carley's opinion and sought further advice from CTA adviser Vicky Miren. According to respondent, Ms. Miren told respondent she was not sure if the EL certification requirement was legal.

18. On October 22, 2003, district memoranda were sent to certificated staff who still needed to sign commitment letters and to their site principals, with instructions to complete and return the attached commitment letter by October 31, 2003. Respondent did not comply.

19. On January 20, 2004, district personnel clerk Ms. Luis sent respondent a memorandum advising her that, due to a severe budget shortfall for the 2004-2005 school year, layoffs were being considered and that "one of the primary factors that will be used to determine the order of layoff will be the possession of CLAD certification." An update on respondent's current CLAD status was requested.

On February 2, 2004, respondent informed Ms. Luis that she did not respond because the memorandum stated the district would assume she did not have a CLAD and did not plan to pursue one if a response was not received by January 30, 2004. Respondent further stated:

I have a life credential. As far as I know getting or not getting CLAD will not affect my teaching license in this state. I do not need units or professional growth. I have twenty-five years of experience teaching high school music and drama (20 with this district.) I have many extra-curricular hours I work with students. I do not have the time to pursue this certification. I DO NOT PLAN TO PURSUE THIS CERTIFICATION.¶ Sorry.

20. On February 9, 2004, the district's board passed Resolution No. 03-11 "Establishing Competency Standards," in anticipation of an economic layoff of certificated employees. In its recitals, the Resolution referenced the CDE's noncompliance findings in the district's EL Program and provided that:

WHEREAS, to correct these out-of-compliance findings, the District and the Teachers' Association agreed that all teachers must obtain CLAD, BCLA, or SDAIE certification by December 2005, resign, or be terminated.

The Resolution provided that teachers who either possessed EL certification or were "in training" to obtain such certification would be considered "competent" in the event of certificated layoffs and "shall be entitled to be retained over a more senior teacher who lacks such credentials or is not a 'teacher in training'." The board directed the Superintendent to implement these competency criteria.

Ultimately, the district did not lay off any certificated employees for the 2004-2005 school year.

21. Both Mr. Zuber and Ms. Boje testified that the teachers' union never voiced any objection to the requirement that district teachers must sign the commitment letter, complete the training by December 30, 2005, resign or be subject to termination.

22. In 2004, Ms. Boje sent reminders to certificated staff still needing EL authorization regarding their training options.

On March 25, 2004, respondent returned the CLAD status form to Ms. Luis, indicating her continual refusal to obtain EL certification by marking the form's box: "I do not have CLAD certification and I am not participating in a program."



23. On February 2, 2005, Ms. Boje sent respondent an email memorandum to remind her that the District “has an agreement with RUDTA that all teachers would obtain the needed certification to teach English learners by December 30, 2005. Furthermore, it was agreed that teachers who fail to get the certification might be terminated at the conclusion of the 2005-2006 school year.” Ms. Boje asked respondent to send her any evidence of training or coursework by March 4, and stated that “failure to complete the needed certification may result in termination at the conclusion of the 2005-2006 school year.” Ms. Boje advised respondent to contact her if she had any questions. Respondent did not respond.

24. On July 7, 2005, Ms. Boje sent respondent an email memorandum which provided in part:

Since fall of 2002 I have sent several reminders to you regarding your need to complete this training. In addition, you have received notification from the personnel department and the Superintendent also reminding you of your need to complete the certification. To date you have not provided the district with any information regarding your intent to complete the requirement.

My records indicate that you will not pursue the training. Again, I must remind you that failure to complete the needed certification may result in termination at the conclusion of the 2005-2006 school year.

25. On October 28, 2005, as the deadline approached, Ms. Boje sent respondent additional reminders, advising respondent to contact Ms. Boje’s office if she was concerned about her ability to meet the deadline.

26. On January 31, 2006, Ms. Boje sent respondent an email memorandum, noting that “as mentioned in prior communication, lack of CLAD certification will result in a recommendation from the Superintendent that a contract not be issued to you for the 2006-2007 school year.” Respondent was advised that the district would recommend to the board at its March 13, 2006 meeting that she would not receive a contract for the upcoming year, but that the recommendation could be rescinded on proof of certification before that meeting. Ms. Boje urged respondent to meet with her to discuss her status in the certification process.

Respondent was not willing to work with Ms. Boje and never responded.<sup>4</sup>

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<sup>4</sup> Respondent allowed her dislike of Ms. Boje to create a barrier to communication. Ms. Boje conducted respondent’s evaluation for the 2003-2004 school year. In her May 12, 2004 evaluation, Ms. Boje “dinged” respondent by rating her as “needing improvement” in several categories. Respondent took umbrage at this evaluation and subsequently avoided interacting with Ms. Boje.

27. In February 2006, respondent began an email correspondence with Superintendent Zuber about becoming EL certified, which was copied to Ms. Boje. On February 10, 2006, respondent acknowledged that “I now understand that I should get my CLAD certificate.” She advised Mr. Zuber that she had enrolled in San Diego correspondence certification classes and “will have them completed by March 2007.”

Superintendent Zuber suggested that the COE’s coursework would be cheaper and faster for her to complete. Respondent replied that:

I really don’t have the evenings to spare because of play rehearsals and concerts, etc. I don’t think it does our students any good to just cancel those sorts of things. I will move as quickly as possible to get it done through San Diego, but I don’t want to commit to June 2006. I should be able to finish before the start of the next school year. I’m pleading for you to consider an extension.

28. On February 13, 2006, Ms. Boje sent respondent an email with a flyer about the COE’s AB 2913 (formerly SB395) training for EL certification that was scheduled from January 31 through May 16, 2006. Although respondent had already missed several class sessions, Ms. Boje advised respondent that she would have an opportunity to make up the missed time and that, if the board did not grant her an extension, “this may be your only opportunity to complete the needed training before June 30, 2006.”

29. On March 2, 2006, respondent sent an email to Ms. Boje asking if she could take the AB2913 SDAIE training offered from June 13 through 22, 2006. Respondent expressed her belief that she qualified for this training because she was a permanent district employee in 1999 and had “two years of full-time or equivalent experience teaching English learners (I have had EL students almost every year...?).” With approval, respondent indicated she would have her certification by June 23.

On March 3, 2006, Ms. Boje replied that respondent was qualified to take the course and that the district would accept this in fulfillment of the EL certification requirement once she had successfully fulfilled all requirements.

30. In March 2006, at Mr. Zuber’s recommendation, the board agreed to extend the EL certification deadline to June 30, 2006, as long as the teacher was in the process of completing the training. Mr. Zuber testified that the board allowed respondent to continue teaching during the 2006-2007 school year even though she had not completed the certification, based upon his assurance that she was in the process and it was a “reasonable risk.” He also advised the board that any EL student seeking admission to respondent’s classes would have to be denied and that the board risked charges by the Office of Civil Rights (OCR) for denying access to an educational program. At the time he made this recommendation, Mr. Zuber had no idea the process would extend an additional 4 years.

31. *Notice of Unprofessional Conduct:* On March 14, 2006, Superintendent Zuber signed a “Notice of Unprofessional Conduct” (Notice) directed to respondent and five other teachers pursuant to Education Code sections 44932 and 44938. Respondent was advised that the following alleged specific behavior constituted “unprofessional conduct” because: (1) she failed to take any steps toward completing a supplemental ELL teaching certification to become qualified to teach students with limited-English proficiency; and (2) she was insubordinate on November 25, 2002 and August 26, 2003, when she refused to sign a Letter of Commitment to complete the supplemental ELL certification as requested by the district. Respondent was provided with various documents in support of these allegations.

The Notice advised respondent that the district also considered these specific behaviors to demonstrate “evident unfitness for service” and “persistent violation of or refusal to obey 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 district.” By this Notice, respondent was given an opportunity to correct her behavior and she was advised that further unprofessional conduct of this type would result in her dismissal.

32. *Original and Amended Statement of Charges and Accusation:* As indicated in Finding No. 1, on May 9, 2006, the district filed its Statement of Charges, which alleged that respondent had still not completed the EL certification requirement despite receipt of the Notice and had therefore engaged in unprofessional conduct, evident unfitness for service, and/or persistent violation of laws and reasonable regulations, as described by Education Code section 44932, subdivisions (a)(1), (a)(5), and/or (a)(7). Based upon this conduct, Superintendent Zuber recommended to the board that respondent be notified of its intention to dismiss her as a permanent employee. On May 10, 2006, the board adopted Resolution No. 05-07, indicating its “Resolution of Intention to Dismiss a Permanent, Certificated Employee.” The Resolution directed that respondent and five other permanent certificated employees be served with notices of intention to dismiss and related documents (Resolution No. 05-07). The Notice of Intent to Dismiss was served on respondent on May 11, 2006.

On June 7, 2006, respondent and other teachers filed a request for a hearing.<sup>5</sup>

33. By the June 30, 2006 extended deadline, respondent had not completed her EL certification.

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<sup>5</sup> On June 8, 2006, Mr. Driscoll as attorney for each of these teachers wrote to Mr. Zuber outlining his position that the district had no authority to require EL certification and that, if ELL instruction is required in a particular class, the district “must assign the teacher with the proper authorization, but you cannot order, compel or coerce any teacher, directly or indirectly by agreement, to obtain additional authorizations in order to keep their job.”

As indicated in Finding No. 2, on July 6, 2006, the district served its Notice of Accusation, Accusation, and supporting documents on respondent. The Accusation incorporated the specific charges outlined in the Statement of Charges. On July 20, 2006, respondent filed a Notice of Defense denying and objecting to the Accusation and raising various affirmative defenses. On August 15 and September 25, 2006, respectively, the district filed its First Amended Statement of Charges and First Amended Accusation.

34. *Completion of EL Certification Coursework and One Test:* In June 2006, respondent participated in the COE's AB2913 SDAIE coursework training, completed the course, and took the required test. On July 21, 2006, COE's Director of Multilingual Education Claudia Lockwood advised respondent that she had passed the "short answer essay" assessment test.

35. *Failure to Complete EL Certification:* To complete her EL certification after passing this essay test, respondent had to prepare and finish a "portfolio" that was designed to "demonstrate individual classroom use of ELD and SDAIE methodologies." To complete the portfolio, respondent had to: (1) "pull up" EL data about the district; (2) design four lesson plans for EL students, (3) implement the lesson plans with EL students in the class, and (4) write "reflections" based upon the delivery of the lesson plans.

Ms. Boje worked with other district teachers who had to complete portfolios as the final step in obtaining EL certification. Based upon this experience, Ms. Boje estimated that five to eight hours of "non-contractual" (uncompensated) time was required to prepare the portfolio's lesson plan and reflection components. The lesson plans could be implemented during working hours. Other teachers Ms. Boje worked with completed their portfolios within one to eight weeks. If the teacher did not have any EL students in their classes, the district would arrange for the teacher to deliver the lesson plans as a substitute in classes with EL students. For music, an arrangement could be made for respondent to teach music at an elementary or junior high school site where EL students were present.

Ms. Boje never directly advised respondent of these options and respondent never contacted Ms. Boje for assistance in completing her portfolio.

36. At the end of the 2005-2006 school year, respondent agreed to teach seven periods during the 2006-2007 school year. When she agreed to teach this load, respondent believed she would have completed the portfolio over the summer. Once summer arrived and she finished the COE coursework and test, respondent decided to "take a summer break."

37. COE's deadline for completing the portfolio was October 3, 2006. Respondent's COE instructor had informed the class that they would have eight weeks after the start of the 2006-2007 school year to finish their portfolios. This would provide them an opportunity to implement the lesson plans in the classroom.

Once school began, respondent realized she had no EL students and had not completed the portfolio. She called Ms. Lockwood. Respondent testified that she and Ms. Lockwood developed a "good plan" for respondent to take a few EL students from another teacher's class and implement her lesson plans with those students between 2:15 p.m. and 3:00 p.m.

Respondent took no action to follow this plan. Instead, respondent found that she "was really tired at 2:15 p.m." and she "didn't manage to get the portfolio together." The deadline for completing COE's EL certification program passed.

38. After ALJ Sarli dismissed the district's dismissal charges in January 2007, respondent believed she could not be terminated for not having an EL certification.

39. In March 2008, respondent learned that the Superior Court had overturned Judge Sarli's ruling. Respondent took no action to complete her portfolio or otherwise obtain EL certification.

40. In September 2009, respondent learned that the Court of Appeal had affirmed the Superior Court's decision overturning Judge Sarli's order. Respondent then signed up for the California Teacher of English Learners (CTEL) test, by which she could become CLAD certified. On December 5, 2009, respondent took the CTEL. In January 2010, respondent learned that she had only passed two of the three required CTEL tests.

41. As of the conclusion of the hearing, respondent had not completed her EL certification. Respondent testified that she signed up for the next available CTEL and would retake the CTEL on June 12, 2010.

42. Until her recent layoff, the district allowed respondent to continue teaching pending her appeal. Respondent received positive biennial performance evaluations from her site principal for the 2005-2006, 2007-2008, and 2009-2010 school years. Respondent's most recent evaluation recommended that she be evaluated every five years.

Superintendent Dr. Nan testified that the district's decision to allow respondent to keep teaching without her EL certification was a pragmatic one. Due to the district's strained budget, millions of dollars in spending have been cut, vacancies have not been filled, layoffs have been required (15 full-time equivalent staff reductions for 2010-2011), and class sizes have been increased. Under these

circumstances, it did not make fiscal sense to hire another music teacher while it paid respondent to be on administrative leave.<sup>6</sup>

Dr. Nan testified that the superintendent does not review performance assessments. Dr. Nan agreed with some of the positive comments about respondent; however, because respondent refused to obtain her EL certification for eight years despite consistent directives to do so, Dr. Nan disagreed that respondent's performance was satisfactory in the categories of "professional growth," "climate for student diversity," and "sensitivity to student needs."

43. In April 2010, respondent addressed the board about the reasons she did not obtain her EL certification and her current efforts to do so. After hearing from respondent, the board took no action to change its recommendation for her termination.

44. Dr. Nan testified that the district needs EL certified teachers to ensure compliance with federal and state laws. The district's EL population is growing, from 5 percent of the student population in 2002 to 12 percent of the student population in 2010. It is discriminatory to deprive even a single student of the opportunity to take a class because a teacher does not have an EL certification and therefore cannot have the student enrolled in the class. Respondent's failure to obtain her EL certification has resulted in depriving the district's EL students of the opportunity to take music. Because of her conduct, the district was unable to place EL students in respondent's classes and was systematically excluding groups of students from its music classes in a manner that is unfair to students, other teachers and staff. That the district has not been the subject of complaints does not alter this conclusion. Parents of the district's predominantly Hispanic EL students have language barriers and fear of authorities that make complaints about their children's treatment less likely. Both Dr. Nan and Mr. Zuber expressed their opinions that respondent's conduct constituted unprofessional conduct, evident unfitness for service and persistent violation of the district's reasonable rules.

45. In his October 9, 2006 verified responses to respondent's Requests to Admit, Mr. Zuber admitted that, "[s]ince the 2001-2002 school year, no Ripon High School English Learner has been denied access to music education at Ripon High School."

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<sup>6</sup> Prior to her lay off, respondent also took the untenable position that the district should simply hire another music teacher with an EL certification to which EL students could be assigned. As credibly explained by both Mr. Zuber and Dr. Nan, the district's financial circumstances do not allow this. Additionally, to do so would result in the creation of small segregated music classes where all EL students would be in one class.

As indicated in respondent's testimony, as well as in the testimony of the district's counselors, however, EL students at Ripon High School have been denied access to music education at least since 2006.

46. Respondent testified that, during the first week of each school year, she always looked at the computer list to ensure that EL students were not assigned to her classes. Respondent had two EL students, brothers who spoke no English, placed in her music appreciation class one time for a few months. On another occasion, an EL student who spoke little English, played drums with her band class. None of these students was issued a grade.

During the 2008-2009 school year, respondent discovered that a brother and sister enrolled in her class were designated as EL students. Respondent was aware they had good English skills. These students were tested and were found to be "redesignated fluent English proficient" (RFEP) students rather than EL students; they were never removed from her class. Respondent acknowledged that an EL student (Child No. 1) was removed from her music ensemble class during the 2008-2009 school year. She worked with him informally on guitar. During the 2009-2010 school year, this student was re-designated as RFEP. He then auditioned for and was enrolled in music ensemble class.<sup>7</sup>

Other than these students, respondent has never been told that EL students have been kept out of her classes.

47. District high school counselors Michael Morenzone and Dawn Goudeau testified that they help students select classes each year, including electives.<sup>8</sup> Students complete a course preference form, ranking classes in order of desire. Both Mr. Morenzone and Ms. Goudeau were aware that respondent did not have EL certification and that the district could not place EL students into any of her classes. These counselors worked to ensure that EL students were not erroneously placed in respondent's classes. Ms. Boje and respondent were also aware that EL students should not be placed in respondent's classes and would bring any potential problems to the counselors' attention. Ms. Boje would compile a list of the district's EL students and call the counselors to ensure that none were assigned to respondent's class, or to remove them if they had been assigned. After Ms. Boje left the district, other administrators worked with the counselors to catch potential assignment errors. The counselors would try to find another elective for the EL student before classes began. If assignment errors were not caught, EL students would be placed in respondent's class and removed during the first several weeks.

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<sup>7</sup> To protect confidentiality, a "Child Number" is substituted for the names of students; their true names are contained in the confidential names list.

<sup>8</sup> Each counselor is responsible for half of the alphabet of student names. Ms. Goudeau testified that she considers respondent to be a friend.

Ms. Goudeau estimated that, during her six years in this position, three to ten EL students had to be removed from respondent's classes during the first few weeks of school. Three of these students were replaced in respondent's class after being reassessed for language proficiency and determined to be RFEP rather than EL students. Ms. Goudeau never had an EL student come to her and complain about being removed from respondent's classes. Respondent was aware that Ms. Goudeau would have to remove EL students from her classes. Ms. Goudeau stated it is not unusual for students to be denied desired classes or to have their classes changed within the first two weeks of school. Non-EL students were deprived of music when respondent's classes reached their limits.

48. Respondent's classes can be used to fulfill graduation and college requirements. For example, music can satisfy a fine arts requirement for graduation. Music and band can fulfill college preparatory Visual and Performing Arts (VAPA) requirements. Respondent actively worked to have all her music classes accepted for VAPA certification.

49. All other district certificated staff have completed the EL certification.

*Respondent's testimony*

50. Respondent knew she was directed by the district to sign the commitment letter and complete the EL certification training. In her testimony, respondent acknowledged her understanding that the district required all certificated staff to obtain EL certification and that the district was not able to place any EL students in her classes without it. From 2002 through the spring of 2006, respondent received regular memorandums from the district regarding this requirement. Even though the union's agreement with the district was not written in the collective bargaining contract, respondent understood that the union agreed to the requirement and had never repudiated it. By 2004, it was clear to respondent that she had to obtain EL certification, resign or be terminated. Even though respondent had not consulted an attorney, she persisted in not obtaining EL certification because she did not think the requirement was legal. Respondent wanted to see if the district would actually pursue her termination; letters from Ms. Boje only indicated that respondent "might be" terminated. As a result, she did not consult an attorney until she received the Notice of Unprofessional Conduct and it became clear that the district would fire her for noncompliance. Respondent "was willing to risk being fired." Even though she was aware that the district risked losing funding, respondent did not believe that her behavior was problematic for or risked harm to the district. She never really understood that signing the commitment letter made her "magically able" to teach EL students as a teacher in training. Respondent agreed that, at her deposition, she stated she would rather do housework than complete her EL certification.



51. In her testimony, respondent acknowledged that many district teachers are busy and have extracurricular commitments. For each school year from 2002 until her layoff, respondent chose to accept additional assignments for stipends. She agreed to teach an additional class period during the 2006-2007 school year. Respondent engaged in these activities instead of completing her EL certification.<sup>9</sup>

52. Respondent understood that, until she had her EL certification, no EL students could be placed in her class. Respondent did not believe this to be either discriminatory or problematic because many other students wanted to enroll in her classes as electives and were not able to get in. Respondent denied that she had any responsibility for EL students being unable to take her class and denied personally discriminating against EL students because she “does not do the scheduling.” Based upon Superintendent Nan’s testimony, respondent did acknowledge that potentially 10 to 12 percent of the high school population could miss the opportunity to take music.

53. Respondent provided various explanations for why she did not complete the commitment letter and EL certification. Respondent believed the commitment letter and EL certification requirement were ambiguous and did not apply to her because she did not have EL students in her class. She was very busy on nights and weekends and did not want to pay for a course that might not be required. A CTC advisor told her it was unclear whether the requirement was just for “core” classes or not. The union’s agreement with the district was not in writing; however, union people told her that “it happens all the time that things are not written down.” Ms. Boje only told respondent that she risked losing her job in a layoff proceeding. Respondent thought her chances of being laid off were slim because she did not think the district would cut her classes and she had good seniority. Respondent told Ms. Boje she would not sign the commitment letter because, other than layoff, she was not sure what the consequences of not signing would be. Ms. Boje’s letters never said that respondent “would be” fired, just that she “might” be. Respondent’s life credential did not require her to complete any continuing education requirements.

### *Fitness to Teach*

54. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230, the State Board of Education revoked a teacher’s teaching certificates based upon conduct alleged to be “immoral” or “unprofessional” under the Education Code. On review, the California Supreme Court held that conduct cannot be determined to be “immoral” or “unprofessional” unless it first indicates a teacher’s “unfitness to teach.” The Court identified the following factors to be considered in determining whether a teacher’s conduct indicates unfitness to teach: (1) the likelihood that the conduct may

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<sup>9</sup> Respondent received a total of approximately \$7,200 additional income per year from stipends for drama, chorus and band performances.

have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the party involved; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.<sup>10</sup> Similar requirements are imposed on charges of “evident unfitness for service.” (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691.)

Courts have suggested that “fitness to teach” is a question of ultimate fact.<sup>11</sup> The fitness criteria are applied to the facts of this case, as set forth below.

*Likelihood that the conduct may have adversely affected students or fellow teachers*

55. *Impact on Teachers:* Respondent testified that she has personally received no complaints from other teachers about her conduct and was not aware of any animosity against her. Other evidence supports a finding that respondent’s conduct did adversely affect her peers. Mr. Zuber was the district’s Superintendent until he retired in 2008. He testified that, during his tenure, the district had 145 teachers. With the exception of respondent, all teachers obtained their EL certifications. Many of these teachers had busy schedules and were involved in extracurricular activities. As superintendent, Mr. Zuber received individual complaints from five to ten teachers who expressed their concerns about why they had to comply with the policy and obtain EL certification when respondent did not.

56. *Impact on Students:* As set forth in Factual Findings 39, 54 through 58, and 62 respondent’s persistent refusal to agree to obtain and to obtain her EL certification had both an actual and a potential adverse impact on the EL students the EL program is designed to serve. The extent of this impact is addressed below.

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<sup>10</sup> Similarly, the Court of Appeals in *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560, stated:

Our high court in *Board of Education v. Jack M.* (1977) 19 Cal.3d 691, delineates the process to be considered in determining fitness. This opinion upheld the standard established in *Morrison* that a discharged teacher is entitled to a fitness hearing in which not only his conduct but also these factors are analyzed: (1) likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teachers and students relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct.

<sup>11</sup> *Board of Education v. Commission on Professional Competence*, *supra*, 102 Cal.App.3d at 560-561, citing *Board of Education v. Jack M.*, *supra*, 19 Cal.3d 691, 698, fn. 3.

*Degree of adverse impact on teachers and students anticipated*

57. *Teachers:* Respondent's conduct has had a moderately negative impact on her fellow teachers. While respondent may not have been privy to complaints about her failure to accomplish what all other teachers were required to accomplish, the district received expressions of dissatisfaction and perceived unfairness from other members of the certificated staff. In addition, EL students had to be removed or screened out of respondent's classes and placed in other teachers' classes. Respondent's conduct placed her peers in the position of having to teach students she was not qualified to teach.

58. *Students:* As indicated by the students who attended the hearing with supportive banners, respondent is a popular teacher who is viewed as something of an institution at Ripon High School. Over the years, respondent has helped to create and has positively contributed to the district's music and drama performance culture. In this context, respondent has worked with and positively affected many district students.

Nevertheless, respondent's conduct has had a moderate to severe adverse impact on EL students who have not been allowed to take her music classes. These classes not only enhance personal skill and development but are electives that can be used to fulfill graduation and college preparatory requirements. While the number of EL students affected might be small, the discriminatory impact on a single student is great and may never be fully understood.<sup>12</sup> The district's demographics indicate a growing EL population that cannot legally be ignored and that it attempted to proactively address. Further, students who are not English learners are negatively impacted by the lack of diversity in their classrooms. It is significant that, in her testimony, respondent displayed a complete lack of remorse or regret for the effect of her conduct on students.

*Proximity or remoteness in time of the conduct*

59. This factor weighs against respondent. Her refusal to comply with repeated directives to complete EL certification has spanned a period of eight years and was still unresolved at the conclusion of the hearing.

*Type of teaching certificate held by the party involved*

60. By failing to obtain her EL certification, respondent did not demonstrate the "lifelong learner" philosophy that is an integral part of the teaching profession. Respondent's single subject music credential is a neutral factor.

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<sup>12</sup> As an example of the potential negative impact, the district likened the impact to placing an EL student with musical abilities akin to Yo Yo Ma into an art class rather than a music class.

*Extenuating or aggravating circumstances, if any, surrounding the conduct*

61. *Respondent's busy schedule:* Over the years, respondent has argued that she is "too busy" to complete the certification requirement. In addition to her full teaching load, respondent voluntarily agreed to assume additional positions for a stipend. As indicated in Finding No. 7, respondent was involved in preparing for dramatic, choral and band performances after hours throughout the year.

Mr. Zuber testified that he did not objectively believe respondent was too busy to complete this requirement. He noted that all teachers are busy, that some other teachers had more extracurricular obligations than respondent, and that all other district teachers obtained their EL certifications. During a conversation in 2006, Mr. Zuber told respondent that if the plays and music were "in the way" of her fulfilling this obligation, he would suggest that her responsibilities be removed for one semester to allow her time to complete the certification process. Respondent declined this offer because she had already begun casting a play and many students were depending on it.

Respondent's refusal to abandon the play in this specific context was reasonable. However, respondent had nearly four years before being served with the Notice of Unprofessional Conduct and nearly four years after that Notice during which she should have curtailed her volunteer activities to comply with her employer's requirement. It is unfortunate that the district did not affirmatively require respondent to give up her stipend positions pending completion of her certification. Given respondent's many years with the district, the district bears some blame for leaving this question completely in respondent's discretion. Viewed in the larger context, however, it is apparent that respondent's busy schedule was not the reason she failed to obtain her EL certification and it does not mitigate her actions.

62. *Reliance on Judge Sarli's order:* After the January 2007 issuance of the order dismissing the termination action, respondent believed she was not legally required to obtain the EL certification. Respondent's conduct from 2002 through the end of 2006 is not mitigated by this order. In particular, respondent's failure to complete her portfolio in the summer of 2006 or before COE's October 2006 deadline was in no way excused by this subsequent dismissal order. Respondent's conduct during this time period is a significant aggravating factor which underscores her blatant determination to do as she alone saw fit. There was no reasonable justification for respondent not to complete her certification during this period. Similarly, respondent's failure to take any action to obtain EL certification after the Superior Court overturned Judge Sarli's ruling in of March 2008 until December 2009 is an additional factor in aggravation.

63. *Respondent's 2007 conduct regarding marching band:* Mr. Zuber testified that respondent had been uncooperative with the district regarding a request to develop a marching band for the football games. Evidence presented did not

establish that respondent's conduct regarding this issue should be considered a factor in aggravation.

*Praiseworthiness or blameworthiness of the motives resulting in the conduct*

64. Respondent has an admirable history of being dedicated to producing student performances and not wanting to disappoint students engaged in these events. There was no persuasive evidence that respondent undertook these activities to obtain the modest stipends involved.

65. Respondent's conduct has been the subject of local news reports and student protests. As indicated in *Board of Education v. Jack M.* (1977), supra, 19 Cal.3d at 700, the fear that students will emulate a teacher's negative conduct (there "immoral" and/or "illegal" conduct) "becomes realistic only under two conditions. First, the teacher's conduct must be sufficiently notorious that the students know or are likely to learn of it. . . Second, the teacher must continue to model his past conduct. . ." (citations omitted.) By her conduct of repeatedly flaunting her employer's directives, respondent has provided a negative example to the district's students.

*Likelihood of recurrence of the questioned conduct*

66. This factor weighs against respondent. Respondent still lacks her EL certification, eight years after being instructed to obtain it. Assuming respondent passes the June 2010 CTEL, this specific factual scenario will not recur. Nevertheless, respondent's demeanor suggests that she will continue behaving as she alone sees fit, without regard to her employer's requirements, student needs, or perceptions of other teachers. Respondent's testimony and overall conduct demonstrates that she views herself as "special," and as not bound by her employer's directives unless they are, in her own mind, absolutely clear and reasonable. She persisted in this conduct knowing that the district might be subjected to sanctions from CDE or civil rights complaints. The fact that the district was not actually subject to such negative consequences is irrelevant. Given the lengthy history of refusal, the district has no basis to trust that respondent would act differently in the future when faced with a different employment condition.

*Adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers:*

67. This factor does not weigh in respondent's favor. Respondent's conduct does not implicate the exercise of constitutional rights. For approximately four years before the district initiated the termination proceeding, respondent repeatedly refused to comply with the district's directives. Respondent raised statutory challenges to the district's authority to impose the EL certification

requirement. The court in *Ripon*, supra, rejected these challenges and affirmed the district's authority.

68. The *Morrison* factors, individually and collectively, do not weigh in respondent's favor or substantially mitigate her recalcitrant behavior.

## LEGAL CONCLUSIONS

1. The burden of proof is on a school district to show by a preponderance of evidence that a teacher should be dismissed. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

2. A permanent certificated teacher may be dismissed for any of the following causes: "unprofessional conduct," "evident unfitness for service," or "persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her." (§ 44932, subdivisions (a)(1), (5), (7).)

3. *Unprofessional Conduct*: For the purpose of dismissal of a teacher, "unprofessional conduct" is defined as "the unprofessional conduct particularly specified as a cause for dismissal or suspension in Sections 44932 and 44933. . ." (§ 44938, subd. (c).) As set forth in Factual Finding No. 41, the district timely served a Notice of Unprofessional Conduct on respondent and satisfied jurisdictional prerequisites to pursuing this charge. (§ 44938, subd. (a); *Crowl v. Commission on Professional Competence of the Governing Board of the San Juan Unified School District* (Third District 1990) 225 Cal. App. 3d 334, 348.)

4. *Evident Unfitness for Service*: Pursuant to Education Code section 44932, subdivision (a)(5), a permanent certificated teacher may be dismissed for "[e]vident unfitness for service."

In *Woodland Joint Unified School District v. Commission on Professional Competence* (Woodland) (1992) 2 Cal.App.4th 1429, 1444, the Third District Court of Appeal defined the term "evident unfitness for service," as used in Education Code section 44932, subdivision (a)(5), to mean "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." The court found that the term "connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*) The court held that the *Morrison* factors "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service." (*Id.* p. 1445.) As the court in *Woodland* explained, "[i]f the *Morrison* criteria are satisfied, the next step is to

determine whether the ‘unfitness’ is ‘evident’; i.e., whether the offensive conduct is caused by a defect in temperament.” (*Ibid.*)

5. *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 District:* A charge of persistent violation of, or refusal to obey school rules requires a showing of insubordination. (*Midway School Dist. of Kern County v. Griffeath* (1946) 29 Cal.3d 13, 18-19.) Persistence requires a showing of “continuing or constant” behavior. (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.)

6. The Commission has considered the *Morrison* factors in light of the record as a whole. On balance, these factors weigh against respondent. As set forth in the Factual Findings as a whole, respondent’s conduct was unprofessional and persistently insubordinate over a period of eight years. Consequently, the District sustained its burden of proving, by a preponderance of the evidence, respondent’s “unprofessional conduct” and “persistent violation” of rules within the meaning of Education Code section 44932, subdivisions (a)(1) and (7).)

7. The district did not meet its burden of establishing that respondent’s unfitness to teach rises to the level of a non-remediable character defect required for a finding of “evident unfitness for service,” as used in Education Code section 44932, subdivision (a)(5), and as interpreted in *Woodland, supra*. Respondent’s conduct since December 2009 indicates that she does have the capacity to change her behavior.

## ORDER

Respondent Theresa Messick is dismissed as a permanent certificated employee of the Ripon Unified School District pursuant to Education Code section 44932, subdivisions (a)(1) and (7).

DATED: \_\_\_\_\_

\_\_\_\_\_  
DAVINA M. KEISER, Member  
Commission on Professional Competence

DATED: \_\_\_\_\_

\_\_\_\_\_  
RUSSELL K. SPERLING, Member  
Commission on Professional Competence

DATED: \_\_\_\_\_

\_\_\_\_\_  
MARILYN A. WOOLLARD, Chairperson  
Commission on Professional Competence