

**BEFORE THE
COMMISSION ON TEACHER CREDENTIALING
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

CYNTHIA UJU SIMIEN, Respondent

Agency Case No. 2-71013055

OAH No. 2021040735

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by telephone and videoconference on September 14, 2021, from Sacramento, California.

Brent O. Jex, Deputy Attorney General, represented complainant Mary Vixie Sandy, Executive Director, Commission on Teacher Credentialing (Commission).

Justin L. Ward, Attorney at Law, represented respondent Cynthia Uju Simien, who was present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on September 14, 2021.

SUMMARY

Complainant seeks to revoke respondent's Child Development Site Supervisor permit on the grounds that she had multiple inappropriate interactions with students and other staff in her Head Start classroom, and that she fell asleep in the classroom and later denied it. Respondent denied the allegations. Complainant failed to prove the charging allegations by clear and convincing evidence. Therefore, the Accusation must be dismissed.

FACTUAL FINDINGS

1. On June 10, 2010, the Commission issued a Child Development Site Supervisor Permit (permit) to respondent. The permit was in full force and effect at all times relevant to this matter and will expire on July 1, 2025, unless renewed or revoked.¹ The permit authorizes respondent:

... to supervise a child care and development program operating at a single site; provide service in the care, development, and instruction of children in a child care and development program; and serve as a coordinator of

¹ On June 25, 2009, the Commission issued a Child Development Associate Teacher Permit to respondent. That permit expired on July 1, 2014.

curriculum and staff development in a child care and development program.²

Background

2. Respondent was employed by the Stanislaus County Office of Education (COE) for approximately 10 years, beginning as a substitute teacher and later becoming a permanent employee. In 2018 and 2019, respondent worked as an infant/toddler educator at Muncy Early Head Start (Muncy) in Modesto. The students in respondent's classroom ranged in age from 18 months to four years old.

3. Nicole Rivalta (Rivalta) is a registered behavior technician (RBT) employed by Kendall Therapeutic Pathways (Kendall), a County vendor. At all times relevant to this matter, and for approximately one year, Rivalta was assigned to assist E.W., a three-year old student with special needs in respondent's classroom. Rivalta also provided in-home sessions with E.W. and regularly consulted with her parents. Rivalta was not assigned to assist any other students in respondent's classroom; her sole role was to stay with E.W. and help her in and around the classroom.

4. On April 16, 2019, Rivalta made a report to her supervisor, Cynthia Owens (Owens), wherein she alleged respondent had been overly aggressive and physical with multiple students in her classroom earlier that day. Owens memorialized Rivalta's allegations in a letter and submitted it to the COE. The COE subsequently investigated Rivalta's allegations and substantiated them. On May 10, 2019, Jason Maggard (Maggard), Assistant Superintendent of Human Resources, signed and issued

² See the Commission's website, [https://www.ctc.ca.gov/credentials/leaflets/child-development-permits-\(cl-797\)](https://www.ctc.ca.gov/credentials/leaflets/child-development-permits-(cl-797)).

to respondent a Preliminary Notice of Statement of Charges for Dismissal (Statement of Charges).

5. In November 2020, the Commission determined probable cause existed to discipline respondent's permit based, in large part, upon the COE's investigation. Respondent timely requested an evidentiary hearing. Accordingly, on February 18, 2021, complainant signed and filed the Accusation against respondent, seeking to discipline her permit on the grounds that she engaged in immoral and unprofessional conduct, and is unfit for service while employed as a preschool teacher at a Head Start program. Specifically, complainant alleged that respondent: (1) directed an aide not to change a student's soiled diaper; (2) was angered and made a homophobic comment when she observed a male student wearing a dress; (3) lifted a student with special needs by one arm, carried her across the room, and forcibly sat her down; (4) fell asleep in the classroom while in charge of students; and (5) denied falling asleep when questioned about it. In aggravation, complainant alleges respondent's actions demonstrate a pattern of misconduct; her misconduct involved bad faith or dishonesty; her actions significantly harmed a child trusted to her care as well as the public or educational system; and respondent has demonstrated indifference toward the consequences of her actions. Respondent timely appealed. This hearing followed.

Incidents on April 16, 2019

STUDENT A.S.

6. On April 16, 2019, around 10:00 a.m., respondent was on her break and Vera Loboda (Loboda), associate teacher, was covering for her in the classroom. A male student, A.S., began playing "dress up" and donned a costume dress over his regular clothes. "Dress up" play was a common student activity, and male students had

often put on costume dresses. A few minutes later, Loboda started to prepare the students to go outside, and lined the children up by the door. Respondent re-entered the classroom and saw that A.S. was still wearing the costume dress. As students were not allowed to take costumes outside, respondent walked over to A.S. and removed the dress from his person.

7. Loboda witnessed this interaction. Although she thought respondent had removed the dress “kind of roughly,” she did not believe there was anything to report as A.S. was not injured or crying. Rivalta was also in the classroom at the time and witnessed the interaction. She later claimed that after respondent removed the dress, she said to Rivalta that she hoped A.S. “did not end up gay.” Respondent denied the allegations and Loboda did not hear her make any such comment.

STUDENT E.W.

8. Later that same day, just before the lunch hour, respondent directed the students it was “clean up time” in the classroom. Rivalta’s student, E.W., was sitting on the floor and did not start cleaning up immediately. According to Rivalta, respondent walked over to E.W., grabbed her by the arm and raised her to her feet, then walked her across the classroom to a chair where she forcibly sat the child down. E.W. began to cry. Rivalta tried to walk to her, but respondent stopped her and said E.W. was “acting like a baby” and respondent was “handling it.” Rivalta did not attempt to intervene again. Rivalta did not report the incident to anyone right away as she did not believe E.W. was in any immediate danger. Instead, she reported it to her supervisor at the end of her shift.

9. Rivalta also reported the alleged incident to E.W.’s parents, who in turn reported the matter to Child Protective Services and the Modesto Police Department.

When an officer interviewed respondent, she denied having any physical contact with E.W. The officer filed an incident report and closed the matter without any action taken against respondent.

RIVALTA REPORT

10. On April 16, 2019, at the end of her shift, Rivalta spoke with her supervisor, Owens, and reported respondent's conduct she had observed earlier that day. Specifically, Rivalta reported the "dress up" incident with a male student and respondent's physical handling of E.W. during clean-up time.

11. Rivalta also reported a third incident, alleging respondent used verbal and physical force against a male student, N.B., who had not followed instructions. Specifically, Rivalta alleged respondent grabbed N.B. by the upper arm and forcibly sat him down in a chair, and "flicked" his forehead with her finger and thumb to force him to remain seated.³ Per Owens' memorandum, this incident took place before respondent's alleged physical handling of E.W.

12. Owens memorialized Rivalta's allegations in a memorandum, also dated April 16, 2019. At hearing, Rivalta testified about the first two incidents. However, she could not recall the third incident with N.B., notwithstanding having reviewed Owens' memorandum to refresh her memory.

³ The description of the incident in Owens' memorandum differed significantly from how the incident is alleged in the Accusation, including an allegation the incident started with the student throwing a block at respondent.

SLEEPING INCIDENT

13. The Accusation alleged that respondent was observed to be asleep in her classroom on April 16, 2019. However, as discussed below, no direct evidence was offered to establish this allegation. On April 15, 2019, respondent was absent from work as she was not feeling well. Her supervisor, Shawnda Pombo (Pombo) checked with respondent to see if she were feeling better and if she would be at work the next day, April 16. Respondent confirmed she planned to attend work, but notified Pombo that she had arranged for a substitute teacher to relieve her at 2:00 p.m., as she had an appointment. At no time did Pombo instruct respondent that she was required to report to work on April 16, 2019.

COE Interview

14. The COE initiated an investigation into Rivalta's allegations. As a result, respondent was placed on paid administrative leave on April 16, 2019.

15. On April 25, 2019, Superintendent Maggard met with respondent in his office to discuss her classroom conduct on April 16, 2019. Also present were two representatives, Terri Stone and Dianne Warner, from respondent's union. Respondent denied Rivalta's allegations.

16. Superintendent Maggard then informed respondent that staff⁴ also had observed her sleeping in the classroom on April 16, 2019. Respondent denied the allegation. She stated she had been sick that day, and that she may have placed her

⁴ At hearing, Superintendent Maggard could not name the staff members who reported this allegation to him, though he believed it was a Kendall employee.

head down on the table for a brief moment after she had taken some medication. She also showed Superintendent Maggard the text messages with Pombo to show she was not feeling well that week. Superintendent Maggard believed respondent was implying that Pombo had “forced” her to report to work on April 16, despite being sick.

17. Superintendent Maggard signed the Statement of Charges against respondent on May 10, 2019. The Statement of Charges alleged respondent was grossly insubordinate or negligent, caused a potential clear and present danger to her students or others, and was dishonest. Specifically, the Statement of Charges alleged five instances of misconduct: (1) dress-up and homophobic incident; (2) inappropriate physical contact with student E.W.; (3) inappropriate physical contact with male student; (4) sleeping in the classroom; and (5) dishonesty during the COE interview regarding sleeping in the classroom and being forced to report to work when she was sick. Respondent resigned from her position, effective June 13, 2019. Her last physical day at the Muncy campus was April 16, 2019.

Diapering Incident

18. The Accusation alleged an additional incident not included in the COE’s Statement of Charges. On an unspecified date in March 2019, respondent, Rivalta, and a substitute teacher were working in respondent’s classroom. At hearing, Rivalta testified about a “small altercation” she witnessed between respondent and the substitute. According to Rivalta, a student had soiled his diaper with diarrhea. The substitute began to lead the student to the changing area to change his diaper. Respondent instructed the substitute to wait until after the students’ lunch time was over. The substitute disregarded respondent and changed the student’s diaper.

19. At hearing, Rivalta could not remember the name of the student or substitute teacher. She did not report the incident to her supervisor or anyone else at the time, nor was there any evidence that anyone had reported such an incident had occurred at that time. No other witnesses testified about the incident. There was no evidence to establish when Rivalta reported the allegation to either Kendall, the COE, or the Commission, or how it came to be included in the Accusation.

Respondent's Evidence

20. In a letter dated May 10, 2020, respondent prepared a written rebuttal to each of the allegations contained in the Statement of Charges. She testified at hearing consistent with this account.

STUDENT A.S.

21. Respondent explained that A.S. had been her student for some time and she had observed him play dress-up with dresses on multiple occasions without incident. She has never prevented or discouraged a student from playing with any of the dress up clothes during "free play" time, regardless of gender. However, the costumes are to remain in the classroom and not go outside. On April 16, 2019, as the students were lining up to go outside, respondent returned from her break and observed some of the students were still wearing dress-up costumes. She reminded the students that the costumes remain in the classroom. A.S. asked her to help him take off the dress, which respondent did. She did not tell A.S. it was inappropriate to wear a dress because he is a boy, nor did she make any homophobic comment to Rivalta or anyone else.

STUDENT E.W.

22. Respondent denied she had ever been “physically or verbally abusive with any student,” including E.W. Respondent pointed out that Rivalta, as E.W.’s RBT, was required to be with or near E.W. at all times throughout the school day. If respondent had physically assaulted E.W., Rivalta would have intervened. Furthermore, there was no evidence E.W. had visible injuries, marks, discoloration, bruises or sores anywhere on her body. Finally, the police investigated the incident and did not substantiate the allegation.

STUDENT N.B.

23. Respondent denied that she ever used physical force to make N.B. sit down, or that she flicked his forehead with her finger. She again noted the lack of visible injury or other markings on the student. This allegation was also investigated by the Modesto Police Department and the matter closed without any action taken against respondent.

SLEEPING INCIDENT

24. Respondent denied that she was ever asleep in the classroom while on duty. Consistent with her prior statements, she explained she had not been feeling well and may have rested her head briefly on the table when no students were present.

DISHONESTY

25. Respondent denied that she was dishonest with Superintendent Maggard when she stated she had not fallen asleep in class. She also denied making any suggestion that Pombo had forced her to work on April 16 when she was sick.

PRIOR CONFLICT WITH RIVALTA

26. Respondent explained that she and Rivalta did not have a good working relationship, and that she had several issues with Rivalta's conduct in the classroom. For instance, Rivalta repeatedly brought her cell phone or tablet and charged it in the classroom, leaving cords within easy reach of the students. A supervisor inspected the facility and noted the exposed cord, and Rivalta blamed another staff member. On multiple occasions, Rivalta removed E.W. from the classroom without notifying respondent or changing the "magic number" on the door.⁵

27. On the morning of April 16, 2019, the date of Rivalta's complaint, the students were playing outside. One student was riding a bicycle and Rivalta was talking with him. Rivalta then pulled the student off the bicycle, causing him to fall. The student began to cry, but Rivalta ignored him. Respondent went to the student, picked him up and checked for any injuries. The student stopped crying. Rivalta told respondent that the student did not listen and "needed to be tamed." Respondent informed Rivalta that she would file an incident report.

A few minutes later, the class returned to the classroom for meal time. Rivalta began serving food to herself before the students had washed their hands. Respondent told Rivalta it was inappropriate to eat the children's food or take food home from the facility. Respondent had given Rivalta this admonition several times previously.

⁵ Respondent explained the "magic number" indicated how many students were present in the classroom at any given time, which helped the facility ensure all students were accounted for.

Respondent never filed an incident report regarding the bicycle. She explained the report was still in the classroom when she was placed on administrative leave by Jewelee Hotchkiss (Hotchkiss), director of child family services. At that time, Hotchkiss directed respondent not to contact any staff while the investigation was pending. Accordingly, respondent did not inform Pombo or anyone else at Muncy about the unfiled incident report in the classroom.

28. Respondent resigned from her position while the investigation was pending. She was “stressed out,” devastated, and could not concentrate. Although she had been with COE for 10 years with no issues and no parent complaints, no one seemed to listen to her.

CHARACTER EVIDENCE

29. Respondent introduced several character letters from fellow teachers and supervisors. The letters generally describe respondent as an exceptional teacher who is an asset to her students and classroom. They extoll respondent’s good working relationship with parents and gentle demeanor with students. She is further described as empathetic, supportive, professional, and a good listener.

Analysis

INCIDENTS WITH STUDENTS

30. Complainant offered Rivalta’s testimony only to establish the alleged incidents with students A.S., E.W., and N.B. For the reasons discussed below, Rivalta’s testimony regarding these events is not credited.

31. Evidence Code section 780 sets forth factors to consider in determining the credibility of a witness: the demeanor and manner of the witness while testifying;

the character of the testimony; the capacity to perceive at the time the events occurred; the character of the witness for honesty; the existence of bias or other motive; other statements of the witness that are consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified; and the attitude of the witness toward the proceeding in which the testimony has been given.

32. The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Finally, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

33. Rivalta could not recall the incident with N.B., even after she reviewed Owens' memorandum summarizing her report and even though the incident purportedly took place on the same day as the those alleged with A.S. and E.W. Moreover, the physical interaction between respondent and N.B., which Rivalta allegedly described to Owens, had similarities to the incident she described between respondent and E.W. In both cases, Rivalta alleged respondent physically grabbed the child and forcibly sat them down in a chair. It is improbable that Rivalta could recall specifically the incident with E.W., but have no memory of a similar incident with another student that allegedly occurred a short time earlier. As there is no other direct evidence to establish this incident occurred, the allegation must be dismissed.

34. Rivalta's testimony regarding the incident with E.W. is also problematic. Rivalta testified that respondent raised E.W. by her arm until she was off the ground, then roughly sat her down in a chair. Even though E.W. was Rivalta's sole charge, she did not intervene immediately when she saw respondent purportedly handle E.W. in a rough manner. When E.W. began to cry, Rivalta walked over to her but immediately stepped away when respondent told her to leave it alone. Despite believing respondent had harmed the child, Rivalta did not report the incident to anyone that morning. Rather, she waited until the end of her shift. Rivalta is a mandated reporter, required to report immediately any instances of suspected child abuse. Despite having supposedly witnessed two incidents, very close in time to one another, wherein respondent physically manhandled two students, Rivalta did not take any action to stop the abuse nor report to anyone immediately. For these reasons, her version of events that took place that day is suspect and is not credited.

35. Finally, Rivalta's testimony regarding the dress-up incident with A.S. is contradicted by other credible evidence. Both respondent and Loboda testified that students frequently dress-up in costumes available in the classroom, and often wore costumes that were not traditionally ascribed to their presumed genders. Respondent has observed A.S. wear dresses before and did not interfere. Respondent and Loboda also both confirmed that while dress-up costumes inside the classroom were permitted and frequent, the costumes were not allowed to be taken outside. Loboda observed respondent remove the dress from A.S. Although she described it as "roughly," she did not believe respondent had crossed a line or caused harm to A.S. Loboda also never heard respondent comment that she hoped A.S. did not turn out gay. Because Loboda was lining up the children to go outside, she was in closer proximity to respondent and A.S. than Rivalta was, and would have heard the comment if respondent had made it.

36. Complainant must establish the charging allegations by clear and convincing evidence. This means the evidence must be highly and substantially more likely to be true than untrue, and the fact finder must be convinced the contention is highly probable. (*Colorado v. New Mexico* (1984) 467 U.S. 310, 315-16.) Complainant offered Rivalta's testimony only, which was too unconvincing to meet this higher bar. Therefore, the allegations regarding respondent's interactions with students A.S., E.W., and N.B. on April 16, 2019, must be dismissed.

DIAPERING INCIDENT

37. Complainant failed to introduce sufficient evidence to establish the diapering incident occurred. First, Rivalta's testimony was the only direct evidence offered regarding the event. She could not remember the name of the student nor the substitute teacher involved. She did not report the incident close in time to when it allegedly occurred, nor did she include it in her report to Owens when she reported the April 16, 2019 allegations. There was no evidence that Rivalta reported the incident at all. It was not included in the Statement of Charges brought by COE against respondent. Nor was it established how complainant learned of the allegation to include it in the Accusation. For all of these reasons, the allegation was not established by clear and convincing evidence and must be dismissed.

SLEEPING INCIDENT AND DISHONESTY

38. Complainant offered Maggard's testimony to establish that respondent was sleeping in the classroom on April 16, 2019. However, Maggard did not personally observe respondent sleeping. Nor could he recall which staff had reported the alleged incident to him, only that he thought it was someone from Kendall. Rivalta was the

only Kendall employee assigned to respondent's classroom; she did not testify at all about the sleeping incident.

39. Maggard was also the only witness who testified regarding respondent's alleged dishonesty during the COE interview. However, his testimony was inadequate to meet the clear and convincing evidence standard. First, Maggard accused respondent of lying when she denied the allegations Rivalta lodged against her. As explained earlier, Rivalta's testimony was not reliable or sufficient to establish the incidents actually occurred. Second, Maggard accused respondent of implying that Pombo had "forced" her to report to work on April 16, 2019, despite feeling sick. However, the evidence does not bear this out. The text messages respondent showed to Maggard establish that Pombo had followed up with respondent to see if she was feeling better, and that respondent confirmed she would report to work on April 16, 2019. There was no indication that respondent was forced to report to work while sick. Even if respondent had given an indication that she felt obligated to report to work that day rather than stay home sick, that does not rise to the level of dishonesty such that discipline is warranted.

40. For all of these reasons, the allegations of sleeping in the classroom and dishonesty were not established. Therefore, they must be dismissed.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proving the allegations contained in the Accusation by clear and convincing evidence. (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) "Clear and convincing evidence" requires a

finding of high probability. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re David C.* (1984) 152 Cal.App.3d 1189.)

2. Education Code section 44421 authorizes the Commission to take adverse action against a credential or certificate of one who has engaged in immoral or unprofessional conduct, persistently defied or refused to obey the laws regulating the duties of persons serving in the public school system, demonstrated evident unfitness for service or for any cause that would have warranted the denial of an application for, or a renewal of, a credential.

3. Pursuant to Education Code section 44345, subdivision (e), the Commission may deny an application for a credential if the applicant has "committed any act involving moral turpitude." The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or that is indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740.) The phrase "unprofessional conduct" is conduct such as to indicate unfitness to teach. (*Perez v. Commission On Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

4. "Evident unfitness for service" 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 professional standards. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.)⁶

5. Education code section 49001 states:

(a) For the purposes of this section "corporal punishment" means the willful infliction of, or willfully causing the infliction of, physical pain on a pupil. An amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, is not and shall not be construed to be corporal punishment within the meaning and intent of this section. Physical pain or discomfort caused by athletic competition or other such recreational activity, voluntarily engaged in by the pupil, is not and shall not be construed to be corporal punishment within the meaning and intent of this section.

(b) No person employed by or engaged in a public school shall inflict, or cause to be inflicted corporal punishment

⁶ Because complainant did not prove the charging allegations by clear and convincing evidence, it is unnecessary to discuss the *Morrison* factors regarding unfitness to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214.)

upon a pupil. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing the infliction of corporal punishment upon a pupil attending a public school is void and unenforceable.

Cause for Discipline

6. As set forth in the Factual Findings as a whole, and particularly Factual Findings 29 through 39, complainant did not establish by clear and convincing evidence that respondent engaged in the allegations listed in the Accusation. Therefore, there is no cause under Education Code section 44421 to impose discipline against respondent's permit.

ORDER

The Accusation against Cynthia Uju Simien is DISMISSED.

DATE: October 27, 2021



TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings