BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Accusation Against, RYOGO MATSUO, Respondent.	OAH No. 2013101048

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on April 20, 21, 22, and 23, 2015. The Commission consisted of Deanna Clark, Tammi DiGrazia, and Administrative Law Judge Carla L. Garrett, Office of Administrative Hearings, State of California, who presided.

Meredith Karasch, Assistant General Counsel, represented the Los Angeles Unified School District (District). Rosemary Ward and Deborah Eshaghian, Attorneys at Law, represented Respondent Ryogo Matsuo (Respondent). The parties submitted the matter for decision on April 23, 2015.

Respondent is a permanent certificated employee of the District assigned to 66th Street Elementary School (66th Street). District alleged that Respondent demonstrated unprofessional and immoral conduct (sections 44932, subdivision (a)(1) and 44939),[1] evident unfitness for service (section 44932, subdivision (a)(5)), and 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 (section 44932, subdivision (a) (7)), all arising from an allegation dating back to the 1990's, prior to Respondent becoming a teacher, that Respondent engaged in inappropriate sexual behavior in the presence of a child. District seeks Respondent's dismissal.

FACTUAL FINDINGS

1. District served Respondent with a Statement of Charges and an Accusation on September 18, 2013 and November 15, 2013, respectively, both executed by Vivian K. Ekchian, Chief Human Resources Officer, acting in her official capacity. On September 27, 2013, Respondent served his Notice of Defense.

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[1] All statutory references are to the Education Code unless otherwise noted.

2. In the summer of 1987, when Respondent was 16 years old, Respondent came to the United States from Japan as a foreign exchange student, and was housed at the home of the C[redacted] family for three weeks. The C[redacted] family consisted of J[redacted] C[redacted], who was the matriarch of the family, her husband G[redacted] C[redacted], their oldest daughter A[redacted] K[redacted], who was a teenager, their son C[redacted] C[redacted], who was six or seven-years-old, and their daughter E[redacted] "Be[redacted]" C[redacted], who was three or four-years-old. In August 1987, at the completion of his foreign exchange program, Respondent returned to Japan.

3. In April 1988, Respondent returned to the United States, but not as a foreign exchange student. Rather, Respondent returned to lived permanently with the C[redacted] family. Respondent enrolled in Alta Loma High School.

4. In July 1988, A[redacted] K[redacted] (A[redacted]) gave birth to a daughter, B[redacted] K[redacted] (B[redacted]). In April 1989, A[redacted], who had a tumultuous relationship with her mother (J[redacted] C[redacted]), moved out of the house with B[redacted]. The discord in the relationship between A[redacted] and Ms. C[redacted] stemmed, in part, from A[redacted]'s belief that Ms. C[redacted] had begun an emotional affair with Respondent. In 1990, A[redacted] and B[redacted] relocated to Iowa, where A[redacted], after completing college, became a teacher.

5. Between 1993 and 1996, when she was between the ages of five and eight-years-old, B[redacted] spent her summers in California in the C[redacted] household. During that time, B[redacted], along with other members of the household, including Respondent, often viewed movie videos in the living room. Respondent also had a television and video player in his bedroom, where he also viewed movie videos. Pursuant to the rules of the house, no children (i.e., C[redacted], Be[redacted], and B[redacted]) were permitted to enter or spend time in the bedroom of Respondent or any other foreign exchange student hosted by the C[redacted] family.

6. In 1999 or 2000, Ms. C[redacted] moved out of the house and into the home of her friend, and Respondent had moved into his own apartment. Ms. C[redacted] and Respondent then began a romantic relationship. They have maintained that relationship ever since.

7. On October 30, 2001, District offered Respondent a position as a probationary elementary school teacher, to commence on November 19, 2001, and provided Respondent with written information concerning its policies, including child abuse policies. Respondent accepted the offer and began his employ with District on November 19, 2001.

8. Prior to May 2011, when B[redacted] was 22-years-old, she reported to her life-partner during a discussion concerning family dynamics, that between 1996 and 1998, on one occasion during one of her summers in the C[redacted] household, her grandmother (J[redacted] C[redacted]) sent her into Respondent's bedroom to watch a movie with Respondent. No other family members were home. B[redacted] told her partner that she and Respondent had lain on his bed together, with B[redacted]'s back to Respondent, and that Respondent was wearing boxer shorts only. B[redacted] recounted she felt a rapid motion against her back, which she did not understand at the time, but later understood as Respondent masturbating. B[redacted] conveyed

that Ms. C[redacted] banged on the bedroom door, prompting Respondent to get up from the bed, and begin an argument with Ms. C[redacted]. B[redacted] ran down the hall into Be[redacted]'s room.

9. On May 16, 2011, B[redacted] told her mother (A[redacted]) about the masturbation incident. The news upset A[redacted], which resulted in A[redacted] disclosing the incident to her personal psychologist. A[redacted]'s psychologist, as a mandated reporter, alerted the authorities.

10. On May 17, 2011, Detective Lynn Silvey of the San Bernardino County Sheriff's Department, pursuant to a report initiated by the Child Protection Service, was assigned to investigate B[redacted]'s matter. Because B[redacted] now resided in North Carolina, Detective Silvey contacted the Charlotte Mecklenberg Police Department (CMPD) and requested one of its detectives to interview B[redacted].

11. On August 1, 2011, Detective Dave Conn of CMPD interviewed B[redacted]. During the course of the interview, which was videotaped, B[redacted] advised that Respondent would walk around the house in his boxers with an unsecured fly that exposed his genitals. Additionally, B[redacted] reported Respondent, dressed in boxers only, would encourage her to lay her head on his lap, which felt "weird and wrong" to B[redacted], as her head was so close his genitals. B[redacted] further reported the masturbation incident, and conveyed that she had not seen his penis, but, after Respondent had gotten up to argue with Ms. C[redacted], she had put her hand into something wet on the bed, which she later concluded was Respondent's semen from where he had ejaculated. B[redacted] became frightened, and ran down the hall into Be[redacted]'s room.

12. Detective Conn forwarded the videotaped interview to Detective Silvey, who reviewed it. Detective Silvey did not interview B[redacted], but concluded, based on B[redacted]'s body language and statements, B[redacted] was credible. Detective Conn did not testify at hearing.

13. At hearing, B[redacted] repeated, in essence, the same account she stated during her videotaped interview, but clarified she was not sure whether Respondent had ejaculated or not, or whether she had placed her hand in semen. B[redacted] could not state with specificity which one of the summers between 1993 and 1996 Respondent allegedly masturbated in her presence. B[redacted] felt motivated to testify against Respondent because she wanted to prevent him, as a teacher of small children, from sexually abusing any students.

14. Detective Silvey interviewed A[redacted], who, at hearing, explained that Ms. C[redacted] told her that she would only consider reconciling their tumultuous relationship if Respondent could have access to A[redacted]'s children alone, including B[redacted]. A[redacted] also reported that she had expressed previously to Ms. C[redacted], that it was wrong for Ms. C[redacted] to be engaged in a sexual relationship with Respondent. A[redacted] also stated she never got along with Respondent, mainly because of the inappropriate relationship she felt Respondent was having with her mother, who was a married woman.

15. Immediately following her interview of A[redacted], Detective Silvey conducted a "pretext" telephone call between A[redacted] and Ms. C[redacted]. During the telephone call, to which Detective Silvey listened and recorded, but said nothing, Detective Silvey prompted A[redacted] to discuss allegations B[redacted] made against Respondent. During the discussion, as stated by Detective Silvey in her September 14, 2011 report, Ms. C[redacted] did not deny that Respondent had watched a movie with B[redacted] in his bedroom, but did deny that Respondent had been physical with B[redacted]. A[redacted] asked Ms. C[redacted] whether she believed B[redacted] was lying, to which Ms. C[redacted] replied, "[T]hat's what happened in [B[redacted]'s] eyes." Detective Silvey's September 14, 2011 report also included her summary of Detective Conn's videotaped interview of B[redacted].

16. Detective Silvey concluded she had probable cause to arrest Respondent. In that regard, on September 14, 2011, Detective Silvey and other deputies from the San Bernardino Sheriff's Department, as well as Detective Ray Jordan of the Los Angeles School Police Department, entered the campus of 66th Street during school hours, located Respondent, escorted him into a room, and advised him he had engaged in lewd or lascivious acts involving a child, in violation of Penal Code section 288. The deputies handcuffed Respondent and took him to the sheriff's station. Detective Silvey questioned Respondent, who denied masturbating in the presence of B[redacted], and denied walking around the house in his boxer shorts.

17. Detective Silvey interviewed none of Respondent's past or current students. While Detective Silvey was not certain, she believed she tried to locate other potential victims through a press release issued to local newspapers that included Respondent's photograph, a description of the alleged crime, the date and time of his arrest, and a request that other alleged victims of Respondent come forward. No one came forward.

18. Detective Silvey submitted her report to the District Attorney's Office, which declined to prosecute. At hearing, Detective Silvey stated that the District Attorney's Office decline to prosecute Respondent because the statute of limitations had expired, and the facts of the case failed to fall under any exception to the statute of limitations, "because the abuse was not substantial enough." However, neither party submitted any independent evidence setting forth the District Attorney's rationale for not prosecuting the case against Respondent.

19. On September 16, 2011, the San Bernardino County Sheriff's Department released Respondent from custody. Upon his release, Respondent received a "detention certificate" from the San Bernardino County Sheriff's Department certifying that "the taking into custody of [Respondent] on 09/14/2011, by the Rancho Cucamonga [division], was a detention only, not an arrest."

20. Thereafter, the investigation file was destroyed, including the videotaped interview of B[redacted] and the pretext call recording of A[redacted] and Ms. C[redacted].

21. In January 2012, Detective Ray Jordan conducted a separate administrative investigation for the Los Angeles Unified School District, and interviewed A[redacted] and Respondent, but was not able to interview B[redacted]. Detective Jordan also interviewed students and staff members from 66th Street, who reported they had witnessed no inappropriate behavior from Respondent, and all reported they were comfortable with Respondent. Detective Jordan also talked to Detective Silvey and read her report. Detective Jordan did not testify at hearing, but rather submitted an affidavit which included an investigation report he drafted, which was comprised, primarily, of a summary of Detective Silvey's report. Detective Jordan noted in his report that Respondent remained consistent in his denial of the allegations leveled by B[redacted], and stated Respondent had no prior criminal history and no complaints or disciplinary records in his personnel file.

22. At hearing, Respondent continued to deny B[redacted]'s allegations, and contended he never engaged in inappropriate activity with B[redacted], and did not walk around the house in his boxer shorts, except when walking a few feet from his bathroom after a shower to his adjacent bedroom, after ensuring no one was in the hallway to see him. Respondent also denied ever directing B[redacted] to place her head in his lap while he wore boxer shorts. Ms. C[redacted] and her son, C[redacted], corroborated Respondent's statements at hearing. Specifically, neither Ms. C[redacted] nor C[redacted] witnessed Respondent walk around the house wearing only his boxer shorts, and never witnessed Respondent with B[redacted]'s head on his lap. Additionally, both reported the house rules prohibited children from going into Respondent's bedroom or into the bedroom of any foreign exchange students the C[redacted] family had hosted over the years. Additionally, Ms. C[redacted] denied sending B[redacted] into Respondent's room to watch a movie, and denied that she would reconcile her relationship with A[redacted] only if A[redacted]'s children, including B[redacted], could spend alone time with Respondent. Neither Ms. C[redacted] nor C[redacted] has maintained a relationship with A[redacted] or B[redacted] because of the allegations they have leveled against Respondent.

23. On May 11, 2012, the California Commission on Teacher Credentialing (CTC) sent Respondent a leter advising that it was conducting an investigation into the allegations made by B[redacted]. On May 30, 2012, Respondent sent CTC a letter stating that the allegations leveled against him were false, and that he had not been arrested or charged with any crime. Rather, as Respondent explained in his letter, he had been detained, questioned, and then released. On July 25, 2012, the CTC sent Respondent a letter stating that it had closed its investigation and would recommend no adverse action at this time.

24. On January 8, 2013, District issued Respondent a notice of unsatisfactory acts and a notice of suspension as a result of the allegations leveled by B[redacted].

25. On January 16, 2013, Dr. James Noble, who served as District's Administrator of Operations and Skelly respondent, sent Respondent a letter advising that he had scheduled a meeting with Respondent for January 30, 2013 to discuss Respondent's possible dismissal and immediate suspension. Dr. Noble indicated in the letter that following the meeting, he would recommend whether or not District should move forward with Respondent's dismissal. On January 27, 2013, Respondent sent Dr. Noble a letter stating, among other

things, the allegations were false, and that the District Attorney's Office had rejected the case because there was no evidence to support the allegations.

26. On February 14, 2013, after meeting with Respondent and his representative on January 30, 2013, Dr. Noble sent Respondent a letter stating that he had carefully considered the matter, including statements made by Respondent and letters submitted by Ms. C[redacted] and C[redacted] asserting the allegations leveled against Respondent were false. Dr. Noble concluded he would uphold the recommendation for immediate suspension. At hearing, Dr. Noble explained that he had reached that conclusion because Respondent had been accused of an act, which had "later been found credible." Dr. Noble found compelling that B[redacted] had nothing to gain by making the allegations against Respondent. Additionally, he found B[redacted] credible because she gave a very detailed account. Dr. Noble considered the fact that Respondent was teaching children in the same age range as B[redacted] was when Respondent had allegedly engaged in inappropriate acts in her presence. Dr. Noble added that had the crime been reported properly when it happened, Respondent would have never become a teacher.

Character Testimony

27. Twenty-nine staff members from 66th Street signed an undated document in support for Respondent. Specifically, the document stated they had worked with Respondent for many years, and in their daily interactions and observations, had at no time witnessed inappropriate conduct with any students. The document further stated that they had observed Respondent to be responsible, caring, and professional at all times, and they were "outraged and appalled by the false accusations that were made against him." While it is unclear the basis underlying the following statement, "It is our understanding that these erroneous accusations have been proven false by the authorities," the document stated that the staff members were standing by Respondent "with unwavering confidence that he will be reinstated to his rightful position within the district."

28. One of the staff members, Sonsere Taylor, who is a fourth grade teacher, testified at hearing. Ms. Taylor, who has been employed with District for 16 years, has known Respondent for nine years, and had found him to be very professional, concerned about the education of students, honest, and focused. Ms. Taylor believes the allegations leveled against Respondent are false, based on the professional behavior she has witnessed in Respondent.

29. Julia Lynn Olsen served as a character witness, who has been employed as a teacher with the Alta Loma Unified School District for the last 18 years. Ms. Olsen met Respondent through her friend Ms. C[redacted] in the late 1980's, when Respondent was a foreign exchange student. Her son, who was three or four-years-old when she first met Respondent, has spent a substantial amount of time with Respondent over the years, because they share a mutual interest: computers. She has never felt hesitant about her son spending time with Respondent, and her son has never expressed that he has felt uncomfortable with Respondent. Additionally, Ms. Olsen had an opportunity to observe Respondent in a

professional setting when he served as a student teacher at the same elementary school in which Ms. Olsen worked. Ms. Olsen found Respondent to be very engaging with the students and demonstrate a great demeanor with the children. Ms. Olsen disbelieves the allegations leveled against Respondent, and believes Respondent has upstanding character, and is extremely direct and truthful.

30. C[redacted] C[redacted] also served as a character witness. Mr. C[redacted] has never known Respondent to lie, and has always felt comfortable allowing his own children to interact with Respondent without supervision.

Credibility Findings[2]

31. The Commission concluded that B[redacted] believed that Respondent had engaged in the acts that she had described, given her straight-forward demeanor when testifying, and her detailed account of the events. However, the Commission identified problems with her credibility, given the more than two decades it took her to raise the allegations, the lack of specificity concerning the summer in which Respondent had allegedly committed the act of masturbation in her presence, and the retraction of her statement that Respondent had ejaculated.

32. A[redacted] and Ms. C[redacted], who both admitted they did not have a positive relationship with each other, offered diametrically opposed testimony. Specifically, A[redacted] asserted and testified, among other things, that Ms. C[redacted] had told her the only way she would consider reconciling their tumultuous mother-daughter relationship is by permitting Respondent to have alone time with A[redacted]'s children, including B[redacted]. Ms. C[redacted] emphatically denied A[redacted]'s claim. Arguably, both had motive for presenting their respective accounts. Specifically, A[redacted], who admittedly did not like Respondent because of what she perceived as his improper romantic relationship with Ms. C[redacted], could have offered the testimony to help ensure Respondent would be disciplined. Such a result would also hurt Ms. C[redacted], because she is, and has been, in love with Respondent for a number of years. For that same reason, Ms. C[redacted] had a motive to provide testimony which supported Respondent. For these reasons, the Commission considered the testimony from each on this point equally unpersuasive.

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[2] In this matter, the Commission evaluated the credibility of the witnesses pursuant to the factors set forth in Evidence Code section 780: 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 which 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. The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

33. The Commission found credible Respondent's testimony asserting he did not commit any of the acts alleged by B[redacted], given the clear, straight-forward, unequivocal manner in which he testified. Additionally, C[redacted]'s testimony, which the Commission found credible, as well as the testimony of Ms. C[redacted], corroborated Respondent's testimony that he did not walk around the house wearing his boxer shorts only. Detective Silvey's testimony and Detective Jordan's affidavit and report supported the notion that Respondent did not have the propensity for engaging in sexual acts with a child, because no one came forward in response to the press releases likely issued by Detective Silvey, and no student or staff member advised Detective Jordan that Respondent had engaged in inappropriate conduct. Additionally, the Commission found compelling that Respondent was neither charged nor convicted of any crime, and found problematic that the evidence the Commission could have used to evaluate the veracity of the statements made by B[redacted], A[redacted], and Ms. C[redacted] in the presence of law enforcement, had been destroyed.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The "burden of proof" means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) The burden of proof in this proceeding is thus on District to prove the charging allegations.

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

3. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Sections 44932, 44934, and 44944.)

4. Under section 44944, subdivision (b), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district, and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

5. When a school board recommends dismissal for cause, the Commission may only vote for or against it. Likewise, when suspension is recommended, the Commission may only vote for or against suspension. The Commission may not dispose of a charge of

dismissal by imposing probation or an alternative sanction. (Section 44944, subdivision (c)(1)(3).)

6. Section 44932 provides in part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] . . . [¶]

(5) Evident unfitness for service.

[¶] . . . [¶]

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.
[¶] . . . [¶]

7. Unprofessional conduct as used in Education Code, section 44932, subdivision (a)(1), may be defined as conduct that violates the rules or ethical code of a profession or is unbecoming a member of a profession in good standing. (*Board of Ed. v. Swan* (1953) 41 Cal.2d 546, 553, overruled in part, on another ground, in *Bekiaris v. Board of Ed.* (1972) 6 Cal.3d 575, 588, fn. 7.)

8. The term "immoral conduct" has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

9. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "'Evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Id.*)

10. Even where immoral conduct or evident unfitness for service are established, it must also be established that such immoral conduct or evident unfitness renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-

230 (*Morrison*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*); *Woodland, supra,* 4 Cal.App.4th at 1444-1445.) In *Morrison*, the California Supreme Court set forth guidelines (8 factors) to aid in determining whether the conduct in question indicates such unfitness:

(1) The likelihood that the conduct may have adversely affected students, fellow teachers, or the educational community, and the degree of such adversity anticipated

(2) The proximity or remoteness in time of the conduct

(3) The type of credential held by the person involved

(4) The extenuating or aggravating circumstances surrounding the conduct

(5) The praiseworthiness or blameworthiness of the motives resulting in the conduct

(6) The likelihood of the reoccurrence of the questioned conduct.

(7) 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.

(8) The publicity or notoriety given to the conduct

11. Not all "*Morrison* factors" need be present for the *Morrison* test to be satisfied. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.)

12. "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 her," which concerns Education Code, section 44932, subdivision (a)(7), requires a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.)

13. Section 44932, subdivision (b) provides that a district may suspend a permanent employee without pay for a specific period of time if it follows the same procedures as for dismissal of a permanent employee.

14. Section 44939 provides in part:

> Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, . . . with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, . . . the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

15. Section 44944, subdivision (a)(5), which sets forth a four-year statute of limitations, states: "No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice."

16. This language was interpreted as not creating an absolute bar to accepting earlier evidence in *Atwater Elementary School District v. California Department of General Services* (2007) 41 Cal.4th 227 (*Atwater*). In that case the Administrative Law Judge had granted the teacher's objections to evidence outside of the four-year period, and no such evidence was permitted. The school district contended that four different equitable doctrines could operate to extend the four-year rule: equitable tolling, equitable estoppel, fraudulent concealment, and delayed discovery. The Supreme Court determined it was not necessary to examine all four doctrines, because the "conclusion that any one applies resolves whether the four-year time limitation is absolute." (*Id.*, p. 232.) The Supreme Court focused on the doctrine of equitable estoppel and concluded that, "because equitable estoppel is 'wholly independent' of section 44944(a)'s time limitation, it could be relied upon to prevent a defendant from asserting the statutory bar." (*Ibid.*) The four-year time limitation is not absolute. "[I]f the district were able to meet the requirements of equitable estoppel, it could have been allowed to introduce evidence of, and base its dismissal proceedings on, incidents falling outside the four-year window." (*Id.*, p. 233.)

17. In the instant matter, Respondent's Motion in Limine No. 4 seeking to exclude evidence beyond the four-year period was denied, and District was permitted to submit evidence preceding September 2011, because the doctrine of equitable estoppel applied. *Atwater* described this doctrine as operating when the circumstances justify preventing, or estopping, a party from asserting a time limit because his conduct has induced another into not making a claim within that time limit. The doctrine "'takes its life ... from the equitable principle that no man [may] profit from his wrongdoing in a court of justice.'" (*Atwater, supra,* 41 Cal.4th at 232, quoting *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.)

"'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citation.]" (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 257.)

18. Here, District alleged in its Accusation the four elements of equitable estoppel. Specifically, District alleged (1) Respondent engaged in inappropriate conduct with B[redacted] K[redacted] in or about 1993 to 1996, when B[redacted] was five to eight-years-old; (2) Respondent intended to engage in such misconduct in the presence of a child, arguably too young to understand the nature of Respondent's actions; (3) District did not learn of the misconduct until September 2011, after B[redacted] disclose the alleged misconduct to her mother, who, in turn, reported the acts to a mandated reporter; and (4) District, unaware of Respondent's previous misconduct, hired him as a teacher. For those reasons, District was permitted to present evidence predating the four-year statutory period.

19. Despite this, District failed to sustain its burden of establishing by a preponderance of the evidence that Respondent committed the acts alleged in the Accusation. On balance, as set forth in Factual Findings 2 through 33, District's evidence, namely the testimony of its witnesses, was not more persuasive than the ones presented on Respondent's behalf, including Respondent. In a he-said, she-said matter such as this, where the credibility of the percipient witnesses was key, District failed to demonstrate that Respondent made a practice of walking around the house in his boxer shorts, had B[redacted] lay her head in his lap, and, on one occasion, masturbated in B[redacted]'s presence.

20. Based on the foregoing, District failed to demonstrate Respondent engaged in unprofessional conduct (section 44932, subdivision (a)(1)), immoral conduct (sections 44932, subdivision (a)(1) and 44939), evident unfitness for service (section 44932, subdivision (a)(5)),and persistent violation of or refusal to obey reasonable regulations (section 44932, subdivision (a) (7)). Accordingly, District's Accusation shall be dismissed.

21. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The court concluded that a teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness. However, as it has been determined that the conduct was not proven as alleged, it is not necessary to discuss the "*Morrison* factors" as they relate to that conduct.

ORDER

The Accusation is dismissed.

DATED: May 26, 2015

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: May __, 2015

DEANNA CLARK
Commission Member

DATED: May __, 2015

TAMMI DI GRAZIA
Commission Member

ORDER

The Accusation is dismissed.

DATED: May __, 2015

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: May 26, 2015

DEANNA CLARK
Commission Member

DATED: May __, 2015

TAMMI DI GRAZIA
Commission Member

ORDER

The Accusation is dismissed.

DATED: May __, 2015

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

DATED: May __, 2015

DEANNA CLARK
Commission Member

DATED: May 26, 2015

TAMMI DI GRAZIA
Commission Member