

BEFORE THE COMMISSION ON PROFESSIONAL COMPETENCE
OAKDALE JOINT UNIFIED SCHOOL DISTRICT
COUNTY OF STANISLAUS
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension
and Dismissal of:

OAH No. 2011020428

DON SPALDING,

A Permanent Certificated Employee,

Respondent.

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Oakdale Joint Unified School District on April 4, 5, and 6, 2011, in Oakdale, California. The Commission included Tracy Manzoni, Robert Ackerman, and Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, presiding.

Peter Sturges, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Oakdale Joint Unified School District (District).

Don Spalding (respondent) appeared without counsel.

Evidence was received, the hearing was closed, and the record was held open for the submission of briefs. The District's Post Hearing Brief was received on April 7, 2011, and was marked as Exhibit 36. Respondent's Brief was received on April 7, 2011, and was marked as Exhibit A. The record was closed and the matter was submitted for decision on April 7, 2011. The Commission met in executive session on April 8, 2011.

SUMMARY

The District sought to immediately suspend and dismiss respondent from his employment as a school psychologist pursuant to Education Code section 44932, subdivisions (a)(1), unprofessional conduct; (4), unsatisfactory performance; (5), evident unfitness for service; and/or (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.¹ The District's action was based upon respondent's unexcused absenteeism, tardiness, repeated failure to advise the District of his whereabouts, failure to complete assessments in a timely manner, failure to complete assessments in accordance with professional standards, failure to attend required meetings, and failure to safeguard the confidentiality of student records. The evidence presented amply supported respondent's dismissal from employment by the District; however, the District failed to establish grounds for immediate suspension under section 44939. Therefore, respondent's dismissal is upheld, but respondent is entitled to back pay and benefits from the date of his immediate suspension, on January 25, 2011, to the date of this Decision.

FACTUAL FINDINGS

Procedural Issues and Jurisdiction

1. On January 24, 2011, Marc Malone, Assistant Superintendent, Human Resources, filed a Statement of Charges against respondent, which was approved by the District Board of Education in its Resolution of Intention to Dismiss a Permanent, Certificated Employee (Resolution No. #10-11-07) on January 24, 2011. Mr. Malone, on behalf of the District, served a Notice of Intention to Dismiss a Permanent, Certificated Employee on respondent on January 25, 2011 (Notice of Intent). The Statement of Charges and Resolution No. #10-11-07 were attached to the Notice of Intent. Also included with the Notice of Intent was a letter dated January 25, 2011, from Mr. Malone to respondent, notifying him of the recommendation that he be immediately suspended and terminated based on the Statement of Charges, and advising him of his right to respond to the charges in a meeting with District Superintendent Fred Rich, or in writing. Respondent was placed on unpaid leave as of January 25, 2011. On February 4, 2011, respondent signed a Request for Hearing in accordance with section 44934. On February 10, 2011, Superintendent Rich filed an Accusation against respondent, which attached and incorporated by reference the Statement of Charges, Resolution No. #10-11-07, and the Notice of Intent. Respondent did not file a Notice of Defense. The District filed an Amended Motion for Entry of Default (Motion) against respondent dated March 9, 2011. The Commission considered the Motion at the commencement of the hearing on April 4, 2010. The Commission exercised its discretion under Government Code section 11506, subdivision (c), to grant a hearing despite respondent's failure to file a Notice of Defense, and the matter proceeded to hearing.

2. The Statement of Charges against respondent states, in part:

TO THE GOVERNING BOARD OF THE OAKDALE JOINT
UNIFIED SCHOOL DISTRICT:

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

Pursuant to the provisions of Education Code section 44934, the undersigned hereby files this Statement of Charges with the Governing Board of the Oakdale Joint Unified School District against Don Spalding (“Respondent”), a permanent certificated employee of Oakdale Joint Unified School District (“District”). The undersigned is informed and believes and on that basis alleges that the matters stated herein are true. The undersigned charges Respondent with the following grounds for immediate suspension and dismissal of a permanent employee under Education Code section 44932:

1. Immoral/Unprofessional Conduct (Ed. Code, § 44932(a)(1).)
2. Evident unfitness for service (Ed. Code, § 44932(a)(5).)
3. Unsatisfactory Performance (Ed. Code, § 44932(a)(4).)
4. 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. (Ed. Code, § 44932(a)(7).)

The specific instances of behavior and acts or omission supporting the charges are set forth below. . . .

3. Resolution No. #10-11-07 recites the fact that Assistant Superintendent Malone “filed with the Board of Education (‘Board’) a Statement of Charges, alleging that cause exists for the immediate suspension and dismissal of Don Spalding (‘Respondent’) . . .” and further states, in part:

WHEREAS, the Board deems it necessary to give notice to Respondent of its intention to dismiss him at the expiration of 30 days from the date of service of the notice, unless within such 30-day period he demands a hearing;

NOW, THEREFORE, BE IT RESOLVED THAT:

1. Respondent shall be notified that he will be dismissed from service as a certificated employee of the District at the expiration of 30 days from service of the notice unless within such 30-day period he demands a hearing by filing a written request for hearing with the Board.

[¶] . . . [¶]

4. The Notice of Intent states, in pertinent part:

TO: Don Spalding, A Permanent, Certificated Employee
Of the Oakdale Joint Unified School District

YOU ARE HEREBY NOTIFIED THAT:

1. On January 24, 2011, a Statement of Charges was filed with the Governing Board of the Oakdale Joint Unified School District (“District”) alleging that cause exists for dismissing you as a permanent, certificated employee of the District. A copy of the Statement of Charges is attached to this Notice and incorporated herein by reference.

2 On January 24, 2011, the District Governing Board adopted a Resolution of Intention to Immediately [sic] Dismiss a Permanent, Certificated Employee, a copy of which is attached to this Notice and incorporated herein by reference.

3. You will be dismissed from service at the expiration of thirty (30) days from the date of service of this Notice, unless within such thirty (30) day period you demand a hearing by filing a written request for a hearing with the District Governing Board.

[¶] . . . [¶]

5. The Accusation states, in pertinent part:

[¶] . . . [¶]

7. Upon receipt of Respondent’s demand for hearing, and in accordance with the direction of the District Board of Trustees, this Accusation is filed charging that there exists cause for the immediate suspension without pay and for the dismissal of Respondent as a permanent, certificated employee of the District *as set forth in the Statement of Charges and its exhibits (attached hereto as Exhibit A), Notice of intention to Dismiss (attached hereto as Exhibit B), and Resolution of Intention to Dismiss (attached hereto as Exhibit C), which charges are hereby incorporated by reference and*

made a part of this Accusation document as though fully set forth herein.

WHEREFORE, the undersigned prays that a Commission on Professional Competence be convened pursuant to the California Education Code, that the Commission hear this matter, that the Commission render a decision against Respondent, finding that the charges or any of them against Respondent are true, as herein set forth, and that the charges or any of them constitute sufficient grounds for the immediate suspension and dismissal of the Respondent as a certificated employee, and order the Respondent be dismissed pursuant to Education Code sections 44939 and 44944.

(Italics added.)

Background

6. Respondent graduated with a Bachelor of Arts degree in psychology from the University of California at Santa Barbara. He has a Master's degree in clinical and counseling psychology from California State University, Stanislaus, and is currently enrolled in a Doctoral program in school psychology and school counseling at the University of the Pacific. Respondent holds pupil personnel services credentials in school psychology and school counseling. He has worked for the District as a school psychologist since 1997.

7. Respondent was primarily assigned to work with students in grades 9 through 12 at Oakdale High School (OHS), East Stanislaus Continuation High School (East Stanislaus), Valley Oak Independent Study High School (Valley Oak), and Charter High School (Charter). Respondent also provided psychological testing/assessment services to students at East Valley Education Center (EVEC), a nonpublic school serving emotionally disturbed students. Respondent's primary duties at the District's high schools were to assess students for special education eligibility, and to participate in Individual Education Plan (IEP) meetings to help identify services and supports for students qualifying for special education services. Respondent was also available to provide mental health support for students (counseling and crisis intervention), so long as those activities did not interfere with his primary duties, i.e. assessments/testing, eligibility determinations, report-writing, and attendance at IEP meetings.

8. Since 2007, respondent's office has been located at OHS, which was considered to be his primary worksite. Respondent's duties required him to travel to other assigned school sites to perform assessments and attend IEP meetings. East Stanislaus and Valley Oak are located across the street from OHS.

9. Larry Mendonca is the Director of Pupil Services for the District. His duties include oversight of special education programs and services. In that capacity, Mr.

Mendonca has supervisory responsibility for personnel providing special education services, including respondent. Tracy Jakubowski is the District's Special Education Program Specialist. Her administrative responsibilities include facilitation of IEP meetings, and determination of appropriate placement and programming for District students. As a District administrator responsible for special education programming, she had some supervisory responsibilities over certificated staff providing special education services, including respondent.

10. Mike Riley is the principal of alternative education for the District (East Stanislaus, Valley Oak, and Charter). Mike Moore is the principal of OHS. Michael Tambini and Diana Crofts are vice principals at OHS. As site administrators, all of these individuals had some supervisory responsibilities for certificated staff working at their school sites, including respondent.

11. Mr. Mendonca previously served as a vice principal at OHS for the 2005-2006 school year. Ms. Crofts became a vice principal at OHS in 2006, after Mr. Mendonca assumed his responsibilities as Director of Pupil Services. In her capacity as a site administrator at OHS, Ms. Crofts was responsible for completing respondent's performance evaluations.

2009 Evaluation

12. Ms. Crofts completed an evaluation of respondent during the 2008-2009 school year. She filled out a Classroom Observation Form for respondent on January 23, 2009, indicating that she observed him from 10:19 a.m. to 11:30 a.m., while he reviewed files from EVEC and Charter. Under "Specific areas suggested for improvement," Ms. Croft stated: "Continue to work with the other members of the special education staff to form a functional working relationship with them." Ms. Crofts filled out a Certificated Evaluation Summary (2009 Evaluation) on January 23, 2009. Ms. Crofts rated him as "Meets and/or exceeds District expectations" in the following areas:

ENGAGING & SUPPORTING ALL STUDENTS IN LEARNING

[¶] . . . [¶]

Comments: Mr. Spalding is able to engage students; he has had the opportunity this year to counsel students with various issues. He has been willing to meet with those students when they are in an emotional crisis.

UNDERSTANDING & ORGANIZING SUBJECT MATTER FOR STUDENT LEARNING

[¶] . . . [¶]

Comments: Mr. Spalding is very knowledgeable in his subject matter.

PLANNING INSTRUCTION & DESIGNING LEARNING EXPERIENCES FOR ALL STUDENTS

[¶] . . . [¶]

Comments: Mr. Spalding is very genuine in helping the students to develop goals for themselves.

DEVELOPING AS A PROFESSIONAL EDUCATOR

[¶] . . . [¶]

Comments: Mr. Spalding strives to keep abreast of current trends in Special Education. He actively participates in staff, in-service meetings, and professional growth opportunities as they arise.

ASSESSING STUDENT LEARNING

[¶] . . . [¶]

Comments: Mr. Spalding must be more careful in performing his job and refrain from writing reports without parent permission.

13. Ms. Crofts rated respondent as “Needs to improve to meet District expectations” in the following area:

CREATING & MAINTAINING EFFECTIVE ENVIRONMENTS FOR STUDENT LEARNING

[¶] . . . [¶]

Comments: Mr. Spalding has had a difficult time effectively interacting with other employees, thereby adversely impacting the efficiency of the Special Education department at Oakdale High School. You are expected to maintain a courteous and supportive working relationship with co-workers to avoid negatively impacting the efficiency of the Special Education department and staff morale.

14. Ms. Crofts recommended respondent for continued employment. Under “SUGGESTION(S) TO ENHANCE STUDENT LEARNING,” she stated:

1. Continue to follow the Student Conduct Code
2. Your employment with the district necessitates that you be present and perform your job so as not to unduly disrupt or adversely impact the efficient operations of the district. You are expected to be here when students are in session from 7:40 a.m. to 2:05 p.m.

15. The 2009 Evaluation and the Classroom Observation Form were signed by respondent and Ms. Crofts on April 6, 2009, after a follow-up conference on that date.

Personal Issues Affecting Respondent

16. Respondent was dealing with personal issues in 2010 and 2011 which had an impact on his job performance and attendance. Respondent was involved in contentious divorce proceedings. Respondent sustained a job-related shoulder injury, which required several surgeries. He underwent surgery in the spring of 2010, and did not return to work for the remainder of the school year. Respondent returned to full duty for the 2010-2011 school year.

Attendance Issues at the Start of the 2010-2011 School Year

17. Pete Simoncini teaches psychology and advanced placement (AP) psychology at OHS. Mr. Simoncini scheduled respondent to speak to his first period psychology class, and his second and fifth period AP psychology classes, on Thursday, August 19, 2010. Respondent had been making such presentations annually in Mr. Simoncini’s classes since the fall of 2001, discussing general psychology issues and responding to student questions about psychology.

On the morning of August 19, 2010, shortly before the start of first period, respondent telephoned Mr. Simoncini indicating that he could not be present at the first period psychology class because respondent “had to work an issue pertaining to a family checking account.” Respondent came and addressed the second and fifth period AP psychology classes and, according to Mr. Simoncini, “did a very good job.” Respondent assured Mr. Simoncini that he would address his first period psychology class on Friday, August 20, 2010. However, on the morning of August 20, 2010, shortly before the start of first period, respondent telephoned the OHS office indicating that he could not be present at Mr. Simoncini’s first period psychology class because respondent “had to repair something pertaining to his garage door.”

Respondent’s failure to appear for Mr. Simoncini’s first period psychology class two days in a row caused stress to Mr. Simoncini, who had to create a last-minute lesson for the

class. Respondent's excuses for failing to attend the first period class were not work related. His conduct was unprofessional, and demonstrated unsatisfactory performance of his duties as a school psychologist.

18. During the first week of September 2010, respondent did not report to work at OHS at his scheduled time on at least three occasions, as set forth below:

A. On September 1, 2010, respondent arrived at work at 12:07 p.m. Respondent was supposed to report to work at 7:40 a.m., and he failed to call in sick to work prior to the beginning of the school day. No one could find respondent at his desk, and respondent did not check in with anyone on campus when he arrived at work. One of the special education teachers was looking for respondent and could not locate him. Respondent never provided any excuse as to why he reported to work more than four hours late on that day.

B. On September 2, 2010, respondent arrived at work at 9:36 a.m. Again, respondent did not provide an excuse as to why he reported to work almost two hours late.

C. On September 3, 2010, respondent did not show up for work at all, and respondent did not call in to report his absence.

First Warning Re: Absences/Tardiness/Failure to Report his Whereabouts

19. Ms. Crofts, spoke to respondent about his absences when he returned to work on Monday, September 6, 2010. During this meeting, Respondent blamed his absences on personal excuses, mainly on issues that he was having related to his divorce. Respondent did not provide any acceptable excuses for his absences. Ms. Crofts reiterated that respondent needed to be at work on time.

20. On September 7, 2010, Ms. Crofts gave respondent a warning letter regarding his poor attendance. Ms. Croft's letter indicated that respondent's tardiness and absences negatively impacted the special education department by preventing the department from getting IEP re-evaluations completed in a timely manner. Respondent was directed to call the principal's secretary, Jan Alstad, to report his absences if he was sick or running late, and to notify Ms. Alstad if his services were needed at another school site. He was also directed that, if he was not sick, he must request a personal necessity day by filling out the proper documentation and obtaining prior approval from the principal, Mr. Moore. Ms. Croft's letter indicated that respondent's employment with the District necessitated that he be present daily and perform his job so as not to unduly disrupt or adversely impact the efficient operations of the District. Ms. Croft stated that respondent was "expected to work a professional day." He had previously been informed of the District's expectation that he be present at school from 7:40 a.m. to 2:05 p.m. in his 2009 Evaluation (Finding 14).

21. Rosie Ortiz is the bilingual school secretary at OHS. Ms. Crofts directed Ms. Ortiz and Ms. Alstad, the principal's secretary, to document respondent's attendance, including telephone calls from respondent when he was going to be late or absent. Ms. Ortiz

kept a written log, in which she recorded respondent's statements to her when he called in to report absences or tardies. Ms. Alstad also kept notes of her conversations with respondent.

Respondent's Conduct Did Not Improve after September 7, 2010 Warning

22. Despite having received a written warning on September 7, 2010, respondent continued to fail to report to work as required at 7:40 a.m. Respondent was tardy or absent on the following dates:

A. On September 9, 2010, respondent arrived at work at 8:49 a.m.

B. On September 10, 2010, respondent called at 7:56 a.m., and informed Ms. Ortiz that he was running late. He informed Ms. Ortiz that he would leave his home in 20 minutes and stop by the District office before coming to OHS. Respondent arrived at OHS at 9:32 a.m.

C. On September 13, 2010, respondent called Ms. Ortiz at 8:09 a.m. to say that he was running late. At 8:39 a.m., respondent spoke to Ms. Alstad and said he was on campus.

D. On September 14, 2010, respondent called Ms. Ortiz at 8:06 a.m. and stated he was running late, because "his dogs are out lose [sic]." He called again at 8:19 a.m. to say he was leaving his house because "he was just now able to get his dogs in." His exact arrival time was not established by the evidence.

E. On September 21, 2010, respondent did not report for work and did not call OHS to say he would be absent.

F. On September 22, 2010, respondent called Ms. Ortiz at 8:15 a.m. and stated that he was running late and would arrive at OHS in five minutes. His exact arrival time was not established by the evidence.

23. On Monday, September 20, 2010, respondent spoke to Ms. Ortiz at 7:34 a.m. He notified her that was "heading to E. Valley [EVEC] for a home visit," and was hoping to be at OHS by 9:30 a.m. Respondent did report to OHS at 9:30 a.m. However, when Ms. Crofts contacted Luca Oliveri at EVEC on September 20, 2010, Mr. Oliveri said that no one at EVEC had seen Respondent that day. EVEC could not confirm respondent's whereabouts.

24. On Tuesday, September 21, 2010, Respondent did not report to work and did not call in to OHS to report his absence or let the District know where he was. Ms. Crofts called Mr. Oliveri at EVEC again looking for respondent, and she was told that respondent called EVEC at approximately 9:00 a.m., indicating that he would be working from home for the remainder of the day. Respondent was required to report his whereabouts to Ms. Alstad or Ms. Ortiz, not EVEC. Director of Pupil Services Larry Mendonca, OHS Principal Mike Moore, and Assistant Superintendent of Human Resources Marc Malone all contacted respondent by telephone that day to discuss his whereabouts. When asked why he did not

report to work, respondent gave some personal reasons for his absences related to his divorce that were unrelated to work. Respondent also told Mr. Mendonca that he had made a visit to the home of student B.D. to talk to B.D.'s parents about B.D. and B.D.'s younger sibling. Respondent was told by Mr. Moore, and Mr. Malone that his excuses were not acceptable. Moreover, Respondent was told that he was not permitted, nor had he ever been permitted, to work from home.

September 21, 2010 Letter of Reprimand

25. As a result of respondent's absences on September 20, 2010, and September 21, 2010, Ms. Crofts issued respondent a letter of reprimand dated September 21, 2010. Ms. Crofts met with respondent to discuss this letter on September 22, 2010. Ms. Crofts reviewed the directives that were set forth in the September 7, 2010 letter of reprimand that she issued to respondent, including the requirements that respondent "work a professional day;" that he call Ms. Alstad to report his absences; that he let Ms. Alstad know if his services were needed at another school; and that he request personal necessity days in advance if his absences were not due to illness. In the September 21, 2010 letter, respondent was given the following additional instructions:

Effective immediately, you are directed to sign in each day at Oakdale High School by 7:40 a.m. with the principal's secretary. You will be docked a sick day for today's absence. As a school psychologist you are needed daily at the school site, you are not to work from home. Any and all home visits are required to be pre-approved by an administrator.

As Ms. Crofts re-reviewed these directives with respondent, he indicated that he had already been "lectured" on this topic by three people the day before (Mr. Mendonca, Mr. Moore, and Mr. Malone). Respondent signed the letter of reprimand, confirming that he received it, writing in part, that he "will take this matter to the top, Cal State Labor Commissioner . . ."

Respondent's Conduct Did Not Improve After September 21, 2010 Letter of Reprimand

Absenteeism /Tardiness/Failure to Report to OHS Office

26. Despite the continued admonitions and directives of District administrators on September 21 and 22, 2010, respondent was tardy or absent, or failed to advise the principal's secretary of his whereabouts, as set forth below:

A. On September 23, 2010, respondent called Ms. Ortiz at 7:50 a.m. and stated that he was "on his way here to OHS." His exact arrival time was not established by the evidence.

B. On September 24, 2010, respondent called Ms. Ortiz at 7:53 a.m. and stated that he was still at home getting ready for work. He further stated that he had an appointment with student B.M. and Ms. Crofts. Respondent arrived at OHS at 8:46 a.m.

C. On September 27, 2010, respondent arrived at OHS at 7:48 a.m.

D. On September 28, 2010, respondent called Ms. Ortiz at 7:40 a.m. to say he was experiencing muscle spasms and cramps in his right shoulder and would not be able to come to work. As a result, he was not able to complete the evaluation of student B.M.

E. On September 30, 2010, respondent called Ms. Alstad at 7:45 a.m. and said that he was not coming to work. He stated that he would finish the evaluation of student B.M. "tomorrow."

F. On October 1, 2010, respondent arrived at OHS at 8:00 a.m.

G. On October 4, 2010, respondent arrived at work at 8:20 a.m.

H. On October 5, 2010, respondent arrived at OHS at 8:23 a.m. He did not call the OHS office to notify Ms. Alstad that he was going to be late. Respondent left for lunch at 11:11 a.m., and did not return from lunch until 1:05 p.m. Respondent did not notify Ms. Alstad or any of the vice principals that he would be off campus for lunch for more than approximately two hours.

I. On October 6, 2010, respondent called at 7:50 a.m. and stated that he overslept. Respondent did not arrive at OHS until 1:25 p.m. Respondent failed to notify Ms. Alstad, or anyone else at OHS, that he would be coming into work approximately five and one-half hours late.

October 6, 2010 Verbal and Written Warning

27. Ms. Crofts and Vice Principal Michael Tambini met with Respondent at 3:15 p.m. on October 6, 2010, in an attempt to obtain an explanation from Respondent regarding his extreme tardiness. Respondent stated that he had thrown up on himself twice trying to get to work that day. Respondent indicated that his wife had put raw meat in the cupboard that was rotting. Respondent also indicated that his wife had unplugged his refrigerator, making all of his food spoil. Respondent stated that the police had been at his house regarding a domestic dispute between him and his wife and that his health was failing. Respondent also said that he had been taking work-related phone calls at home from a neurologist with regard to a student that day. Ms. Crofts reiterated, both verbally and in a follow-up email, the directives she has already given Respondent regarding reporting to work and his work schedule. Specifically, Ms. Crofts again gave Respondent the following directives:

You will sign in daily as you arrive at work.

You are to be here by 7:40 each day.

You will let either the Principals [sic] secretary or one of the Vice Principals know if you are going to be late or are going off campus for an extended amount of time.

You will be docked sick time for your absence today.

Respondent's Conduct Did Not Improve After October 6, 2010 Written and Verbal Warning

28. On October 7, 2010, Respondent called OHS at 7:50 a.m., ten minutes after he was supposed to have reported to work, and spoke to Ms. Crofts. Respondent stated that he could not move his hands and that he had aches and pains in his shoulders. Respondent stated that he would try to get to work when he could. Respondent also spoke about not having money and said that his wife was "taking everything." Respondent called Ms. Alstad at about 9:30 a.m. He stated that he was in his car and on his way to work. Respondent arrived at OHS at 9:40 a.m.

Failure to Complete Work for IEP for Student M.P.

29. During his telephone conversation with Ms. Crofts on October 7, 2010, Respondent admitted that he had not had time to get the information he needed for an IEP that was scheduled for that day which had been arranged prior to his calling in sick. According to Ms. Crofts, the IEP meeting involved student M.P.

Failure to Complete Assessment Report for Student B.M.

30. Student B.M. was a severely handicapped student who had transferred to the District from out of state. The District was required to comply with a 30-day evaluation deadline to assess B.M. for appropriate placement. B.M. was being considered for an out-of-District placement in the severely handicapped program in the Ceres Unified School District. OHS staff held a meeting with B.M.'s parent on October 7, 2010, with regard to the placement of B.M. Respondent came to the meeting with an incomplete report, stating that he did not have time to put his report together or have time to adequately assess the student. Respondent left the meeting and returned 15 minutes later with additional information; however, the information provided by respondent was still incomplete and inadequate. Tim Meyer is a special education teacher at OHS. He teaches the special day class where B.M. was placed temporarily after moving into the District. According to Mr. Meyer, he was required to do some assessments of B.M. prior to the October 7, 2010 meeting. Mr. Meyer stated that he had adequate time and access to B.M. to perform assessments, and stated that B.M. was on campus a sufficient amount of time to have allowed respondent to perform required assessments.

Absenteeism /Tardiness/Failure to Report to OHS Office

31. Despite the previous admonitions and directives of District administrators on September 7, September 21, September 22, and October 6, 2010, respondent was tardy or absent, or failed to advise the principal's secretary of his whereabouts, as set forth below:

A. On October 7, 2010, respondent contacted the OHS office after the start of the school day to report that he would be late, and did not arrive until 9:40 a.m., as set forth in Finding 28.

B. October 8, 2010, respondent called Ms. Ortiz at 7:51 a.m. He stated that he had spilled food on himself "due to his arm," and he needed to change his clothes. Respondent came to the OHS office at 8:15 a.m. to sign in. He told Ms. Alstad that his house alarm had gone off, and he had to go back to his house, which had made him late for work.

C. On October 11, 2010, respondent called at 8:46 a.m. He stated that he had just woken up, and was not coming in to work because he was in too much pain.

D. On October 12, 2010, respondent signed in at the OHS office at 7:45 a.m.

E. On October 13, 2010, respondent arrived at OHS at 8:11 a.m. (did not call to say that he would be late).

F. On October 14, 2010, respondent called at 8:05 a.m. to say he was having a hard time with his arm and would not be coming to work.

G. On October 18, 2010, respondent arrived at OHS at 8:13 a.m.

H. On October 19, 2010, respondent called Ms. Ortiz at 8:08 a.m. He stated that he was "on his way, just getting his coffee out of [the] microwave." Respondent had an appointment with a parent at 8:00 a.m. that morning. Ms. Ortiz informed respondent that the parent was at the OHS office waiting for him. Respondent did not arrive at OHS until 8:26 a.m. Respondent's late arrival inconvenienced the waiting parent, and constituted unprofessional conduct.

I. On October 20, 2010, respondent called Ms. Ortiz at 8:52 a.m. to state that he was in pain due to his shoulder and not coming to work

J. On October 21, 2010, respondent called Ms. Ortiz at 8:13 a.m. to state that he was on his way to work. Respondent arrived at OHS at 8:24 a.m.

October 21, 2010 Notice of Unsatisfactory Performance

32. As a result of respondent's history of tardiness and failure to report to work at his scheduled time, along with the effects this tardiness and failure to report to work has had on his performance, the District issued respondent a Notice of Unsatisfactory Performance by letter dated October 21, 2010. Principal Moore and Assistant Superintendent Malone met with respondent on October 21, 2010, to review and discuss the Notice of Unsatisfactory Performance. The Notice of Unsatisfactory Performance stated, in part:

Your continued tardiness and not reporting to work at your scheduled time has had a severe impact on your ability to complete your work in a satisfactory manner and, thus, has had a severe impact on the District. When you are not on campus, it does not appear as though you are getting work done sufficiently. As a result, other members of the Special Education Department have had to step in and complete tasks that should have been completed by you.

In addition, you place the District in jeopardy of violating its 504 and Special Education obligations to its students when you are not at work during your scheduled hours and fail to have enough time to fulfill your duties. . . .

In the Notice of Unsatisfactory Performance, respondent was again given directives to follow with regard to reporting his absences:

The above-described conduct violates the directives that have been previously been [sic] given to you by Ms. Crofts and Mr. Moore regarding reporting to work at 7:40 a.m. and working a "professional day" at OHS, as opposed to working from home. If you are sick or running late, you are expected to call Ms. Alstad or one of the Vice Principals to report your absence. If you are not sick, you must request a personal necessity day by filling out the proper documentation and getting prior approval from Principal Moore. When your services are needed at another school site, you are required to let Principal Moore or one of the Vice Principals know of these trips in advance of the beginning of the school day. Any home visits you make to students must be pre-approved by Principal Moore or one of the Vice Principals.

As required by section 44938, subdivision (b)(1), respondent's 2009 Evaluation was attached to the Notice of Unsatisfactory Performance.

Respondent's Conduct Did Not Improve After October 6, 2010 Written and Verbal Warning

Absenteeism /Tardiness/Failure to Report to OHS Office

33. Despite receiving a Notice of Unsatisfactory Performance on October 21, 2010, respondent continued to fail to follow directives given to him regarding reporting to work and/or calling in sick in a timely manner, as set forth below:

A. On October 22, 2010, at 7:30 a.m., respondent called the District office to say that he was running late; he thereafter called Ms. Alstad at 7:40 a.m. to say that he was out sick and was attempting to make an appointment with his doctor to obtain medical verification of his arm and shoulder condition.

B. On October 25, 2010, respondent had not called the OHS office or signed in by 9:30 a.m. Ms. Alstad called respondent's home telephone number and left a message. Respondent did not report to work on October 25, 2010. Respondent did not call the OHS office to report his absence, and the District was unable to reach respondent by telephone.

C. On October 27, 2010, Mr. Mendonca came to OHS in an attempt to locate respondent, because he needed information from respondent prior to attending an IEP meeting. Mr. Mendonca told Ms. Alstad that he called respondent at about 8:30 a.m. Respondent stated that he was having problems with his arm, and would come to work after he took a bath. At 11:09 a.m., respondent called the OHS office and spoke to Ms. Ortiz. Respondent stated that Mr. Mendonca called him at 8:30 a.m. and woke him up. Respondent took a hot bath for an hour but was not feeling any better. Respondent was experiencing problems with his home laptop and printer. He had emailed a report to Mr. Mendonca, and Mr. Mendonca wanted respondent to make corrections. Respondent had lost his cell phone and could not function without it. He said he was coming into work "as soon as he finishes the printer issue." Respondent did not thereafter come to work.

D. On October 28, 2010, respondent called Ms. Ortiz at 7:30 a.m. to "report in." He stated that he was "getting in the shower now and plans to be here at OHS within one hour or so." Respondent called Ms. Ortiz again at 9:01 a.m. to say he was leaving his driveway. Respondent arrived at OHS at 9:13 a.m.

E. On October 29, 2010, respondent called Ms. Ortiz at 7:42 a.m. and stated that he was in his car driving to work. Respondent did not provide a reason for his tardiness. Respondent signed in at the OHS office at 7:47 a.m.

F. On November 1, 2010, respondent called Ms. Ortiz at 7:30 a.m. and stated that he was almost ready to leave for work. Respondent called Ms. Ortiz again at 8:13 a.m. to inform her that he was "now on his way." Respondent arrived at OHS at 8:25 a.m.

G. On November 2, 2010, respondent called Ms. Ortiz at 7:37 a.m. He stated that he was "not feeling good due to going thru his divorce paper work." He told Ms. Ortiz that

he was “calling in sick in case if he doesn’t come in.” Respondent called Ms. Ortiz again at 10:13 a.m. and stated that he was ill and not coming in. He told Ms. Ortiz that he “thinks he has some IEP’s but will deal with them tomorrow.”

H. On November 3, 2010, respondent called Ms. Ortiz at 7:35 a.m. to state that he was sick and not coming to work.

I. On November 4, 2010, respondent called Ms. Ortiz at 7:29 a.m. and “checked in.” He stated he “will be in later.” Respondent arrived at OHS at 7:55 a.m.

J. On November 5, 2010, respondent called Ms. Ortiz at 7:48 a.m. and told her he was in a lot of pain and could not move his arm. Respondent called Ms. Ortiz again at 8:49 a.m. and stated that “he got his arm to work again,” and he planned to get dressed and come to work. Respondent arrived at OHS at 9:37 a.m.

Failure to Perform Duties in a Professional Manner

34. Respondent’s absenteeism and tardiness adversely impacted the quality of his work, as well as his attitude toward his job. As a result, respondent failed to take the necessary steps to ensure that he attended to his duties in a professional and responsible manner on October 26 and 27, 2010, as set forth in detail below.

Triennial Evaluation for Student B.D.

35. Marshall Musselman is the principal at EVEC. In August 2010, Mr. Musselman transmitted to the District a signed assessment plan for a triennial evaluation of student B.D. As Director of Pupil Services, Mr. Mendonca received a copy of the assessment plan by email, as did respondent. Mr. Mendonca discussed the plan with respondent in late August, as part of a conversation about the need for respondent to complete reports in a timely fashion and respondent’s participation in IEP meetings. B.D.’s family was involved in litigation with the District concerning issues involving one of B.D.’s siblings. Therefore, the completion of this assessment by respondent was considered to be a sensitive, high priority matter.

36. In a conversation between Mr. Mendonca and respondent in late September 2010, respondent indicated that he had begun the assessment process for student B.D.

37. The IEP for student B.D. was scheduled to take place on October 27, 2010, at 10:00 a.m. Mr. Mendonca wanted to know the status of the assessment and triennial report, and he sent an email to respondent on October 25, 2010, requesting a draft of the report prior to the IEP meeting. Mr. Mendonca sent copies of the email to Principal Moore and Vice Principal Tambini to advise them that he was requesting a draft copy of the report.

38. As set forth in Finding 33.B, respondent was not at work on October 25, 2010. On October 26, 2010, Respondent reported to work on time. Mr. Mendonca went to

respondent's office late in the day to obtain a copy of the triennial report. Respondent admitted that he had not yet finished the report because he had spent a portion of his work day drafting a rebuttal to the Notice of Unsatisfactory Performance that was served on him on October 21, 2010. Mr. Mendonca told respondent that drafting the rebuttal to the Notice of Unsatisfactory Performance at work was unacceptable and that respondent's priority should have been preparing the triennial report that was a pivotal piece to the important IEP meeting that was to take place the next day. Respondent ultimately emailed a draft of the triennial report to Mr. Mendonca at approximately 6:00 p.m. on October 26, 2010. Respondent's first draft of the report did not meet professional standards. Mr. Mendonca noted the following deficiencies in the report:

A. The report included errors in sentence structure, typing and spelling errors, and vague language.

B. The report included the following statement in the section titled "School:" "There is limited information provided for review." It was unclear why respondent concluded that there was limited information for review when the student has extensive Cumulative and IEP files that contained an abundance of information, reports, and past school information that was accessible from the date that the assessment plan was received and the date of the IEP meeting.

C. The final statement in the summary section stated, "Subjective data from Rating Scales ommitted [sic] for clarifying data presentation in the IEP set for tomorrow." Respondent's report was supposed to be a "Findings" report, not a report that presented findings of assessment results based upon data presented at the IEP. It was unclear whether the assessment and report was complete, as Rating Scales were omitted and the report did not detail many objective results.

D. The "Recommendations" section of Respondent's report was unclear. Recommendation #1 stated, "A multi-disciplinary conference or IEP Team meeting is recommended to evaluate [B.D.'s] refusal to benefit from general or special education programs, placement, or services in any comprehensive public school setting, for reasons other than reduced work load or refusal." In light of the fact that B.D. had already been identified as emotionally disturbed and placed in a non-public school, Mr. Mendonca questioned the relevancy of this recommendation.

E. Respondent's statements outlined in Recommendations #2 and #3 of his report were inappropriate, as they were stated as conclusions, rather than recommendations.

39. On October 27, 2010, respondent did not report to work at 7:40 a.m. as required, and he did not call OHS prior to 7:40 a.m. to report his absence (Finding 33.C). Mr. Mendonca contacted respondent by telephone at 8:30 a.m. Mr. Mendonca notified respondent that he had some serious concerns with regard to the validity and sufficiency of respondent's report. Respondent admitted that he had just woken up, and stated that he could not move his arm. In Mr. Mendonca's opinion, respondent seemed disoriented during the

phone conversation. Respondent indicated that he would report to work and answer the questions prior to the IEP meeting that was scheduled to take place at 10:00 a.m. that day.

40. Mr. Mendonca came to OHS, expecting to meet with respondent and discuss his concerns about the triennial report before the 10:00 a.m. IEP meeting. At approximately 9:45 a.m., 15 minutes before the IEP meeting, respondent still had not reported to work. As a result, Mr. Mendonca contacted respondent again and asked him if he was going to come to work as he had agreed to do earlier that morning. Respondent answered the telephone and stated that he had not left his home yet, but that he could address Mr. Mendonca's questions regarding the report over the phone and make corrections to the report on his home computer. Mr. Mendonca told respondent that his questions were too numerous to discuss in the 15 minutes before the IEP meeting. Respondent stated that he would report to the IEP meeting in his sweats. Mr. Mendonca told respondent that he should not attend the IEP dressed in such an inappropriate manner. Respondent never reported to work at all that day.

41. The IEP team conducted the IEP meeting for B.D. without having a school psychologist present and without respondent's report in final form. It was vital for the District to have respondent, a school psychologist, present at the IEP meeting, along with a complete, well-written triennial report, as the parents of the student in question had already expressed issues and concerns with the District. Therefore, it was important for the District to run the IEP meeting with regard to this student as accurately and efficiently as possible. Respondent's failure to produce a sufficient triennial report for student B.D., and his subsequent failure to come into work to answer questions regarding his report, and to assist the IEP team by attending the IEP meeting, demonstrated respondent's lack of professionalism and failure to fulfill his duties as a school psychologist.

42. On October 27, 2010, at 3:42 p.m. after the IEP for student B.D. had been completed, respondent emailed Mr. Mendonca a second draft of his triennial report. Mr. Mendonca identified deficiencies in the second draft report, which are discussed in further detail in Finding 55 below.

November 5, 2010 Notice of Unprofessional Conduct

43. As a result of respondent's absences and work performance issues, as described above, the District issued respondent a Notice of Unprofessional Conduct on November 5, 2010. Principal Moore and Assistant Superintendent Malone met with respondent on November 5, 2010, to review and discuss the Notice of Unprofessional Conduct. Paragraph 19 of the Notice of Unprofessional Conduct stated:

On several days that you have called in ill, your general excuse for your absences was that you have pain in your shoulders and hands. You indicated that, because the pain results in restricted movement, you take muscle relaxers. When you take muscle relaxers, you cannot wake up in time to come to work. You never produced a doctor's note [or] any kind of medical

verification to the District verifying your condition or indicating that you need any kind of reasonable accommodation to enable you to perform your basic job functions. You also have exhausted your sick leave as of October 25, 2010. Thus, your absences subsequent to that date are unauthorized under any leave provision.

The Notice of Unprofessional Conduct further stated, in part:

This Notice is given to you in order to provide you with an opportunity to correct your deficiencies and to impress upon you the absolute necessity for remedial action on your part. In order to assist you in correcting your conduct and to protect you from further allegations of the same or similar misconduct, you are directed to comply with the following directives:

- (1) The above-described conduct violates the directives that have been previously been [sic] given to you by Ms. Crofts, Mr. Moore, and Mr. Malone, regarding reporting to work at 7:40 a.m. and working a “professional day” at OHS, as opposed to working from home. If you are sick or running late, you are expected to call Ms. Alstad or one of the Vice Principals to report your absence.
- (2) If you wish to take a personal necessity day, you must request a personal necessity day by filling out the proper documentation and getting prior approval from Principal Moore.
- (3) When your services are needed at another school site, you are required to let Principal Moore or one of the Vice Principals know of these trips in advance of the beginning of the school day.
- (4) Any home visits you make to students must be pre-approved by Principal Moore or one of the Vice Principals.
- (5) You must comply with all of the other recommendations and directives regarding the performance of your duties given to you by your supervisors and/or District personnel.
- (6) As of October 22, 2010, you have exhausted all of your accrued sick leave. Thus, absent a medical verification from your doctor, you will not be paid for any sick days over and above what you accrued. If you have a medical verification of illness or proof that would support another basis for a leave in

[sic] which you may be entitled to by law, you must provide the District with such documentation and/or proof immediately.

As required by section 44938, subdivision (a), respondent's 2009 Evaluation was attached to the Notice of Unprofessional Conduct.

Respondent's Conduct Did Not Improve after November 5, 2010 Notice of Unprofessional Conduct

44. Despite being served with a Notice of Unsatisfactory Performance and a Notice of Unprofessional Conduct, respondent failed to show improvement in his work performance, as set forth in further detail below.

Failure to Protect Confidential Student Records

45. On November 17, 2010, respondent called OHS and said that he would be late. When respondent arrived at school, OHS received a complaint about respondent parking in the wrong parking spot. Respondent asked Ms. Alstad for a new parking spot, and he was given one. Respondent then went out to the parking lot, unloaded a large crate from his vehicle, and proceeded to place the crate in the empty parking spot, as if he were reserving the space. Respondent then went back to his vehicle and drove it to the spot as if he were about to pull in. Before pulling into the parking spot completely, respondent exited his vehicle and moved the large crate to the top of a garbage can in the parking lot so that he could move into his parking spot. Respondent pulled into the parking spot and got out of his car, but he never picked up the crate that he had used to "reserve" his spot. At lunch time, OHS secretary Rosie Ortiz observed some students going through a crate of files and papers. She saw that the papers pertained to students, so she retrieved the crate and brought it to the OHS office. Ms. Ortiz brought the crate to the attention of Vice Principal Croft, who reviewed the documents that were in the crate. She noted that the crate was full of confidential student file, many noting extremely sensitive student matters. She also found personal documents and items belonging to respondent. Ms. Croft gave the crate to Vice Principal Tambini, who in turn handed the crate of materials to respondent.

46. As result of respondent's carelessness in the care of student confidential records on November 17, 2010, Mr. Tambini issued respondent a letter of reprimand on November 19, 2010. The letter noted respondent's unsatisfactory performance in failing to protect the confidentiality of student records, stating in part:

Failure to keep student records confidential is a violation of the Family Education Rights and Privacy Act of 1974 (20 U.S.C., § 1232g) and its regulations (34 CFR § 99), as periodically revised by the U.S. Department of Education, sets forth requirements for the protection and release of personally identifiable student information, including student health information. These requirements are applicable to all

“education records” in public and private schools that receive any federal financial assistance. Education records are defined in the regulations as those records that are:

Directly related to a student; and

Maintained by an educational agency or institution or by a party acting for the agency or institution.

Your failure to secure confidential information could have lead [sic] to negative sanctions against Oakdale Joint Unified School District for future federal funding, as well as a possible lawsuit against the school district. The students’ right to privacy would have been violated by your actions.

The letter of reprimand directed respondent to do the following:

All confidential records will be kept in a secure location in your office. If you remove confidential files from the school premises you are to inform myself or Vice Principal Crofts [as] to the nature of the files and to whom they belong. The files will be returned to school the following day checking them in with the above mentioned Vice Principals.

Noncompliance with these directives will result in further disciplinary action.

Psychological Report for Student M.H.

47. Respondent called in sick on November 22, 2010, and was not at work. At approximately 8:00 a.m. on November 23, 2010, Ms. Crofts reviewed the psychological report that respondent prepared for student M.H. in preparation for the IEP meeting scheduled for 10:30 a.m. that morning. Ms. Crofts noted that spelling corrections were needed, and she identified areas of the report where improper or irrelevant information was listed. For example, under the “referral” section of the report, respondent discussed the student’s grades. Likewise, under the “home” section of the report, respondent included a discussion of the student’s grades.

48. After Ms. Crofts discussed her concerns with respondent, he amended the report that morning to address Ms. Crofts’ concerns. However, he included the following information under the “recommendations” portion of the report:

I recommend that Manifestation Determination forms be completed by the site administrator who is the responsible party for student discipline matter and clearly not influenced by any

exceptional needs or educational placement decisions that could be impacted by the Disability or understanding of Due Process and Procedural Safeguards in evaluations. This statement is made in response to questions posed this morning and time does not permit explanation at 10:31 for 10:38 IEP, today.

49. Respondent's comments were irrelevant to the issues to be addressed through the assessment process, and instead introduced a dispute between himself and Ms. Crofts into a document which was disclosed to the student and the student's family. Respondent's inclusion of the above information in a student record was unprofessional and demonstrated unsatisfactory performance of his duties as a school psychologist.

IEP for Student D.C.

50. On December 13, 2010, an IEP was held for student D.C. At the time of the IEP, E.C. was in the Special Day Class taught by OHS special education teacher Nate Gregory, and he was not mainstreamed into any of the regular education program. Respondent was called in on the case because the District was considering moving the student to a more restrictive program. Respondent was requested to participate in the IEP so that he could express an opinion on the change of placement issue.

51. Respondent completed and signed a Triennial Evaluation Report regarding D.C., and he presented the report at the meeting. At that time, there was no assessment plan signed by E.C.'s parents. Respondent's completion of a Triennial Evaluation Report for D.C. violated the prior directive from Ms. Crofts in his 2009 Evaluation that respondent refrain from writing reports without parent permission.

52. The Report Date on page one of the Triennial Evaluation Report stated: "10/29/2010-12/13/2010." The student's age was listed as "15 years." Under "Test Administered," respondent listed "WISC-IV Core (9/5/2006)," and the student's age at testing was "11 years 5 months."

Under "Recommendations," respondent stated, in part:

1. An IEP Team meeting is recommended to evaluate [D.C.'s] current level of functioning and plan appropriate education programs, placement, or services.

[¶] . . . [¶]

3. [D.C.] continues to benefit from placement and programming in our ED, Sheltered Classroom setting combined with General Education PE and Elective classes at Oakdale High when he is here. He has missed from 24 to 28 days of instruction and he is

not passing his classes. *Attempts to contact student and parent have been unsuccessful during this reporting period.*

(Italics added.)

53. The report included inappropriate and inaccurate information as a result of respondent's failure to do appropriate background research on the student. If respondent had spoken with the student's classroom teacher, respondent would have known that there was no signed assessment plan and that respondent was only asked to be part of the IEP process to weigh in on the change of placement issue. He also would have been aware of the changes in D.C.'s academic program, in that he was no longer mainstreamed into any regular education classes. Finally, respondent's statement that he had been unsuccessful in contacting the student or parents was an indication that he did not assess the student, but rather did a record review and interpretation of prior testing.

54. Respondent's actions with regard to the preparation of a Triennial Evaluation Report for student D.C., as set forth above, demonstrated unsatisfactory performance and unprofessional conduct.

Failure to Complete Triennial Evaluation for Student B.D.

55. On November 10, 2010, Mr. Mendonca formally requested that respondent produce a signed "final version" of the psychological educational assessment report for student B.D. Mr. Mendonca emailed respondent a detailed list of questions he had in regard to the first and second drafts of the Brandon D. findings report on November 10, 2010. OHS Principal Mike Moore also hand delivered the email to Respondent to ensure that he received it. In the email, Mr. Mendonca identified the following deficiencies in the second draft report:

- In [the] last three sentences of the section titled "health," it is mentioned about the parent reporting a diagnosis of PTSD and she was of the opinion that either an FCA or FAA was in [B.D.'s] file. Your report states that you "have not yet reviewed any documents in these categories." Finally you state you "will amend this report with the receipt of any objective data from agreeable authority." Considering there was more than ample time from the time that the Assessment Plan was received, and the time the IEP was scheduled, why haven't all documents been reviewed and all relevant objective data gathering have taken place during your assessment? This triennial evaluation is intended to produce a comprehensive objective data accumulation and analysis, correct? If so, why would it be necessary to amend the report? Shouldn't you provide a complete analysis and findings report and if there is no other data [sic] objective

data from an agreeable authority, would that just be added for the team's consideration without amending your report?

- The final statement in item #3 of the recommendations section, you added, "My opinions are provisional given my limited access to academic data, and no clear information about present levels of performance. My opinions are drawn from my isolated interactions with school staff, the student, his family, and peer groups for all parties." I again question why you had limited access to data and present levels as the files and school personnel have been easily accessible and readily available to you throughout the assessment period. Also, why are opinions drawn from isolated interactions when, again, all parties seemed to have been accessible during the assessment period.

56. Mr. Mendonca directed respondent to have a final signed version delivered to Mr. Moore by 2:00 pm on November 16, 2010. However, on November 16, 2010, respondent failed to follow the November 10, 2010 directive, and produced no final version of the B.D. psychological educational assessment findings report to Mr. Moore or Mr. Mendonca.

57. On November 24, 2010, Mr. Mendonca personally met with respondent in respondent's office. Mr. Mendonca directed respondent to produce the final report including, but not limited to, all assessment data, protocols, and rating scales used in assessing student B.D. Respondent stated that all the information requested was at his home and he had nothing in the office to give to Mr. Mendonca at that time.² Respondent assured Mr. Mendonca that he would go home after school was released that day at 11:40 a.m. and gather all of the requested information. Respondent also indicated that he would stop by the District office and personally deliver all the requested information to Mr. Mendonca later that afternoon before he left town to go skiing. Mr. Mendonca covered the front desk of the District office until 5:30 pm. and waited for respondent to deliver the requested information. However, respondent never showed up at the District office and never delivered the requested information to the site.

58. On December 3, 2010, after allowing respondent an additional week to produce the report, Mr. Mendonca again personally went to respondent's office to receive the assessment data and report. Upon arriving and requesting the information, respondent stated that he could not find the information at his home. Respondent stated the information was "gone" and further indicated that he did not have any of the final report for student B.D., or

² Although not separately charged as a basis for dismissal, respondent did not follow the directives in the November 19 2010 letter of reprimand regarding the removal of student records from school premises with regard to the assessment documents pertaining to student B.D.

any of the accompanying assessment data, protocols, and rating scales used in assessing B.D. Respondent said that he did not know where any of this documentation was.

59. Respondent had not provided a final triennial report for student B.D. as of the date he was placed on leave of absence in January 2011. Shortly thereafter, Mr. Mendonca and Ms. Crofts went to respondent's office to look for records and paperwork pertaining to student B.D., so that another school psychologist could complete the report. Mr. Mendonca located the August 2010 fax from EVEC Principal Musselman, and the signed assessment plan. He also found assessment protocols for tests that had not been completed.

60. Respondent's actions with regard to the preparation of a Triennial Evaluation Report for student B.D., as set forth in the Factual Findings, demonstrated unsatisfactory performance and unprofessional conduct. Respondent's repeated failure to provide requested information to Mr. Mendonca constituted persistent violation of reasonable directives of a school administrator, in violation of the school laws of the state.

Absenteeism /Tardiness/Failure to Report to OHS Office

61. Despite receiving a Notice of Unprofessional Conduct on November 5, 2010, respondent continued to fail to follow directives given to him regarding reporting to work and/or calling in sick in a timely manner, as set forth below:

- A. On November 8, 2010, respondent arrived at 7:50 a.m.
- B. On November 9, 2010, respondent called at 7:09 a.m. to report that he was sick and not coming into work.
- C. On November 15, 2010, respondent arrived at 7:55 a.m.
- D. On November 16, 2010, respondent called Ms. Ortiz at 7:40 a.m. to state that he was "running late." Respondent arrived at OHS at 7:55 a.m.
- E. On November 17, 2010, respondent called Ms. Ortiz at 7:46 a.m. He stated that he was "having a lot of problem in his arm" and did not know if he would be in to work. Respondent called Ms. Ortiz again at 10:57 a.m. and informed her that he was driving in to work and was feeling better. Respondent arrived at OHS at 11:08 a.m.
- F. On November 18, 2010, respondent called Ms. Ortiz at 7:42 a.m. He stated that he was having issues with his arm and was not coming in to work.
- G. On November 19, 2010, respondent arrived at OHS at 7:46 a.m. Respondent went to lunch at 11:40 a.m. and did not return for the remainder of the school day. Respondent never called and informed anyone at OHS that he would not be returning or told anyone at OHS of his whereabouts.

H. On November 22, 2010, respondent called Ms. Ortiz at 7:38 a.m. He stated that he was experiencing muscle spasms in his arm and was not coming in to work.

I. On November 24, 2010, respondent called Ms. Alstad at 7:30 a.m. to report that he was running late. Respondent arrived at OHS at 8:03 a.m.

J. On November 29, 2010, respondent arrived at 7:50 a.m.

K. On November 30, 2010, respondent called Ms. Ortiz at 7:42 a.m. and stated that he was running late. Respondent arrived at OHS at 7:49 a.m.

L. On December 2, 2010, respondent called Ms. Ortiz at 7:42 a.m. and stated that he was on his way into work. Respondent arrived at OSH at 7:50 a.m.

M. On December 3, 2010, respondent arrived at 7:45 a.m.

N. On December 5, 2010, respondent called Ms. Ortiz at 7:51 a.m. He stated that he was running late and would be in the office in 10 minutes.

O. On December 6, 2010, respondent arrived at 8:10 a.m.

P. On December 7, 2010, respondent arrived at 7:52 a.m.

Q. On December 8, 2010, respondent called Ms. Ortiz at 7:41 a.m. to state that he could not move his arm and was not sure if he was coming to work. Respondent did not thereafter call in or come to work.

R. On December 9, 2010, respondent called Ms. Ortiz at 7:48 a.m. to report that he was on his way to work.

S. On December 10, 2010, respondent called Ms. Ortiz at 7:58 a.m. and stated that he was not coming into work because of problems with his arm. Respondent called Ms. Ortiz again at 11:11 a.m. and stated that he was "on his way" into the office. Respondent arrived at OHS at 11:45 a.m.

T. On December 15, 2010, respondent called at 8:19 a.m. to state that he was in a lot of pain and was not coming to work.

U. On December 16, 2010, respondent arrived at the OHS office at 8:05 a.m.

V. On December 17, 2010, respondent called Ms. Ortiz at 8:35 a.m. to state that he had lost his phone and was coming to work late. Respondent called Ms. Ortiz again at 10:06 a.m. to state that he was on his way to work, and that his vehicle had been stuck in the mud. Respondent arrived at OHS at 10:16 a.m.

W. On January 6, 2011, respondent arrived at the OHS office at 8:14 a.m.

X. On January 12, 2011, respondent called Ms. Ortiz at 7:47 a.m. He stated he was “almost ready and heading out in 10 minutes.” Respondent arrived at the OHS office at 8:10 a.m.

Y. On January 14, 2011, respondent called Ms. Ortiz to report that he was running late. He arrived at the OHS office at 10:05 a.m.

Z. On January 18, 2011, respondent called Ms. Ortiz at 7:42 a.m. to state that he had a fever and sore throat and would not be in to work.

AA. On January 20, 2011, respondent called Ms. Ortiz at 7:48 a.m. to state that he was on his way to school. Respondent called Ms. Ortiz again at 7:57 a.m. and stated that he was “now out of his house and on his way to work.” Respondent called Ms. Ortiz a third time at 8:00 a.m. and stated that he was “working from home and trying to work on his hard drive to recover some files.” Respondent eventually arrived at OHS at 9:42 a.m.

BB. On January 21, 2011, respondent called Ms. Ortiz at 7:44 a.m. He stated that he was “exhausted,” and was calling in sick.

CC. On January 22, 2011, respondent called Ms. Ortiz at 7:40 a.m. and stated that he was “getting ready to leave.” Respondent arrived at OHS at 8:23 a.m.

DD. On January 24, 2011, respondent called Ms. Alstad at 7:12 a.m. He stated that he had been up since 5:30 a.m. trying to get ready for work, but his arm was not functioning well. He said he would take a shower, then go to the District office to speak to Mr. Malone about the situation. Respondent arrived at the OHS office at 8:20 a.m.

EE. On January 25, 2011, respondent called Ms. Alstad to state that he was “on his way.” He arrived at OHS at 8:23 a.m. Mr. Moore and Mr. Malone met with respondent and informed him that he was being relieved of duty as of that date.

Charges Not Established

62. The District alleged that “[s]taff has reported that, due to Respondent’s inability to keep an organized calendar, Respondent had to be called to an IEP meeting with regard to student [M.P.] on October 7, 2010. Respondent stated that he did not have the meeting on his calendar.” Respondent told Ms. Crofts that the IEP meeting for student M.P. was not on his calendar. However, the evidence did not establish whether respondent had been notified of the IEP meeting. Therefore, it was not established that respondent had to be called to the IEP meeting for student M.P. due to his alleged inability to keep an organized calendar.

63. The District alleged that respondent “exceeded the timelines in which the District was required to complete the assessment of student [J.A.]” However, the District provided no corroborating evidence of this allegation, which was therefore not established by competent evidence.

64. On November 17, 2010, respondent left a few pages of a psychological report on the copy machine in the main office, and a teacher found the pages in the copier. Because this incident happened on the same day that respondent left a large crate of confidential student files on top of a trash can in the school parking lot, where students were found going through the records, the District considered the copier incident to be further evidence of respondent’s failure to safeguard the confidentiality of student records. However, a document inadvertently left in a copier in the main office of the high school by a teacher or certificated employee, even if a confidential student record, does not rise to the level of careless disregard to constitute unprofessional conduct or unsatisfactory performance.

65. The District alleged that respondent “had not monitored IEP timelines appropriately” with respect to the IEP’s of students M.H., W.R., F.R. T.S. and A.R. In the case of M.H., W.R., and F.R., the IEP’s were held more than 60 days after the assessment plans were signed; in the case of T.S. and A.R., the IEP’s had not been held as of January 25, 2011, the date the Statement of Charges against respondent was signed, and more than 60 days after the assessment plans for those students were signed. However, the evidence did not establish that respondent failed to complete assessments within the required time frames, or that the IEP’s were scheduled past the 60 day deadline as a result of any conduct by respondent. The evidence established that the scheduling of IEP meetings is the responsibility of the case manager or special education teacher, not the school psychologist. Thus, the evidence did not establish in what manner respondent failed to monitor timelines.

66. T.S., an emotionally disturbed (ED) student at Sierra Vista Children’s Center, is currently scheduled for a triennial evaluation. Ms. Crofts contacted respondent on January 10, 2011 for information about this case. During the course of the phone call, respondent indicated that Sierra Vista was asking for a full assessment of this student, because the student was inappropriately placed. Ms. Crofts indicated that she believed that the student was just scheduled for a triennial reevaluation, and respondent indicated that he would have to have meetings at Sierra Vista to discuss this issue. Ms. Crofts, feeling confused about this issue, then contacted the student’s teacher, Nate Gregory, for clarification of the matter. Mr. Gregory told Ms. Crofts that the student was scheduled for a triennial evaluation and that no request was made to respondent for a full assessment of the student due to inappropriate placement. The District alleges that “respondent’s interpretation and explanation of the student’s case was completely wrong.” Mr. Gregory was not called as a witness in this matter, and there was no evidence to confirm what respondent was told in his contacts with Sierra Vista. Consequently, this allegation was not established by competent evidence.

District Efforts to Accommodate Respondent

67. As set forth in the Factual Findings, respondent was experiencing health problems, as well as personal and financial difficulties, in the fall of 2010. Mr. Mendonca attempted to provide support and advice to respondent in dealing with his personal problems. When respondent expressed concern in September 2011 that he was “behind” in completing assessments, Mr. Mendonca told him to “focus on the high school” (i.e., OHS). Respondent also stated that he was spending time counseling students, including crisis counseling. Mr. Mendonca advised respondent that his primary duties were to perform assessments for special education services. Mr. Mendonca instructed respondent not to provide mental health supports unless he was listed as a supplemental service provider in a student’s IEP.

68. Mr. Mendonca reassigned one of respondent’s cases to another school psychologist in October 2011, after respondent contacted the parent of a student prior to having an assessment plan in place. Mr. Mendonca later reassigned two additional high profile cases, due to concerns about respondent’s work performance and ability to complete assessments in a timely manner.

69. Respondent expressed concern to Mr. Mendonca about problems with his printer and computer, and with the internet access in his office. The District took steps to address respondent’s concerns.

70. Mr. Mendonca had many lengthy conversations with respondents concerning various complaints he had about his treatment by administrators and staff, including his belief that site administrators were not qualified to supervise and evaluate him, because he had District-wide responsibilities. Respondent also felt that questions about his whereabouts showed a “lack of trust” that he was getting his work done, and that “people were working against” him. Mr. Mendonca found that it was difficult for respondent to remain focused on work-related topics, and respondent would “go off on tangents” and “talk over peoples’ heads.” In Mr. Mendonca’s opinion, respondent would have had adequate time to complete his primary job duties, and still support students with mental health issues on a “triage” basis, if he did not spend so much time conversing with District personnel about his personal issues.

71. The District followed procedures to determine whether respondent needed reasonable accommodation under the Americans with Disabilities Act (ADA) based upon his shoulder injury. According to Mr. Moore, respondent raised the issue of his shoulder problems at the October 21, 2010 meeting between Mr. Moore, Mr. Malone, and respondent in connection with issuance of the Notice of Unsatisfactory Performance. Mr. Moore asked respondent to provide medical verification of respondent’s condition, so that the District could consider whether to adjust respondent’s work hours as a reasonable accommodation of a medical disability. Respondent did not provide any documentation of his medical condition at that time.

72. The November 5, 2010 Notice of Unprofessional Conduct mentioned that respondent had used his shoulder injury and need to take pain medication as excuses for his attendance and other work problems, and that respondent had not provided requested medical verification to the District. This matter was discussed with respondent by both Mr. Malone and Mr. Moore at the November 5, 2010 meeting in connection with the issuance of the Notice of Unprofessional Conduct.

73. On November 8, 2010, the District received a copy of a letter dated October 26, 2010, from Mark Cook, M.D., a family practitioner. The note stated:

RE: Don Spalding

The patient is diagnosed with chronic and persistent symptoms of muscle spasm, myalgias, insomnia and acute and persistent work related and family stress reaction.

74. The note from Dr. Cook was insufficient for the District to make a determination about whether a reasonable accommodation was warranted because of a physical impairment. On November 10, 2010, Mr. Malone and Mr. Moore met with respondent and provided him with a packet of information about the procedure to request reasonable accommodation. Respondent signed a Proof of Personal Service verifying that he received a copy of OJUSD AR 4032, the District's Reasonable Accommodation Policy, as well as an OJUSD Release of Information/Medical Verification form to be provided to respondent's physician. Respondent did not provide the necessary medical verification to allow the District to consider a reasonable accommodation.

75. On November 17, 2010, District staff observed respondent carrying a heavy crate of files after Mr. Tambini returned the crate of files to him that had been left on the trash can in the parking lot (Finding 45). On November 24, 2010, respondent told Mr. Mendonca that he was going skiing (Finding 57). These activities belied respondent's claim of serious shoulder injury, and undercut his claim that pain was impairing his work performance and attendance.

Impact of Respondent's Conduct

76. Respondent's continued absenteeism and repeated failure report to work at his scheduled time has had a severe impact on his ability to complete his work in a satisfactory manner and, thus, has had a severe impact on the District. Respondent's excessive absences and tardiness was disruptive to District operations. As a result, other members of the special education department were required to step in and complete tasks that should have been completed by respondent,

77. Respondent's failure to complete assessments in a timely manner has exposed the District to potential sanctions from the state and federal Departments of Education, for failure to comply with mandatory time lines set forth in the Individuals with Disabilities

Education Act (IDEA), or section 504 of the Rehabilitation Act of 1973 (504). His failure to attend IEP meetings due to absenteeism or tardiness has likewise jeopardized the District's ability to comply with mandatory time lines, and has negatively impacted provision of services to students. Likewise, the inadequacy of respondent's assessment reports has had a potential detrimental effect on students.

78. Respondent's conduct has also contributed to the impairment of the relationship between the District and the family of special education student B.D. Continuing issues between the District and B.D.'s family relate in part to respondent's failure to complete an assessment of B.D., which has added to an already contentious process and resulted in increased legal fees to the District. Respondent's failure to properly maintain documentation and data pertaining to student B.D. and other special education students has impeded the District's ability to complete the assessment of B.D. and others. Respondent's inability to produce any piece of assessment data that was used in developing his draft special education reports of students is further evidence of unprofessional conduct and unsatisfactory performance. The District is not able to rely on the quality of respondent's work and be assured that he will come to work and perform his duties in an acceptable manner.

79. In the spring of 2010, while respondent was on a worker's compensation medical leave of absence, the District employed a substitute school psychologist. This individual was able to complete all of the required duties and responsibilities of respondent's school psychologist position in a timely manner. Similarly, the substitute school psychologist employed by the District in 2011, after respondent was placed on unpaid leave by the District, has been able to timely complete the duties of the position. Thus, it is clear that respondent's repeated failure to perform his job duties in a satisfactory and professional manner was not due to an unreasonable workload.

Matters in Aggravation

80. The hearing in this matter was scheduled to commence at 10:00 a.m. on April 4, 2011. Respondent did not arrive on time for the start of the first day of hearing. Respondent was 10 minutes late returning from lunch on April 4, 2011. Respondent was almost one-half hour late on the morning of the second day of hearing, because he forgot materials at home and went back to retrieve them. Respondent was admonished that henceforth the hearing would proceed at the scheduled time, with or without him. Despite this admonition from the Commission, respondent was 15 minutes late returning from lunch on the third day of hearing. Respondent appeared incapable of adhering to a schedule. His tardiness delayed the proceedings and inconvenienced the parties and the Commission.

Fitness to Teach

81. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235 (*Morrison*), 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 *Morrison* 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 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. (*Id.* at pp. 229-230.) 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.

Courts have suggested that “fitness to teach” is a question of ultimate fact.³ The fitness criteria are applied to the facts of this case, as set forth below.

Likelihood of adverse effect on students or fellow teachers.

82. Respondent’s conduct adversely affected students and teachers. His unexcused absenteeism and tardiness meant that he was unavailable for meetings and consultation and he was unable to complete his work in a timely manner. His incomplete and inadequate reports impeded the conduct of IEP meetings.

Degree of expected adversity.

83. Respondent’s conduct directly impacted the IEP process for numerous special education students, thereby jeopardizing the District’s ability to provide a free appropriate public education to these students as required by law. Curriculum and planning for special education students are tied to assessment data; when respondent failed to do his job in a

³ *Board of Education v. Commission on Professional Competence*, *supra*, 102 Cal.App.3d 555, 560-561, citing *Board of Education v. Jack M.*, *supra*, 19 Cal.3d 691, 698, fn. 3.

professional and competent manner, it impeded the ability of special education teachers and case managers to do their jobs. Respondent's conduct also put the District at risk for litigation from parents, as well as sanction under state and federal law for failure to comply with mandatory timelines for completion of assessments.

Proximity in time of respondent's conduct.

84. Respondent's conduct was recent, having taken place, for the most part, during the current school year (2010-2011).

Respondent's teaching certificate.

85. Respondent's pupil personnel services credential is typically held by school psychologists. Respondent's conduct would be inappropriate under any teaching certificate, but particularly for a school psychologist, whose primary duty is to assess students for special education eligibility and services.

Extenuating or aggravating circumstances.

86. Respondent has been under extreme emotional and financial pressure due to personal issues relating to his divorce and medical problems. In addition, he apparently takes medication that induces drowsiness and impedes his ability to focus. However, respondent did not provide verifiable medical information to the District to document a need for accommodation of a medical condition, despite repeated efforts by District administrators to obtain documentation. As was noted in Finding 80, respondent appeared incapable of adhering to a time schedule, even at the administrative hearing.

Praiseworthiness or blameworthiness of respondent's motives.

87. Respondent has at times taken on duties, such as crisis counseling, which added to his workload. However, to the extent that respondent's performance of extra duties interfered with his ability to complete the core functions of his job (assessment of students, preparation of reports, and attendance at IEP meetings), his conduct was not praiseworthy. Furthermore, respondent was not able to do any aspects of his job when he was not at work, due to unexcused absenteeism or tardiness.

88. To the extent that respondent contended his conduct should be excused because of a medical condition, respondent did not support this contention with competent medical evidence, and there was evidence in the record to suggest that respondent's condition was not as he portrayed it.

Likelihood of recurrence of the conduct.

89. It is extremely likely that respondent's unprofessional and unsatisfactory conduct would continue unabated if he returned to his position as a school psychologist.

There was no evidence to suggest that the factors contributing to his absenteeism, tardiness, and failure to complete the duties of his position have been addressed or resolved by respondent; on the contrary, his conduct at hearing suggests that respondent is incapable of altering his behavior. Although excused by the Commission, respondent's failure to file a Notice of Defense in this matter was further evidence of his inability to attend to specific instructions and comply with mandatory time lines.

The district contended that respondent's actions are evidence of a character trait that is not amenable to change, and which irreparably impairs his ability to teach. This contention is persuasive, for the reasons set forth above.

Impact on constitutional rights.

90. Respondent's conduct does not implicate the exercise of constitutional rights.

Effects of notoriety and publicity.

91. The evidence did not establish that notoriety or publicity were important factors in this case.

Disruption of the educational process.

92. There was clear evidence that respondent's conduct disrupted the educational process of students B.D., B.M., M.P., M.H., D.C., and the students in Mr. Simoncini's first period psychology class. Furthermore, respondent's repeated absences, tardiness, and failure to account for his whereabouts disrupted the educational process of the special education department at OHS as a whole, and impaired his relationship with other staff.

Conclusion

93. Based upon the foregoing criteria, the evidence established that respondent is unfit to continue in his position as a school psychologist for the District.

LEGAL CONCLUSIONS

1. A school district that seeks to dismiss a permanent certificated employee from its employment bears the burden of proof, and the standard of proof is by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040; *Bevli v. Brisco* (1989) 211 Cal.App.3d 986.)

Grounds for Dismissal were Established

2. Section 44932, subdivision (a), provides in pertinent part that no permanent employee shall be dismissed by a school district except for one or more of the following

causes, including for (1) immoral or unprofessional conduct,⁴ (4) unsatisfactory performance, (5) evident unfitness for service, and/or, (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.

Unprofessional Conduct

3. Although “unprofessional conduct” is identified in section 44932 as one of the eleven specific grounds for which a permanent employee may be dismissed, it appears to have a broader import than the others. The phrase refers generally to conduct demonstrating unfitness to teach. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 ,216.) In *Board of Education of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553 (*Swan*), the Supreme Court stated:

The phrase “unprofessional conduct,” as used in the Education Code, is to be construed according to its common and approved usage, having regard for the context in which the Legislature used it. (Ed. Code, § 10; 23 Cal.Jur., § 122, p. 745.) The word “unprofessional” is a relative expression without technical meaning or arbitrary connotation. “Unprofessional conduct” is defined in 66 Corpus Juris, p. 55, as “that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing.”

4. As set forth in Findings 17-20, 22-28, 31-33, 43, and 61 (attendance issues); 29-30, 34-42, and 55-60 (failure to complete work); 45-46 (failure to protect confidentiality of student records); 47-49 (inappropriate comments in psychological report of student M.H.); and 50-54 (IEP of student D.C.), respondent engaged in unprofessional conduct. As set forth in Findings 76 through 93, respondent’s conduct was directly related to his fitness to teach, thereby establishing grounds for dismissal pursuant to section 44932, subdivision (a)(1).

Unsatisfactory Performance

5. There is no case law that defines the term “unsatisfactory performance,” formerly known as incompetence, as applied in the context of a certificated employee dismissal proceeding. Therefore, in accordance with the rationale of *Swan*, the phrase “unsatisfactory performance” shall be construed according to its common usage, in the context of the school environment, i.e., the expected conduct, requirements and duties of the position of school psychologist. (*Ibid.*)

⁴ The District did not allege immoral conduct as grounds for immediate suspension or dismissal, nor was there any evidence to support an allegation of immoral conduct.

6. As set forth in Findings 17-20, 22-28, 31-33, 43, and 61 (attendance issues); 29-30, 34-42, and 55-60 (failure to complete work); 45-46 (failure to protect confidentiality of student records); 47-49 (inappropriate comments in psychological report of student M.H.); and 50-54 (IEP of student D.C.), respondent's performance as a school psychologist was unsatisfactory. As set forth in Findings 76 through 93, respondent's conduct was directly related to his fitness to teach, thereby establishing grounds for dismissal pursuant to section 44932, subdivision (a)(4).

Evident Unfitness for Service

7. A charge of evident unfitness for service requires proof that the teacher is "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. . . . [It] connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) The *Morrison* criteria must be analyzed as a threshold matter to determine if the conduct indicates unfitness for service. (*Id.* at p. 1445.) If the *Morrison* criteria are met, the next step is to determine if the teacher's unfitness is "evident"; i.e., whether the offensive conduct is caused by a defect in temperament." (*Ibid.*)

8. As set forth in Findings 17-61, and 81-93, respondent's conduct demonstrated evident unfitness for service. As was noted in Findings 19, 20, 25, 27, 32, 43, and 46, the District gave respondent numerous warnings and reprimands, in an effort to allow respondent to correct his conduct; likewise, as set forth in Findings 67-75, the District made efforts to work with and accommodate issues respondent was experiencing. As set forth in Findings 76 through 93, respondent's conduct was directly related to his fitness to teach. As particularly set forth in Findings 80, 86, and 89, respondent's conduct was not amenable to correction, and was instead the result of a defect in temperament. Thus, grounds for dismissal were established pursuant to section 44932, subdivision (a)(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

9. The definition of "persistent violation" was addressed in *Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82:

The word "persistent" is defined by lexicographers as "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated." Webster's New World Dictionary, College Edition; see Webster's Third New International Dictionary.) And in the judicial decisions of this, as well as other states, the word has been interpreted to mean "continuing or constant." (*Buss v. J. O. Martin Co.*, 241

Cal.App.2d 123, 134; *Appeal of Board of School Directors of Cass Township, Schuylkill County*, 151 Pa.Super 543, 30 A.2d 628, 630; *In re Hibler*, 37 Wyo. 332, 261 P. 648, 651.)

10. As set forth in Findings 17-20, 22-28, 31-33, 43, and 61 (attendance issues); and 35-42, and 55-60 (repeated failure to provide completed triennial report and supporting assessment data for student B.D. as directed by Mendonca), respondent persistently violated the school laws of the state and reasonable regulations prescribed by the governing board of the District, as implemented through the reasonable directives of District administrators. As set forth in Findings 76 through 93, respondent's conduct was directly related to his fitness to teach, thereby establishing grounds for dismissal pursuant to section 44932, subdivision (a)(7).

11. Although the District contended in the Statement of Charges that respondent "refused to come into work to answer questions regarding his report [triennial report on student B.D.]," and that he engaged in an "outright refusal to produce any piece of assessment data that was used in developing his draft special education reports of students," the evidence did not support the District's claim. Respondent was not openly defiant; rather, respondent made some effort to comply with District requests. Respondent's explanations for his failures were inadequate to excuse his persistent violations.

Grounds for Immediate Suspension were not Established

12. Section 44939 states, in pertinent 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, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, with *willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district*, with violation of Section 51530, with knowing membership by the employee in the Communist Party or with violation of any provision in Sections 7001 to 7007, . . . inclusive, 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.

(Italics added.)

13. The Statement of Charges purports to charge respondent with grounds for immediate suspension and dismissal, based solely on grounds set forth in section 44932 (Finding 2). The Statement of Charges does not cite any grounds for immediate suspension set forth in section 44939. While Resolution No. #10-11-07 alleges that cause exists for the immediate suspension and dismissal of respondent, the resolution itself only approves notification to respondent that he shall be dismissed from employment, again based on the Statement of Charges, which does not reference section 44939, or any grounds for immediate suspension specified therein (Finding 3). The Accusation incorporated the Statement of Charges by reference, as establishing the grounds for immediate suspension and dismissal; while the Accusation “prays that a Commission on Professional Competence . . . order the Respondent be dismissed pursuant to Education Code sections 44939 and 44944,” the District did not otherwise cite any grounds for immediate suspension based on any of the grounds set forth in section 44939 (Finding 5).

14. The District argued that “willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district,” as set forth in section 44939, is the same as “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” as set forth in section 44932, subdivision (a)(7). This contention was not persuasive. Section 44932, subdivision (a)(7), distinguishes between “persistent violation” of school laws or reasonable regulations of the District’s Board, and “refusal to obey” the school laws or Board regulations. Thus, as in respondent’s case herein, it is possible to persist in violating school rules without willfully refusing to obey them. Section 44939 is even more narrowly written, and is confined to the “willful refusal to perform regular assignments.” Thus, neither the Statement of Charges, Resolution No. #10-11-07, nor the Accusation, gave respondent adequate notice of the basis for his immediate suspension without pay.

15. Furthermore, even if the District had properly alleged section 44939, “willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district,” as a basis for respondent’s immediate suspension, the evidence did not support a finding of “willful refusal.” As reflected in the Factual Findings taken as a whole, and as noted in Legal Conclusion 11, respondent did not willfully refuse to follow the District’s directives; rather, he seemed incapable of following the rules and unable to perform his job duties in a satisfactory manner. Under all of the facts and circumstances, cause was not established to immediately suspend respondent without pay pursuant to section 44939.

Other Matters were not Established

16. Except as otherwise set forth in this Decision, and particularly as set forth in Findings 62 through 66, any and all remaining charges and defenses asserted in this matter are determined not to be established by sufficient evidence or law.

ORDER

Immediate Suspension

The immediate suspension of respondent Don Spalding from his position as a school psychologist with the Oakdale Joint Unified School District is overturned. Respondent shall be entitled to full back pay and benefits from January 25, 2011, to the date of this Decision.

Dismissal

The decision by the Oakdale Joint Unified School District to dismiss respondent Don Spalding from his position as a school psychologist with the District is affirmed.

Respondent Don Spalding is hereby dismissed from his position as a certificated employee of the Oakdale Joint Unified School District, effective on the date of this Decision.

DATED:

ROBERT ACKERMAN Member
Commission on Professional Competence

TRACY MANZONI, Member
Commission on Professional Competence

CATHERINE B. FRINK, Member
Commission on Professional Competence