

**BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
GROSSMONT UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

JOSHUA BARNEY, Respondent

OAH No. 2017090130.1

DECISION AFTER REMAND

PROCEDURAL HISTORY

The Commission on Professional Competence of the Grossmont Union High School District (Commission) heard this matter on January 29, 30, 31 and February 1, 2018, in El Cajon, California.

The Commission included Charles Mendoza, Ron Lardizabal, and Vallera Johnson, Administrative Law Judge, State of California, Office of Administrative Hearings, who served as chairperson.

Ingrid Meyers, Attorney at Law, of the law firm of Dannis Woliver Kelley, represented Julie Mottershaw, Assistant Superintendent, Human Resources of the Grossmont Union High School District (District).

Fern Steiner, Attorney at Law, Smith, Steiner, Vanderpool, & Wax, represented Joshua Barney, Respondent .

The matter was submitted on February 2, 2018.¹

The Commission issued its Decision, dated March 5, 2018, terminating Joshua Barney's employment from the Grossmont Union High School District.

Following issuance of the Decision, Joshua Barney filed a petition seeking a writ of mandamus in the Superior Court of California, County of San Diego, Case No. 37-2018-00022455-CU-WM-CTL.

On April 10, 2019, Superior Court Judge Ronald L. Styn granted the petition, remanded the matter to the Commission, and ordered the Commission to vacate the Decision, issued on March 5, 2018, and to determine if the Commission would have reached the same decision, and/or imposed the same penalty, without an adverse finding on the unprofessional conduct charge.

On July 3, 2019, the administrative law judge issued an order setting oral argument for July 16, 2019, and providing that the parties may file briefs on or before July 12, 2019.

On July 16, 2019, the Commission heard oral argument.

John P. Martin, Attorney at Law, represented Respondent at the remanded hearing. Respondent was present during oral argument.

¹ The hearing concluded on February 1, 2018. The record remained open for the Commission members to deliberate, which occurred on February 2, 2018.

On February 2, 2018, the record closed, and the matter was submitted.

Ms. Meyers represented the District at oral argument on remand.

The Decision, issued on March 5, 2019, is vacated. The following Decision After Remand is issued.

FINDINGS OF FACT

1. Joshua Barney (Respondent) is a permanent certificated employee of the Grossmont Union High School District (District). He holds special education, health and physical education credentials.

Respondent described his career with the District. In 1992, he began at Chaparral High School as a campus supervisor in a classified position. He commenced his career as a certificated employee with the District in 1999. Between 1999 and 2016, he taught special education at Helix High School (one year), Granite Hills High School (10 years), Steele Canyon High School (one year), returned to Granite Hills High School (one year), Santana High School (two years), Chaparral High School (one year) and IDEA Center High School. During the 2016-2017 school year, he taught physical education at IDEA.

2. Chaparral, IDEA and Merit Academy are physically located on the same campus. The administrators for all three schools are the same and are located on the campus of IDEA. In January 2017 and on the dates of hearing, the principal was David Napoleon; there were two vice-principals, and one of the vice-principals was Dawn Cuizon. In addition, the campus resource officer was Darren Ehlers, and the school nurse was Lonnie Raimond.

Chaparral is a continuation school; the students who attend: (1) are on expulsion from the District or enrolled in schools outside the District, or (2) need special education services or a smaller environment.

IDEA is an “alternative school choice” which means that any student within the District can apply to attend. IDEA provides project-based learning. The focus is on restorative practices and competency-based grading. It is a smaller school environment. The school tends to attract students who come from home schools or charter schools or who are on campus because they are anxious about going to a large school. At IDEA, there are smaller classrooms; students demonstrate their knowledge by doing projects or presentations as well as using technology. In addition, at IDEA, career pathways programs are available to students, such as construction, cooking and floral design.

On the class schedule is a class entitled “Maverick Hour.” Mr. Napoleon described Maverick Hour as a combination of homeroom and tutorial, a bit of a teacher-student mentorship. The class is divided into grade levels; so, there is ninth grade Maverick Hour, tenth grade Maverick Hour, etc. It is a time and place for some student counseling, to talk to a specific group of students, and for the students to get additional help. Tutorials are held two days a week. Students can go to other classrooms if the teachers in the classrooms arrange this, for example to take a test or to complete a science laboratory. At IDEA, during the day, typically, even if a student has completed a class (for example science) project, the student does not typically leave the class to go to another class, unless there is a valid reason to do so.

3. On August 10, 2017, the Statement of Charges for Dismissal and Immediate Unpaid Suspension was filed with the District’s governing board. On that date, Ms. Mottershaw, in her official capacity, recommended to the board that

Respondent be dismissed from employment and suspended without pay. Her recommendations were approved by the board. The Statement of Charges alleged that Respondent engaged in actionable conduct, as set forth in:

- California Education Code² section 44932, subdivision (a)(1) [immoral conduct];
- Code section 44932, subdivision (a)(2) [unprofessional conduct];
- Code section 44932, subdivision (a)(6) [evident unfitness for service];
- Code section 44932, subdivision (a)(8) [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 or by the District's governing board; and
- Code section 44933 [unprofessional conduct].

Respondent's immoral conduct authorized immediate suspension under Code section 44933.

On the same date, by letter, Ms. Mottershaw informed Respondent of the foregoing and his right to a hearing.

4. On August 21, 2017, Respondent filed a request for hearing and raised affirmative defenses that included:

² Hereinafter all reference is to the California Education Code unless otherwise stated.

- The facts as alleged were insufficient as a matter of law to constitute "cause" for dismissal pursuant to Code section 44932.
- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in immoral conduct pursuant to Code sections 44932, subdivision (a)(1), and 44939.
- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in unprofessional conduct pursuant to Code section 44932, subdivision (a)(2).
- The facts as alleged were insufficient as a matter of law to establish that Respondent was unfit for service pursuant to Code section 44932, subdivision (a)(6).
- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in persistent violations 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 or the District's governing board pursuant to Code section 44932, subdivision (a)(8).
- The District suspended Respondent without pay but failed to allege any legal basis that would support such action; Respondent sought retroactive pay, retirement contributions, lost fringe benefits and/or medical cost reimbursements according to proof.
- The District failed to provide Respondent with evidence upon which it relied in making its decision as is required by law.

- Under Government Code section 11506, subdivision (a)(2), the Notice did not state facts or omissions on which the District may dismiss Respondent.
- Under Government Code section 11506, subdivision (a)(3), the Statement of Charges was so indefinite or uncertain that Respondent could not identify the specific grounds for dismissal nor prepare his defense.

5. District Board Policy No. 4119.21 sets forth the District's fundamental expectations of its certificated employees and provides: "The Governing Board expects District employees to maintain the highest ethical standards, to follow District policies and regulations, and to abide by state and national laws. Employee conduct should enhance the integrity of the District and the goals of the educational program.

6. Also, the District has policies prohibiting discrimination, intimidation, harassment and bullying for all of its educational programs and activities. (Board Policy Nos. 0410, 4119.11, 5131.2, and 5145.7.³)

³ In addition to the Board policies cited in this finding, the District cited a criminal statute (Penal Code section 243.4), Board policy and Board administrative regulation that are not relevant to this proceeding and therefore not included.

Penal Code section 243.4, subdivision (d), is a criminal statute, and the District has no jurisdiction to file or to enforce criminal charges.

A copy of Board Policy 4011 was not included among the exhibits attached to the Statement of Charges as part of Exhibit B.

7. District Board Policy No. 5137 "Positive School Climate" explains that, "The Governing Board desires to enhance student learning by providing an orderly, caring, and nurturing educational and social environment in which all students can feel safe and take pride in their school and their achievements. The school environment should be characterized by positive interpersonal relationships among students and between students and staff."

8. District Policy/Administrative Regulation No. 4119.11 "Sexual Harassment" states: "The Grossmont Union High School District is committed to having a positive learning and working environment for its students . . . [and] prohibits unwelcome sexual harassment of . . . students by any employee." Moreover, District policy provides relevant examples of sexual harassment, including "unwelcome graphic verbal comments about an individual's body, unwelcome touching, patting, pinching, stroking, squeezing, tickling, or brushing against a person, . . . rating a person's sexuality or attractiveness . . . [and] [s]exist or stereotyped comments."

9. In January 2017, for two quarters, Student B.P. was in Respondent's Maverick Hour. He "gave her a bad vibe" from the first day of class. Typically, she reported to Maverick Hour in Respondent's classroom, and he authorized her to go to Amy Reid's Maverick Hour. (Ms. Reid was another teacher on campus.) On January 23 and 24, 2017, Student B.P. attended Respondent's physical education/weight training class.

Board Policy No. 5145.3 and Administrative Regulation No. 5145.3 are related to students, not certificated personnel.

10. In January 2017, Students N.H. and T.S. were in Respondent's physical education class.

11. On January 24, 2017, Student B.P. reported to Ms. Raimond that Respondent had engaged in inappropriate conduct and behavior. After Student B.P. reported this information, Ms. Raimond called on the "site only" radio for an administrator. Ms. Cuizon responded to the site's nurse's office.⁴ Ms. Cuizon entered the nurse's office. Ms. Raimond asked Student B.P. to repeat her statement to Ms. Cuizon. Student B.P. did so. Because Ms. Raimond's radio call was unusual, Officer Ehlers responded as well. However, Ms. Cuizon waived Officer Ehlers off, indicating that he should not enter the office.

While outside the office, Officer Ehlers observed that Student B.P. was visibly upset (her eyes were red and blurry; she was wiping her eyes and trembling, as if she had been crying) while she talked to Ms. Cuizon and Ms. Raimond. Initially, he did not get involved. Officer Ehlers explained how the "school and police relationship" is supposed to work on campus; initially the administration does the investigation until the administrator identifies possible criminal activity.

Thereafter, Ms. Cuizon took the student into her office, asked Officer Ehlers to join them and asked Student B.P. to repeat her statement in Officer Ehlers's presence. Student B.P. complied; she described and demonstrated how Respondent touched her.

⁴ Officer Ehlers described the physical setup of the nurse's office. It was temporary quarters for a number of offices, including the nurse's office and was located in the learning resource center. The nurse's office had a thick glass window, making it visible to the outside.

Officer Ehlers instructed Student B.P. to write out a statement on school forms. In the meantime, as part of protocol, Officer Ehlers contacted the El Cajon Police Department. He did so for two reasons; in his opinion, the conduct alleged could constitute child abuse; further, he knew Student B.P. (he interacted with all students at the school), and he knew Respondent (as a teacher and a football coach). Officer Ehlers wanted a fair and unbiased investigation conducted by someone who did not know either of them.

12. On January 24, 2017, Student B.P. completed two separate statements. Both were provided to Officer Ehlers at different times.

The first statement was drafted at 11:50 a.m., was provided to Officer Ehlers at 1:40 p.m., and stated:

Barney had me workout my arms [on Monday, January 23, 2017], and when I came to school the next day [he] was touching the top of my chest asking me how my muscles felt, then [he] went and grabbed under my butt and told me it was time to workout my "booty" then repeatedly told me that the bar when I'm doing a bench press needed to come down and touch my "titty" or "nipple" [sic] This has been going on for a couple of days. I've been in his maverick for almost two quutors [sic] and he has always gave [sic] me a bad vibe [sic] but it was just recently that he started touching me. "Your body is going to look so amazing in a bikini this summer" he said that to me while I was working out my abs. In maverick hour, he asked me "do you have a boyfriend?" While I said "no" he continued to ask me questions about what guys at school liked me, and when I

told him what guys I think might like me, he sounded like a jealous boyfriend then asked me if I drove yet and when I said "no" he said "good . . . oh I was going to help you find a job." It made no sense.

The second statement was drafted by Student B.P. on the same date at 2:35 p.m. and stated:

I was wearing jeans with a rip [*sic*] and he was trying to rub the rip off the right side of my leg. He got really close to my vagina, but I didn't think anything of it at the time, and he didn't touch my vagina, so I didn't think anything of it. I kinda just let it go. It was about last Thursday that it had happen [*sic*], no I did not give him permission to touch me in anyway shape or form.

13. On that date, after Student B.P. reported Respondent's alleged misconduct and behavior, Ms. Cuizon contacted Principal Napoleon. He contacted Gary Schwartzwald, the District's Director of Human Resources. The District took the allegations seriously and placed Respondent on paid administrative leave. Mr. Schwartzwald instructed the site administrators to interview other students. Ms. Cuizon interviewed and obtained statements from three other students. She selected students that she believed would be honest. She did not interview any of the students who were in the physical education class with Student B.P.

14. On January 24, 2017, Detective Ted Mansour, of the El Cajon Police Department, arrived at the campus at or about 2:00 p.m. He met with Officer Ehlers and discussed Student B.P.'s statements. Detective Mansour instructed Officer Ehlers

to interview other students. By the time that Detective Mansour arrived, the District had placed Respondent on administrative leave. A criminal investigation was conducted, and no criminal charges were filed against Respondent.

15. On January 25, 2017, Student N.H. drafted and submitted the following statement:

So I have noticed this for a while but didn't think about reporting it until now. Coach Barney has a tendency to touch female students inappropriately. He would touch them around the shoulders and boob area then make comments about our body's [*sic*] and stare at my⁵ boobs and butts. I do not feel comfortable around him. He sometimes grabs their thighs and asks if they are sore. I am 99.9% sure he touched B.P.'s boob on Monday. He makes comments about our bodies in bikinis and stuff.

16. On January 27, 2017, Student T.S. provided the following written statement:

Coach Barney is a good person & coach. He ALWAYS asks if he can touch you to fix your form or show you what muscles you are working. When doing this activity, you can ask all of his students [*sic*] and they will agree with what I said.

⁵ N.H. testified that she should have written "their" and not "my."

17. On February 17, 2017, the District met with Respondent to get "his side of the story." Present at the meeting were Respondent, Respondent's attorney, Principal Napoleon, Ms. Cuizon, Mr. Schwartzwald, Holly Scarella (Mr. Schwartzwald's assistant) and an attorney who represented the District. With the exception of the attorneys and Ms. Scarella, the same individuals testified during the hearing. During this meeting, Respondent admitted the following:

- He touches students when providing exercise instruction instead of modeling proper technique.
- He touches students on the hamstring which is just below the buttocks.
- He uses two fingers and touched student B.P. along and just below the collar bones, a few inches above her breasts.
- He makes statements such as: "Work your booty, tighten your booty, you can have the best booty ever" and "Bring the bar down to your nipples" or something similar to that effect rather than using anatomic terms.
- He does not teach students the names of muscles, or muscle groups.
- He emphasizes the importance of exercise to improve appearance as opposed to improving health and fitness.
- He touches students when providing exercise instruction instead of modeling proper technique.

18. Prior to filing charges in this case, on May 23, 2017, Ms. Mottershaw and Mr. Schwartzwald met with Student B.P. At that time, Student B.P. retold her interactions with Respondent. Student B.P. described and demonstrated on her body how Respondent had touched her. Ms. Mottershaw found Student B.P.'s statements to be consistent with her prior statements and to be credible and trustworthy.

19. Upon completion of the investigation, the District determined that cause existed to dismiss Respondent, and filed the Notice and Statement of Charges.

20. In order to ascertain whether Respondent inappropriately touched Student B.P. and other students and/or made inappropriate statements in the classroom, the Commission evaluated the evidence.

21. Student N.H. testified as a witness in this proceeding. She explained that she was uncomfortable in Respondent's class but did not think to report it until she provided her written statement. Overall, her testimony was consistent with her written statement, with one exception. In the written statement, she said: "He would touch them around the shoulders and boob area and then make comments about our body's [sic] and stare at my boobs and butts." She testified that she should have said: "... then make comments about their bodies and stare at their boobs and butts."

22. In his testimony, Respondent explained how he taught weight training classes. He had machines and free weights in his classroom. When students were new to the class, over a two to three-day period of time, he would demonstrate how to use the machines or weights, talk the students through the movements and then have the students demonstrate. When he taught bench press, Respondent told the students to bring the bar to the nipple or nipple line. He explained that he did so because, earlier in the year, he told the students to bring the bar to their chest; one student did so and

was injured; so, he used more specific language. Further, Respondent explained that when doing a bench press, there needs to be a "spotter," someone who stands behind the student to make sure the person can lift the weight or help if the student is having a hard time with the weight or to protect the student from injury.

Respondent testified that his greatest concern was the safety of the students. He touched students in order to assure that the students were not injured.

23. In his testimony, Respondent denied that, on January 19, 2017, or any date, he had a conversation with B.P. about the jeans she was wearing. He had no memory of whether she wore ripped jeans on that date. Respondent denied that he wiped dirt off B.P.'s jeans. He denied that he ever placed his hand on her thigh, near her vagina.

24. The District's investigation was not optimal. The District did not question the students who were present in the physical education class or the Maverick Hour during the time that Student B.P. alleged the misconduct occurred. There was some inconsistency in testimony; for example, Mr. Napoleon testified that, on January 24, 2017, he was present on campus and in the meeting when Respondent was placed on paid administrative leave. In fact, he was not. Mr. Schwartzwald did not ensure that the investigation was done properly and that the notes were taken accurately during the meetings. There was some question about whether Student N.H. was present in class on the date that Student N.H. alleged that she observed Respondent touch B.P.'s breasts.

Nevertheless, regarding the most salient issues, Student B.P.'s statements to Ms. Raimond, Ms. Cuizon, Officer Ehlers and Ms. Mottershaw were consistent. Her oral statements and testimony were consistent with her written statements. Most

significantly, despite some inconsistencies, the statements of B.P. and N.H. were consistent with Respondent's statements.

25. On January 23, 2017, Student B.P. attended Respondent's second period weight training class for the first time. She was not enrolled in that class. He instructed her to make arrangements to be enrolled in his class.

On this date, he had Student B.P. work on her upper body. Respondent taught her how to use the bench press. He had a student demonstrate. Student B.P. did not do it properly. Respondent described her as uncoordinated; she brought the bar to her ribs. Respondent told her "to bring the bar to your nipples and then back up."

26. On January 24, 2017, Student B.P. returned to the physical education class.

27. On this date, Student B.P. told Respondent that she was hurt, and he told her that he believed that she was sore. Respondent testified that they discussed the issue and she insisted that she was hurt, not sore. He asked her to do an exercise, and she said that she was not able to do so. He talked to her about checking to see if she was sore or injured, explained how he would do so and asked her permission to do so; according to Respondent, she authorized him to touch her. Respondent took two fingers on his right hand, poked the front of her shoulder, in the upper chest and at her collar bone. He was trying to determine if the muscle had knotted or if there was a pulled muscle. Based on his assessment, Respondent explained to Student B.P. that she was sore, not hurt and that the soreness comes from lactic acid buildup; he told her, to get rid of the soreness, she needed to stretch and to drink lots of water.

In Respondent's opinion, he was qualified to assess Student B.P. because he had worked as a coach for 26 years and worked with a college trainer. However, he

acknowledged that he had no formal education or training to assess a student for injury.

According to Respondent, he assessed Student B.P. rather than send her to the nurse's office for evaluation because of a discussion that occurred at a staff meeting he attended. Both the nurse and the principal said that too many students were going to the nurse's office, and the students needed to be checked before being sent to the nurse's office. Though Ms. Raimond and Mr. Napoleon testified as witnesses, neither confirmed Respondent's interpretation of this meeting.

28. On her second day in class, Respondent had Student B.P. work her lower body. Among other things, he had her work on donkey kicks. He had another student demonstrate, and Respondent instructed Student B.P. However, Student B.P. did it wrong. Respondent testified that he went down on his right knee, put his hand on her shoelace on top of her shoe with his right hand; he told her to tighten her hamstring; she did not and asked what was a hamstring; he explained that it was on the back of her leg; he took two fingers, closed his fist and tapped it. He told her to tighten it and could see the hamstring contract. Then he raised her leg with his right hand twice and told her to do it. She did it correctly.

29. On the same date, Respondent admitted that he told Student B.P. that she had a strong core. He explained that he did so because she demonstrated that she was "strong" when she performed a series of exercises; he told the students when they were strong; if they were weak, he told them the areas that could use some improvement and gave exercises they could do to help that issue.

30. Respondent admitted that, in his class, he used the word "booty" and said, "you are going to look so amazing this summer in a bikini." He explained that he

did so to motivate the students. He asked students what their goals were in the class. One student said that she wanted a better "booty" and another student said that she wanted to look good in a bikini during the summer. Another reason was it was his way of telling the students to dress appropriately for class the next day because the students did not have lockers. On January 23, 2017, he said, "we will work our booties tomorrow." Respondent testified that he did not direct the language to Student B.P. Nevertheless, Student B.P. felt that he did.

Respondent described teaching physical education as his dream job. Both Ms. Raimond and Officer Ehlers agreed that Respondent was motivating his students.

31. Respondent did not dispute that he had a conversation with Student B.P. about:

- Whether she had a boyfriend?
- What guys liked her at school?
- Did she have a driver's license?
- Did she have a job?
- He was going to help her find a job.

Respondent explained that he asked about her boyfriend because she and another boy in the class appeared to be flirting; he did not want to pair them in the class if they had a relationship. He asked about what guys liked her at school because he was getting to know her as he had been instructed to do during Maverick Hour. He had been instructed to get to know students so that if they had a particular problem that needed counseling the student could receive assistance.

He asked about whether she drove and if she had a job because a former athlete that he knew asked if he could recommend anyone for a job; he felt that she would qualify because she was a senior and had good class attendance.

32. Teaching physical education is Respondent's dream teaching position. He established that he motivated some of his students. He treated other students in the same manner as he did Student B.P. He touched his students because of his concern about injury for the students. According to Respondent, staff (including Principal Napoleon, Ms. Cuizon, Officer Ehlers and Ms. Raimond) observed him teach students, observed him touch students, and heard him speak to the students in the manner he described. However, the evidence did not support his testimony, and, in fact, was to the contrary. Principal Napoleon testified that, though sometimes he worked out with the students, he did not hear Respondent use such language in his classes or observe him touch students. However, based upon Respondent's admissions, in Principal Napoleon's opinion, Respondent behaved inappropriately.

33. Zachery Peck, a retired teacher, testified as a witness in this proceeding regarding the duties and obligations of a physical education teacher. He worked between September 1985 and June 2015. Between 2004 and 2014, he taught physical education, including weightlifting. Typically, he demonstrated the exercise but might have a student who was proficient demonstrate the exercise. One of his concerns were things that could negatively affect a student's back, spine or neck. If he saw students doing something in that area, he would touch them, push their back in, straighten them. Mr. Peck did not remember touching the students a lot for purposes of instruction. When a student complained of being sore, he did not touch the student's collar bone and/or shoulder because he did not have the ability or knowledge to judge

that the student was sore based on touching the student; so, he would not have done that.

When he taught weight training, Mr. Peck did not touch students as Respondent admitted he touched his students. When Mr. Peck taught weight training, he did not use the language that Respondent admitted he used in class.

34. Despite Respondent's denials, Student B.P.'s version of the events that transpired was more credible than Respondent's version

35. The evidence established that Respondent lifted Student B.P.'s shirt, "play punched" her twice and told her that "she had a nice core."

36. The evidence established that Respondent helped Student B.P. squat, stood behind her and placed his hands on her lower hips as she squatted.

37. Based on N.H.'s testimony as well as Respondent's, it was established that Respondent touched females inappropriately; he touched them around their shoulders and "boob" areas; he made comments about their bodies and stared at their "boobs and butts." He grabbed "thighs" and asked if they were sore. He made comments about female students' bodies and "stuff." Respondent caused N.H. to feel uncomfortable in his class.

38. Based on the facts, it was established that Respondent's misconduct and inappropriate statements violated the Board's policy that set forth its expectation of certificated employees. (Board Policy No. 4119.21). Respondent repeatedly violated this Board policy.

39. Based on the facts, it was established that Respondent's misconduct and inappropriate statements violated the Board's policies that prohibit discrimination,

intimidation, harassment and bullying (Board Policy Nos. 0410, 4119.11, 5131.2, 5145.3, AR5145.3, and 5145.7). He repeatedly violated these Board policies.

40. In accordance with the Superior Court's order, the Commission disregarded factual allegations that occurred more than four years ago as detailed in the Statement of Charges and during the hearing.

41. During the hearing, Respondent provided an explanation for his acts and statements during the 2016-2017 school year (until January 24, 2017). At no time did he appear to understand that his conduct or statements could be misconstrued. At no time did he express appreciation for the wrongfulness of his misconduct. Respondent expressed remorse for his misconduct because it resulted in discipline, not because it was inappropriate or because of the impact it had on colleagues or students.

42. The District's administrators have lost confidence in Respondent's ability to meet the expectations of teachers in the District.

43. In briefs and during oral argument, the parties made factual and legal arguments in support of their positions. After consideration of the foregoing, the Statement of Charges, the exhibits presented during the hearing, and relevant sections of the record of the proceeding, the Commission rejected the factual arguments made by Respondent.

LEGAL CONCLUSIONS

Statutory Authority

1. A permanent employee may be dismissed for cause only after a dismissal hearing. (Cal. Educ. Code, §§ 44934 and 44944.)
2. Education Code section 44932 specifies the permissible causes for termination of a permanent certificated employee.
3. Education Code section 44944 establishes the right to a hearing, the process for selecting the three-member Commission on Professional Competence and sets forth the Commission's authority regarding its final decision.
4. Education Code section 44938 outlines the procedures the governing board must follow before acting on any charges brought against a teacher for unprofessional conduct or unsatisfactory performance.
5. Education Code section 44938, subdivision (a), states:

The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to

correct his or her faults and overcome the grounds
for the charge. . . .

Burden and Standard of Proof

6. The “burden of proof” means the obligation of a party, to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. (*Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

7. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) A preponderance of the evidence means that the evidence on one side of an issue outweighs, preponderates over, and is more than, the evidence on the other side of the issue, not necessarily in number of witnesses or quantity, but in the convincing effect the evidence has on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.APP.4th 1549, 1567.)

Grounds for Dismissal

IMMORAL CONDUCT

8. The term “immoral” has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. The term “immoral conduct” has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the

community, and as inconsiderate attitude toward good order and the public welfare. "Immoral conduct" is not confined to sexual matters. It includes an inconsiderate attitude toward good order and the public welfare. It is sometimes synonymous with "dishonesty" or a high degree of unfairness. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d. 808, 811, noting that no other California cases had previously defined the term "immoral conduct.")

9. "Immoral conduct" is conduct hostile to the welfare of the general public and is not confined to sexual matters. (*San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466)

10. Immoral conduct cannot be considered in the abstract. It must be considered in the context in which the Legislature has considered it, as conduct which is hostile to the welfare of the general public; more specifically, conduct which is hostile to the welfare of the school community. In providing standards to guide school boards in placing restraints on conduct of teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption. This is a proper exercise of the power of a state to abridge personal liberty and to protect larger interests. But reasonableness must be the governing criterion. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224.) The phrase "immoral conduct" within the meaning of the Education Code denotes immoral or unprofessional conduct or moral turpitude of the teacher that renders the teacher unfit to teach. (*Ibid.* at p. 225.)

11. "As between a teacher and his student, '(a)n important part of the education . . . is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept.' (Citation) 'A teacher . . . in the public school system is regarded by the public and

pupils in the light of an exemplar, whose words and actions are likely to be followed by the [students] coming under [his] care and protection . . . The teaching by example as well as precept, of obedience to properly constituted authority and discipline necessary to a well-ordered society, is an important part of education.” (*Watson v. State Bd. of Education* (1971) 22 Cal.App.3d 559, 565.)

12. “The calling of an educator is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. The educator’s ability to inspire children and to govern them, his power as an educator, and the character for which he stands are matters of major concern in an educator’s selection and retention . . . An educator in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the students coming under his care and protection.” (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463-64.)

13. The governing board of a district is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental, and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. “Book learning” is only a phase of the important lessons a child should learn in school. (*Palo Verde Unified School District of Riverside County v. Hensey* (1970) 9 Cal.App.3d 967, 970-71.)

14. Rejecting statutory terms, such as “immorality,” “unprofessional conduct,” or “moral turpitude” as overly broad to use as grounds for discipline of public school teachers, the *Morrison* court created a seven-part test to assess whether a

misbehaving teacher is fit to teach. (*Broney v. California Comm. on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 466.) "Because such terms as 'immoral,' 'unprofessional,' or 'involving moral turpitude' are too broad and amorphous to be used as a basis for the termination of a professional license, it must be shown the conduct in question indicates an unfitness to engage in the profession." (*Id.* at pp. 473-74.)

15. Since the term "immoral conduct" is vague and broad, whether the conduct demonstrates an unfitness to teach must be measured against seven criteria set forth in *Morrison*. (*Governing Board of ABC Unified School District v. Haar* (1994) 28 Cal.App.4th 369, 383.)⁶

EVIDENT UNFITNESS FOR SERVICE

16. The applicable standard or determinative test in teacher dismissal cases is whether the person is fit to teach. "Fitness to teach" is probably a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.)

17. "Evident" is defined as "clear to the vision and understanding." "Unfit" is defined as "not fit; not adapted to a purpose, unsuitable; incapable; incompetent; and physically or mentally unsound" and "unsuitable, incompetent and not adapted for a particular use or service." (*Palo Verde Unified School District of Riverside County v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

⁶ The *Morrison* factors (sometimes also referred to as criteria) are discussed later in this Decision.

18. In *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, the court noted the two parallel, yet contradictory, line of cases regarding "unfit for service." One line of cases equated that term with "unprofessional conduct," and the other line of cases distinguished the definition of the two. In deciding that the latter line of cases was the correct way to evaluate "unfit to serve," and complied with the rules of statutory construction. The *Woodland* court concluded that "unprofessional conduct" and "evident unfitness for service" do not mean precisely the same thing. Although conduct constituting "evident unfitness for service" will often constitute "unprofessional conduct," the converse is not always true. "Evident unfitness for service" requires that unfitness for service be attributable to defect in temperament, which is not necessary for a finding of "unprofessional conduct." Nevertheless, lower courts may not disregard the criteria for unfitness set out in *Morrison* where that court concluded that "unprofessional conduct" meant conduct showing a teacher was unfit to teach. These criteria must be analyzed to determine, as a threshold matter, whether the conduct indicates unfitness for service. If it does, the next step was to determine whether the "unfitness" is "evident", i.e., whether the offensive conduct is caused by a defect in temperament. (*Id.* at pp. 1442-1445.) A finding of "unfit to serve" can be made if the evidence, taken in the aggregate, shows that retaining the employee would pose a significant danger of psychological harm to students and fellow students. (*Id.* at p. 1456.)

19. To establish a teacher is unfit to teach, *Morrison* requires a nexus between government employment and alleged employee misconduct stemming from the principle that "[no] person can be denied government employment because of factors unconnected with the responsibilities of that employment." (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463.). "Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes

a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectation of the employing school district." (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1120, 1142-43.)

PERSISTENT VIOLATION OR REFUSAL TO OBEY LAWS

20. The word "persistent" is defined by lexicographers as "refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated." (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) Code section 44932, subdivision (a)(7), pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; "it is the persistent disregard" of school rules that the subdivision is designed to regulate. (*Id.* at p.84.)

21. A violation of Code section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that employee's refusal to follow the laws or regulations was "persistent," i.e., "stubborn and continuing." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered "persistent." (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

MORRISON FACTORS

22. In *Morrison, supra*, the Supreme Court identified seven factors to consider when evaluating whether the school employee should be dismissed: (1) the

likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity, if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher.

23. The *Morrison* factors may be applied to the charges in the aggregate. When a camel's back is broken, the trier of fact need not weigh each straw in its load to see which one could have done the deed. A trier of fact is entitled to consider the totality of the offensive conduct. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456-1457.)

24. Only the pertinent *Morrison* factors need to be analyzed. (*Broney v. California Commission on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 476.) The pertinent *Morrison* factors are considered in this decision.

Other Disciplinary Considerations

25. An administrator's loss of confidence in the educator and doubt regarding the educator's ability to serve as a role model for students are factors that may be considered. (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1460.)

Evaluation

26. In making the legal conclusions in this case, as ordered in the writ of mandate, the Commission did not consider the evidence that was four years or more before the Statement of Charges was filed. Nor did the Commission consider the alleged cause for dismissal of unprofessional conduct, .

27. In making legal conclusions, the Commission considered the legal arguments made by the parties in their briefs and during closing argument. The Commission did not find Respondent's legal arguments persuasive.

28. The evidence must not only be sufficient to support a finding that Respondent engaged in the misconduct but also a finding that his misconduct met the criteria for grounds for dismissal.

29. While working as a physical education teacher, in his weight training class, Respondent engaged in the following conduct:

- He touched students when providing exercise instruction instead of modeling proper technique.
- He touched students on the hamstring, which is just below the buttocks.
- He used two fingers and touched student B.P. along and just below the collar bones, a few inches above her breasts.
- He made statements such as: "Work your booty," "Tighten your booty," "You can have the best booty ever" and "Bring the bar down

to your nipples" or something similar rather than using anatomic terms.

- He did not teach students the names of muscles or muscle groups.
- He emphasized with his students the importance of exercise to improve appearance as opposed to improving health and fitness.

28. At no time has Respondent expressed true remorse for his misconduct. At no time did Respondent accept responsibility for his actions. Instead, he sought to justify his conduct that occurred during the 2016 – 2017 school year (until January 24, 2017). There was no evidence presented that Respondent appreciated the wrongfulness of his acts or his bad judgment.

29. Respondent's misconduct and inappropriate language evidence his disregard for the District's primary goals and expectations that come with the teaching profession. His touching and making inappropriate and unprofessional comments, negatively impacted the work and educational environment. Respondent's conduct was detrimental to the District and its students. Respondent was fully to blame for his conduct. He is not a model of good behavior. He cannot be relied upon to act morally and to uphold the responsibilities of a public educator. Respondent has no appreciation for the wrongfulness of his acts and misconduct; as such, if allowed to retain his position, it is likely that he will engage in the same or similar misconduct again.

Based on the facts and the law, it was established that cause exists to dismiss Respondent for immoral conduct pursuant to Code section 44932, subdivision (a)(1).

30. The facts and the law have been analyzed to determine whether it was established that Respondent is evidently unfit to serve as a teacher in the District. Specifically, Respondent's sexualizing, harassing, touching and inappropriate comments and actions toward female students, in particular, toward Student B.P. have been considered. He demonstrated no remorse or comprehension that his conduct during the 2016 - 2017 school year was wrong or that he should not touch students along the collarbone, hips, or buttocks. He did not establish that he learned from the experience or that his conduct would change if he returned to the classroom. Nevertheless, it was not established that Respondent was evidently unfit to teach. The testimony provided by Student N.H. was vague, and the timeline was limited in scope.

Based on the facts and the law, insufficient evidence was offered to establish that cause exists to dismiss Respondent pursuant to Code section 44932, subdivision (a)(6), evident unfitness for service.

31. The facts and the law have been analyzed to determine whether Respondent persistently violated or refused to obey the rules governing his employment.

Respondent knew or should have known of the Governing Board's policies and expectations as a certificated employee of the District, including Board Policy Nos. 0410, 4119.11, 4119.21, 5131.2, 5137, and 5145.7. The District attached copies of the foregoing to the Statement of Charges. Having reviewed the foregoing Board policies and the facts, it was determined that Respondent repeatedly violated Board Policy Nos. 0410, 4119.11, 4119.21, 5131.2, 5137, and 5145.7.

Based on the facts and the law, it was established that cause exists to dismiss Respondent pursuant to Code Section 44932, subdivision (8), persistent violation or refusal to obey school laws or reasonable regulations of the District.

32. Upon the filing of the Statement of Charges, the District placed Respondent on immediate unpaid suspension. In his Notice of Defense, Respondent seeks retroactive pay, retirement contributions, lost fringe benefits and/or medical cost reimbursement according to proof. The parties disagree regarding the procedure that must be followed pursuant to Education Code section 44939 and whether the Commission has jurisdiction to issue an order compelling the District to provide back pay and benefits. Respondent offered no evidence of his back pay or benefits during the hearing. The Commission determined that the charges support dismissal of Respondent on the basis of immoral conduct. As such, he is not entitled to reinstatement of his salary and benefits. Thus, it is not necessary to address the arguments related to the appropriate procedure to file pursuant to Code section 44939.

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ORDER

Joshua Barney's appeal of his dismissal from employment with the Grossmont Union High School District is denied. The Grossmont Union High School District's request to dismiss Joshua Barney is granted. Joshua Barney is dismissed from employment with the Grossmont Union High School District. The Notice of Intent to Dismiss and Statement of Charges filed against Joshua Barney is affirmed.

DATED: August 9, 2019

DocuSigned by:

Ron Lardizabal
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RON LARDIZABAL

Commission Member

DATED: August 10, 2019

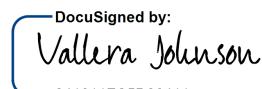
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Charles Mendoza
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CHARLES MENDOZA

Commission Member

DATED: August 12, 2019

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Vallera Johnson
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VALLERA J. JOHNSON

Administrative Law Judge

Office of Administrative Hearings

Commission Member

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
GROSSMONT UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

JOSHUA BARNEY,

Respondent.

OAH No. 2017090130

DECISION

The Commission on Professional Competence of the Grossmont Union High School District heard this matter on January 29, 30, 31, and February 1, 2018, in El Cajon, California.

The Commission on Professional Competence included Charles Mendoza, Ron Lardizabal, and Vallera Johnson, Administrative Law Judge, State of California, Office of Administrative Hearings, who served as chairperson.

Ingrid Meyers, Attorney at Law, of the law firm of Dannis Woliver Kelley, represented Julie Mottershaw, Assistant Superintendent, Human Resources, of the Grossmont Union High School District.

Fern Steiner, Attorney at Law, Smith, Steiner, Vanderpool, & Wax, represented Joshua Barney.

The matter was submitted on February 2, 2018.¹

FACTUAL FINDINGS

1. Joshua Barney (Respondent) is a permanent certificated employee of the Grossmont Union High School District (District). He testified that he holds special education, health and physical education credentials.

¹ The hearing concluded on February 1, 2018. The record remained open for the commission members to deliberate, which occurred on February 2, 2018.

On February 2, 2018, the record closed, and the matter was submitted.

Respondent described his career with the District. In 1992, he began at Chaparral High School as a campus supervisor in a classified position. He commenced his career as a certificated employee with the District in 1999. Between 1999 and 2016, he taught special education at Helix High School (one year), Granite Hills High School (10 years), Steele Canyon High School (one year), returned to Granite Hills High School (one year), Santana High School (two years), Chaparral High School (one year) and IDEA Center High School. During the 2016-2017 school year, he taught physical education at IDEA.

2. Chaparral, IDEA and Merit Academy are physically located on the same campus. The administrators for all three schools are the same and are located on the campus of IDEA. In January 2017 and on the date of hearing, the principal was David Napoleon; there were two vice-principals, and one of the vice-principals was Dawn Cuizon. In addition, the campus resource officer was Darren Ehlers, and the school nurse was Lonnie Raimond.

Chaparral is a continuation school; the students who attend: (1) are on expulsion from the District or enrolled in schools outside the District, or (2) need special education services or a smaller environment.

IDEA is an “alternative school choice” which means that any student within the District can apply to attend. IDEA is project-based learning. The focus is on restorative practices and competency based grading. It is a smaller school environment. The school tends to draw students who come from home schools or charter schools or who are on campus because they are anxious about going to a large school. At IDEA, there are smaller classrooms; students demonstrate their knowledge by doing projects or presentations as well as using technology. In addition, at IDEA, career pathways programs are available to students, such as construction, cooking and floral design.

On the class schedule is a class entitled “Maverick Hour.” Mr. Napoleon described Maverick Hour as a combination of homeroom and tutorial, a bit of a teacher-student mentorship. The class is divided into grade levels; so, there is ninth grade Maverick Hour, tenth grade Maverick Hour, etc. It is a time and place for some student counseling, to talk to a specific group of students, and for the students to get additional help. Tutorials are held two days a week. Students can go to other classrooms if the teachers in the classrooms arrange this, for example to take a test or to complete a science laboratory. At IDEA, during the day, typically, even if a student has completed a class (for example science) project, the student does not typically leave the class to go to another class, unless there is a valid reason to do so.

3. District Board Policy No. 4119.21 sets forth the District’s fundamental expectations of its certificated employees and provides “The Governing Board expects District employees to maintain the highest ethical standards, to follow District policies and regulations, and to abide by state and national laws. Employee conduct should enhance the integrity of the District and the goals of the educational program.”

4. Also, the District has policies prohibiting discrimination, intimidation, harassment and bullying for all of its educational programs and activities. (Board Policy Nos. 0410, 4119.11, 5131.2, and 5145.7.²)

5. District Policy/Administrative Regulation No. 4119.11 "Sexual Harassment states: "The Grossmont Union High School District is committed to having a positive learning and working environment for its students . . . [and] prohibits unwelcome sexual harassment of . . . students by any employee." Moreover, District policy provides relevant examples of sexual harassment, including "unwelcome graphic verbal comments about an individual's body, unwelcome touching, patting, pinching, stroking, squeezing, tickling, or brushing against a person, . . . rating a person's sexuality or attractiveness . . . [and] [s]exist or stereotyped comments."

6. District Board Policy No. 5137 "Positive School Climate" explains that, "The Governing Board desires to enhance student learning by providing an orderly, caring, and nurturing educational and social environment in which all students can feel safe and take pride in their school and their achievements. The school environment should be characterized by positive interpersonal relationships among students and between students and staff."

7. As of January 2017, for two quarters, Student B.P. had been in respondent's Maverick Hour. He "gave her a bad vibe" from the first day of class. Typically, she reported to Maverick Hour in respondent's classroom, and he authorized her to go to Amy Reid's Maverick Hour. (Ms. Reid was another teacher on campus.) On January 23 and 24, 2017, Student B.P. attended Respondent's physical education/weight training class.

8. In January 2017, Students N.H. and T.S. were in Respondent's physical education class.

9. On August 10, 2017, the Statement of Charges for Dismissal and Immediate Unpaid Suspension was filed with the District's governing board. On that date, Ms. Mottershaw, in her official capacity, recommended to the board that Respondent be dismissed from employment and suspended without pay. Her recommendations were

² In addition to the Board policies cited in this finding, the District cited a criminal statute, Board policy and Board administrative regulation that are not relevant to this proceeding and therefore not included.

Penal Code section 243.4, subdivision (d) is a criminal statute, and the District has no jurisdiction to file criminal charges.

A copy of Board Policy 4011 was not included as part of Exhibit B.

Board Policy No. 5145.3 and Administrative Regulation No. 5145.3 are related to students, not certificated personnel

approved by the board. The Statement of Charges alleged that Respondent engaged in actionable conduct, as set forth in:

- California Education Code³ section 44932, subdivision (a)(1) [immoral conduct],
- Code section 44932 subdivision (a)(2) [unprofessional conduct],
- Code section 44932, subdivision (a)(6), [evident unfitness for service],
- Code section 44932, subdivision (a)(8) [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 or by the district's governing board];
- All of his conduct has been unprofessional within the meaning of Code section 44933; and
- Respondent's immoral conduct authorized his immediate suspension under Code section 44933.

On the same date, by letter, Ms. Mottershaw informed Respondent of the foregoing and his right to a hearing.

10. On August 21, 2017, Respondent filed a request for hearing and raised the affirmative defenses that included:

- The facts as alleged were insufficient as a matter of law to constitute "cause" for dismissal pursuant to Code section 44932.
- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in immoral conduct pursuant to Code sections 44932, subdivision (a)(1) and 44939.
- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in unprofessional conduct pursuant to Code sections 44932, subdivision (a)(2).
- The facts as alleged were insufficient as a matter of law to establish that Respondent was unfit for service pursuant to Code section 44932, subdivision (a)(6).

³ Hereinafter all reference is to the California Education Code unless otherwise stated.

- The facts as alleged were insufficient as a matter of law to establish that Respondent engaged in persistent violations 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 or by the District's governing board.
- The District suspended Respondent without pay but failed to allege any legal basis that would support such action; Respondent sought retroactive pay, retirement contributions, lost fringe benefits and/or medical cost reimbursements according to proof.
- The District failed to provide Respondent with evidence upon which it relied in making its decision as is required by law.
- Under Government Code section 11506, subdivision (a)(2), the Notice did not state acts or omissions on which the district may dismiss respondent.
- Under Government Code section 11506, subdivision (a)(3), the Accusation was so indefinite or uncertain that Respondent could not identify the specific grounds for dismissal nor prepare his defense.

11. On January 24, 2017, Student B.P. reported to Ms. Raimond that Respondent had engaged in inappropriate conduct and behavior. After Student B.P. reported this information, Ms. Raimond called on the “site only” radio for an administrator. Ms. Cuizon responded to the site’s nurse’s office⁴. Ms. Cuizon entered the nurse’s office. Ms. Raimond asked Student B.P. to repeat her statement to Ms. Cuizon. Student B.P. did so. Because Ms. Raimond’s radio call was unusual, Officer Ehlers responded as well. However, Ms. Cuizon waived Officer Ehlers off, indicating that he should not enter the office.

While outside the office, Officer Ehlers observed that Student B.P. was visibly upset (her eyes were red and blurry; she was wiping her eyes and trembling, as if she had been crying), while she talked to Ms. Cuizon and Ms. Raimond. Initially, he did not get involved. Officer Ehlers explained how the “school and police relationship” is supposed to work on campus; initially the administration does the investigation until the administrator identifies possible criminal activity.

⁴ Officer Ehlers described the physical setup of the nurse’s office. It was temporary quarters for a number of offices, including the nurse’s office and was located in the learning resource center. The nurse’s office had thick glass, making it visible to the outside.

Thereafter, Ms. Cuizon took the student into her office, asked Officer Ehlers to join them and asked Student B.P. to repeat her statement in Officer Ehlers's presence. Student B.P. complied; she described and demonstrated how Respondent touched her. He instructed Student B.P. to write out a statement on school forms. In the meantime, as part of protocol, Officer Ehlers contacted the El Cajon Police Department. He did so for two reasons; in his opinion, the conduct alleged could constitute child abuse; further, he knew Student B.P. (he interacted with all students at the school), and he knew Respondent (as a teacher and a football coach). Officer Ehlers wanted a fair and unbiased investigation conducted by someone who did not know either of them.

12. On January 24, 2017, Student B.P. completed two separate statements. Both were provided to Officer Ehlers at different times.

The first written statement was drafted at 11:50 a.m. and provided to Officer Ehlers at 1:40 p.m.

Barney had me workout my arms [on Monday, January 23, 2017], and when I came to school the next day [he] was touching the top of my chest asking me how my muscles felt, then [he] went and grabbed under my butt and told me it was time to workout my "booty" then repeatedly told me that the bar when I'm doing a bench press needed to come down and touch my "titty" or "nipple" [sic]. This has been going on for a couple of days. I've been in his maverick for almost two quarters, [sic] and he has always gave me a bad vibe, [sic] but it was just recently that he started touching me. "Your body is going to look so amazing in a bikini this summer" he said that to me while I was working out my abs. In maverick hour, he asked me "do you have a boyfriend?" While I said "no" he continued to ask me questions about what guys at school liked me, and when I told him what guys I think might like me, he sounded like a jealous boyfriend then asked me if I drove yet and when I said "no" he said "good ... oh I was going to help you find a job." It made no sense.⁵

The second statement was drafted on the same date at 2:35 p.m. Student B.P. and stated:

I was wearing jeans with a rip, [sic] and he was trying to rub the rip off the right side of my leg. He got really close to my vagina, but I didn't think anything of it at the time, and he didn't touch my vagina, so I didn't think anything of it. I kinda just let

⁵ Student B.P. wrote this statement at 11:50 a.m. She gave it to Officer Ehlers at 1:40 p.m.

it go. It was about last Thursday that it had happen [*sic*], no I did not give him permission to touch me in anyway shape or form.

13. On that date, after Student B.P. reported Respondent's alleged misconduct and behavior, Ms. Cuizon contacted Principal Napoleon. He contacted Gary Schwartzwald, the District's Director of Human Resources. The District took the allegations seriously and placed Respondent on paid administrative leave. Mr. Schwartzwald instructed the site administrators to interview other students. Ms. Cuizon interviewed and obtained statements from three other students. She selected students that she believed would be honest. She did not interview any of the students who were in the physical education class with Student B.P.

14. On January 24, 2017, Detective Ted Mansour, of the El Cajon Police Department, arrived at the campus at or about 2:00 p.m. He met with Officer Ehlers and discussed Student B.P.'s statements. Detective Mansour instructed Officer Ehlers to interview other students. By the time that Detective Mansour arrived, the District had placed Respondent on administrative leave. A criminal investigation was conducted, and no criminal charges were filed against respondent.

15. On January 25, 2017, Student B.P. drafted another statement that was provided to Ms. Cuizon and Officer Ehlers at 9:12 a.m., which stated:

I was standing there talking to Nicole or Moira, I can't remember, but Barney lifted up my shirt, play punched me twice, then told me I have a really nice core.

Barney then began to help me squat yesterday and stood behind me, placed his hands on my lower hips and began to help me go.

16. On January 25, 2017. Student N.H. drafted and submitted the following:

So I have noticed this for a while but didn't think about reporting it until now. Coach Barney has a tendency to touch female students inappropriately. He would touch them around the shoulders and boob area then make comments about our body's [*sic*] and stare at my⁶ boobs and butts. I do not feel comfortable around him. He sometimes grabs their thighs and asks if they are sore. I am 99.9% sure he touched B.P.'s boob on Monday. He makes comments about our bodies in bikinis and stuff.

Officer Ehlers interviewed Student N.H. Ms. Cuizon did not interview Student N.H. and was not present when Officer Ehlers did so.

⁶ N.H. testified that she should have written "their" and not "my".

17. On January 27, 2017, Student T.S. provided the following statement:

Coach Barney is a good person & coach. He ALWAYS asks if he can touch you to fix your form or show you what muscles you are working. When doing this activity, you can ask all of his students [sic] and they will agree with what I said.

18. On February 17, 2017, the District met with Respondent to get “his side of the story.” Present at the meeting were Respondent, Respondent’s attorney, Principal Napoleon, Ms. Cuizon, Mr. Schwartzwald, Holly Scarella (Mr. Schwartzwald’s assistant) and an attorney who represented the District. During this meeting, in response to questions, Respondent admitted the following:

- He touches students when providing exercise instruction instead of modeling proper technique.
- He touches students on the hamstring, which is just below the buttocks.
- He used two fingers and touched student B.P. along and just below the collar bones, a few inches above her breasts.
- He made statements such as: “Work your booty, tighten your booty, you can have the best booty ever” and “Bring the bar down to your nipples” or something similar to that effect rather than using anatomic terms.
- He did not teach students the names of muscles, or muscle groups.
- He emphasizes with his students the importance of exercise to improve appearance as opposed to improving health and fitness.

19. Prior to filing charges in this case, on May 23, 2017, Ms. Mottershaw and Mr. Schwartzwald met with Student B.P. At that time, Student B.P. retold her interactions with Respondent. Student B.P. described and demonstrated on her body how Respondent had touched her. Ms. Mottershaw found Student B.P.’s statements to be consistent with her prior statements. Ms. Mottershaw found these statements to be credible and trustworthy.

20. Upon completion of the investigation, the District determined that cause existed to dismiss Respondent and filed the Notice and Statement of Charges.

21. In order to ascertain whether Respondent inappropriately touched Student B.P. and other students and/or made inappropriate statements in the classroom, the evidence was evaluated.

The District's investigation was not optimal. The District did not question the students who were present in the physical education class or the Maverick Hour during the time that Student B.P. alleged the misconduct occurred. There was some inconsistency in testimony; for example, Mr. Napoleon testified that, on January 24, 2017, he was present on campus and in the meeting when Respondent was placed on paid administrative leave. In fact, he was not. Mr. Schwartzwald did not ensure that the investigation was done properly and that the notes were taken accurately during the meetings. There was some question about whether Student N.H. was present in class on the date that Student N.H. alleged that she observed Respondent touch B.P.'s breasts.

Nevertheless, regarding the most salient issues, Student B.P.'s statements to Ms. Raimond, Ms. Cuizon, Officer Ehlers and Ms. Mottershaw were consistent. Her oral statements were consistent with her written statements. Most significantly, despite some inconsistencies, the statements of B.P. and N.H. were consistent with Respondent's statements.

Further, based on his testimony, Respondent did not understand that others might misinterpret his conduct.

22. Respondent explained how he taught weight training classes. He had machines and free weights in his classroom. When students were new to the class, over a two to three-day period of time, he would demonstrate how to use the machines or weights, talk the student through the movements and then have the students demonstrate. When he taught bench press, Respondent told the student to bring the bar to the nipple or nipple line. He explained that he did so because, earlier in the year, he told the students to bring the bar to their chest; one student did so and was injured; so, he used more specific language. Further, Respondent explained that when doing a bench press, there needs to be a "spotter," someone who stands behind the student to make sure the person can lift the weight or help if the student is having a hard time with the weight or to protect the student from injury.

Respondent testified that his greatest concern was the safety of the students. He touched students in order to assure that the students were not injured.

Respondent described teaching physical education as his dream job. Both Ms. Raimond and Officer Ehlers agreed that Respondent was motivating his students.

23. On January 23, 2017, Student B.P. attended Respondent's second period weight training class for the first time. She was not enrolled in that class. He instructed her to make arrangements to be enrolled in his class.

On this date, he had Student B.P. work on her upper body. Respondent taught her how to use the bench press. He had a student demonstrate. Student B.P. did not do it properly. Respondent described her as uncoordinated; she brought the bar to her ribs. Respondent told her “to bring the bar to your nipples and then back up.”

24. On January 24, 2017, Student B.P. returned to the physical education class.

25. On this date, Student B.P. told Respondent that she was hurt, and he told her that he believed that she was sore. Respondent testified that they discussed the issue and she insisted that she was hurt, not sore. He asked her to do an exercise, and she said that she was not able to do so. He talked to her about checking to see if she was sore or injured, explained how he would do so and asked her permission to do so; according to Respondent, she authorized him to touch her. Respondent took two fingers on his right hand, poked the front of her shoulder, in the upper chest and at her collar bone. He was trying to determine if the muscle had knotted or if there was a pulled muscle. Based on his assessment, Respondent explained to Student B.P. that she was sore, not hurt and that the soreness comes from lactic acid buildup; he told her, to get rid of the soreness, she needed to stretch and to drink lots of water.

In Respondent’s opinion, he was qualified to assess Student B.P. because he had worked as a coach for 26 years and worked with a college trainer. However, he acknowledged that he had no formal education or training to assess a student for injury.

According to Respondent, he assessed Student B.P. rather than send her to the nurse’s office for evaluation because of a discussion that occurred at a staff meeting he attended. Both the nurse and the principal said that too many students were going to the nurse’s office, and the students needed to be checked before being sent to the nurse’s office. Though Ms. Raimond and Mr. Napoleon testified as witnesses, neither confirmed Respondent’s interpretation of this meeting discussion.

26. On her second day in class, Respondent had Student B.P. work her lower body. Among other things, he had her work on donkey kicks. He had another student demonstrate, and Respondent instructed Student B.P. However, Student B.P. did it wrong. Respondent testified that he went down on his right knee, put his hand on her shoelace on top of her shoe with right hand; he told her to tighten her hamstring; she did not and asked what was a hamstring; he explained that it was on the back of her leg; he took two fingers, closed his fist and tapped it. He told her to tighten it and could see the hamstring contract. Then he raised her leg with his right hand twice and told her to do it. She did it correctly.

27. On the same date, Respondent admitted that he told Student B.P. that she had a strong core. He explained that he did so because she demonstrated that she was “strong” when she performed a series of exercises; he told the students when they were strong; if they were weak, he told them the areas that could use some improvement and gave exercises they could do to help that issue.

28. Despite his denials, for the reasons stated in Findings 11 through 27, Student B.P.'s version of the events that transpired was more credible than Respondent's version.

29. The evidence established that Respondent lifted Student B.P.'s shirt, "play punched" her twice and told her she had a nice core.

30. The evidence established that Respondent helped Student B.P. squat, stood behind her and placed his hands on her lower hips as she squatted.

31. Respondent admitted that, in his class, he used the word "booty" and "you are going to look so amazing this summer in a bikini." He explained that he did so to motivate the students. He asked students what their goals were in the class. One student said that she wanted a better "booty" and another student said that she wanted to look good in a bikini during the summer. Another reason was it was his way of telling the students to dress appropriately for class the next day because the students did not have lockers. On January 23, 2017, he said, "we will work our booties tomorrow." Respondent testified that he did not direct the language to Student B.P. Nevertheless, Student B.P. felt that he did.

32. Respondent did not dispute that he had a conversation with Student B.P. about:

- Whether she had a boyfriend?
- What guys liked her at school?
- Did she have a driver's license?
- Did she have a job?
- He was going to help her find a job.

Respondent explained that he asked about her boyfriend because she and another boy in the class appeared to be flirting; he did not want to pair them in the class if they had a relationship. He asked about what guys liked her at school because he was getting to know her as he had been instructed to do during Maverick Hour. He had been instructed to get to know students so that if they had a particular problem that needed counseling the student could receive assistance. He asked about whether she drove and if she had a job because a former athlete that he knew asked if he could recommend anyone for a job; he felt that she would qualify because she was a senior and had good class attendance.

33. Teaching physical education is Respondent's dream teaching position. He established that he motivated some of his students. He treated other students in the same manner as he did Student B.P. He touched his students because of his concern about injury for the students. According to Respondent, staff (including Principal Napoleon, Ms. Cuizon, Officer Ehlers and Ms. Raimond) observed him teach students, observed him touch and heard him speak to the students in the manner he described. However, the evidence did not support his testimony, and, in fact, was to the contrary. Principal Napoleon testified that, though sometimes he worked out with the students, he did not hear Respondent use such language in his classes or observe him touch students; he thought his conduct and language were inappropriate.

34. Student N.H. testified as a witness in this proceeding. She explained that she was uncomfortable in Respondent's class but did not think to report it until she provided her written statement. Overall, her testimony was consistent with her written statement, with one exception. In the written statement, she said: "He would touch them around the shoulders and boob area and then make comments about our body's [sic] and stare at my boobs and butts." She testified that she should have said: ". . . then make comments about their bodies and stare at their boobs and butts."

Based on her testimony as well as Respondent's, it was established that Respondent touched females inappropriately; he touched them around their shoulders and "boob" areas; he made comments about their bodies and stared at their "boobs and butts"; Student N.H. did not feel comfortable around Respondent. He grabbed "thighs" and asked if they were sore. He made comments about their bodies and "stuff."

35. Zachery Peck, a retired teacher, testified as a witness in this proceeding regarding the duties and obligations of a physical education teacher. He worked between September 1985 and June 2015. Between 2004 and 2014, he taught physical education, including weight lifting. Typically, he demonstrated the exercise but might have a student who was proficient demonstrate the exercise. One of his concerns were things that could negatively affect their back, spine or neck. If he saw students doing something in that area, he would touch them, push their back in, straighten them. Mr. Peck did not remember touching the students a lot for purposes of instruction. When the student complained of being sore, he did not touch the student's collar bone and/or shoulder because he did not have the ability or knowledge to judge that the student was sore based on touching the student; so, he would not have done it.

When he taught weight training, Mr. Peck did not touch students as Respondent admitted he touched his students. When he taught weight training, he did not use the language that Respondent admitted he used in class.

36. Based on the facts, it was established that Respondent's misconduct and inappropriate statements violated the Board's policy that set forth its expectation of certificated employees. (Board Policy No. 4119.21). Respondent repeatedly violated this Board policy.

37. Based on the facts, it was established that Respondent's misconduct and inappropriate statements violated the Board's policies that prohibit discrimination, intimidation, harassment and bullying (Board Policy Nos. 0410, 4119.11, 5131.2, 5145.3, AR5145.3, and 5145.7). He repeatedly violated these Board policies.

38. This is not the first time that Respondent has engaged in the type of conduct described in Findings 18, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

On July 2, 2013, the District provided Respondent with a Notice of Suspension without Pay, Notice of Unprofessional Conduct as a result of his sexual harassment towards

a colleague, failure to follow directives from administration, use of profanity and engaging in inappropriate interactions with students. More specifically, it was alleged in that Notice that, during the course of the 2012-2013 school year, Respondent made the following comments and took the following actions toward Bobbi Salazar, an instructional aide, and others.

- (a) He repeatedly referred to Ms. Salazar as “Hot Bobbi” and did so with enough regularity that students in his class began calling her “Hot Bobbi.”
- (b) On November 21, 2012, when a student asked Ms. Salazar if she missed her husband (who was out of town), Respondent stated: “What time should I come over?” implying that he and Ms. Salazar were having an affair. Respondent made this comment in front of students.
- (c) He made comments toward Ms. Salazar that her sisters were “hot” or words to that effect.
- (d) On December 6, 2012, during classroom instruction, Respondent stopped teaching and told Ms. Salazar that she “looked good” that day.
- (e) Between August and November 2012, Respondent told Lindsay Connolly, the District’s substitute instructional aide, that she looked good in her pants and that she should wear them more often.
- (f) On December 12, 2012, during a conversation with Ms. Salazar, Respondent tried to excuse his inappropriate actions and comments; he said, “This class drives me crazy. They piss me off, and Courtney (one of his students) is a fucking cunt,” or words to that effect.
- (g) Respondent displayed images of female celebrities (Carrie Underwood and Katie Perry) and, in references to those images, Respondent told his students that the women were “hot.”
- (h) Respondent downloaded images of the Dallas Cowboys cheerleaders and the San Diego Chargers cheerleaders and engaged in a discussion with male students wherein he compared their physical attributes. This conversation was held in front of female students.

39. In the 2013 Notice, the District provided Respondent with specific directives on how to improve his conduct through a “Plan of Assistance.” Relevant portions of this “Plan of Assistance” included the following:

- (a) Conduct yourself in appropriate and professional manner at all times. At minimum you must treat your students . . . with fairness, respect, consideration, and dignity. You shall endeavor at all times to avoid circumstances which may give rise to the appearance of improper behavior.
- (b) Cease and desist from all unnecessary physical contact with students.
- (c) Do not engage in any conversations or communications in which you make reference to any student[’s] . . . physical attributes or body shape. You shall not refer to students . . . as “sexy” or “hot” or otherwise physically or sexually attractive.
- (d) Do not discuss matters of a sexual nature or make use of sexual innuendo with any students . . . Do not discuss your personal relationships or sexual proclivities, or any other inappropriate personal matters with any student. . . . Do not compare the physical attributes of anyone with or in the presence of your students.
- (e) You are specifically directed to discontinue any teaching style in which you have assumed or established the role of friend, peer, buddy, or other such inappropriate relationship with students.
- (f) Do not use profanity while at work, or in reference to any student.

40. Also, the Plan of Assistance notified Respondent that he is “to correct his performance during the ensuing 45-day period. . . . [and following] the completion of the 45-day period, you are further directed to maintain compliance with the directives contained in this letter at all times in the future.” Further, he was notified that if he failed to follow the directives in the Plan of Improvement, “the Board of Education may institute additional disciplinary action against you, up to and including dismissal.”

41. Respondent provided evidence that, in 2010 and after his discipline in 2013, he completed “Making Right Choices: Educator Sexual Misconduct Training”. He was unable to articulate what he learned, if anything, about whether he could touch students. Regarding the discipline in 2013, he testified that he learned not to have friendships at work, and that the discipline occurred because a friend of 10 years turned on him.

42. During the hearing, Respondent provided an explanation for his acts and statements during the 2016-2017 school year (until January 24, 2017). At no time did he appear to understand that his conduct or statements could be misconstrued. At no time did he express appreciation for the wrongfulness of his misconduct. At no time did he appear to understand that his conduct and/or inappropriate statements constituted or may have constituted a violation of the 2013 "Plan of Assistance."

Respondent expressed remorse for his misconduct because it resulted in discipline, not because it was inappropriate, unprofessional or because of the impact it had on colleagues or students.

43. Principal Napoleon was aware that Respondent had been previously disciplined by the District and the basis for discipline. He served as the vice-principal at Granite Hills High School for four years, including during the school year that the District disciplined Respondent. Mr. Napoleon was not involved in the investigation and/or discipline of Respondent, but he was aware of the District's action. Mr. Napoleon described the facts underlying the investigation.

44. The District's administrators have lost confidence in Respondent's ability to meet the expectations of teachers in the District.

LEGAL CONCLUSIONS

Statutory Authority

1. A permanent employee may be dismissed for cause only after a dismissal hearing (Cal. Educ. Code, §§44934 and 44944.)

2. Education Code section 44932 specifies the permissible causes for termination of a permanent certificated employee.

3. Education Code section 44944 establishes the right to a hearing, the process for selecting the three-member Commission on Professional Competence and sets forth the Commission's authority regarding its final decision.

4. Education Code section 44938 outlines the procedures the governing board must follow before acting on any charges brought against a teacher for unprofessional conduct or unsatisfactory performance.

5. Education Code section 44938, subdivision (a) states:

The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its

authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. . . .

Burden and Standard of Proof

6. The “burden of proof” means the obligation of a party, to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. (*Redevelopment Agency v. Norm’s Slauson* (1985) 173 Cal.App.3d 1121, 1128.)

7. The standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) A preponderance of the evidence means that the evidence on one side of an issue outweighs, preponderates over, and is more than, the evidence on the other side of the issue, not necessarily in number of witnesses or quantity, but in the convincing effect the evidence has on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.APP.4th 1549, 1567.)

Grounds for Dismissal

8. The term “immoral” has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. The term “immoral conduct” has been defined to include conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as inconsiderate attitude toward good order and the public welfare. “Immoral conduct” is not confined to sexual matters. It includes an inconsiderate attitude toward good order and the public welfare. It is sometimes synonymous with “dishonesty” or a high degree of unfairness. (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d. 808, 811, noting that no other California cases had previously defined the term “immoral conduct.”)

Immoral Conduct

8. “Immoral conduct” is conduct hostile to the welfare of the general public and is not confined to sexual matters. (*San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466)

9. Immoral conduct cannot be considered in the abstract. It must be considered in the context in which the Legislature has considered it, as conduct which is hostile to the welfare of the general public; more specifically, conduct which is hostile to the welfare of the school community. In providing standards to guide school boards in placing restraints on conduct of

teachers, the Legislature is concerned with the welfare of the school community. Its objective is the protection of students from corruption. This is a proper exercise of the power of a state to abridge personal liberty and to protect larger interests. But reasonableness must be the governing criterion. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224.) The phrase “immoral conduct” within the meaning of the Education Code denotes immoral or unprofessional conduct or moral turpitude of the teacher that renders the teacher unfit to teach. (*Ibid.* at p. 225.)

10. “As between a teacher and his student, ‘(a)n important part of the education . . . is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept.’ (Citation) ‘A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the [students] coming under [his] care and protection. . . . The teaching by example as well as precept, of obedience to properly constituted authority and discipline necessary to a well-ordered society, is an important part of education.’” (*Watson v. State Bd. of Education* (1971) 22 Cal.App.3d 559, 565.)

11. “The calling of an educator is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. The educator’s ability to inspire children and to govern them, his power as an educator, and the character for which he stands are matters of major concern in an educator’s selection and retention. . . . An educator in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the students coming under his care and protection.” (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th, 1454, 1463-64.)

12. The governing board of a district is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental, and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. “Book learning” is only a phase of the important lessons a child should learn in school. (*Palo Verde Unified School District of Riverside County v. Hensey* (1970) 9 Cal.App.3d 967, 970-71.)

13. Rejecting statutory terms, such as “immorality,” “unprofessional conduct,” or “moral turpitude” as overly broad to use as grounds for discipline of public school teachers, the *Morrison* court created a seven-part test to assess whether a misbehaving teacher is fit to teach. (*Broney v. California Comm. on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 466.) “Because such terms as ‘immoral,’ ‘unprofessional,’ or ‘involving moral turpitude’ are too broad and amorphous to be used as a basis for the termination of a professional license, it must be shown the conduct in question indicates an unfitness to engage in the profession.” (*Id.* at pp. 473-74.)

14. Since the term “immoral conduct” is vague and broad, whether the conduct demonstrates an unfitness to teach must be measured against seven criteria set forth in *Morrison*. (*Governing Board of ABC Unified School District v. Haar* (1994) 28 Cal.App.4th 369, 383.)

Evident Unfitness for Service

15. The applicable standard or determinative test in teacher dismissal cases is whether the person is fit to teach. “Fitness to teach” is probably a question of ultimate fact. (*Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560-561.)

16. “Evident” is defined as “clear to the vision and understanding.” “Unfit” is defined as “not fit; not adapted to a purpose, unsuitable; incapable; incompetent; and physically or mentally unsound” and “unsuitable, incompetent and not adapted for a particular use or service.” (*Palo Verde Unified School District of Riverside County v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

17. In *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, the court noted the two parallel, yet contradictory, line of cases regarding “unfit for service.” One line of cases equated that term with “unprofessional conduct,” and the other line of cases distinguished the definition of the two. In deciding that the latter line of cases was the correct way to evaluate “unfit to serve,” and complied with the rules of statutory construction. The *Woodland* court concluded that “unprofessional conduct” and “evident unfitness for service” do not mean precisely the same thing. Although conduct constituting “evident unfitness for service” will often constitute “unprofessional conduct,” the converse is not always true. “Evident unfitness for service” requires that unfitness for service be attributable to defect in temperament, which is not necessary for a finding of “unprofessional conduct.” Nevertheless, lower courts may not disregard the criteria for unfitness set out in *Morrison* where that court concluded that “unprofessional conduct” meant conduct showing a teacher was unfit to teach. These criteria must be analyzed to determine, as a threshold matter, whether the conduct indicates unfitness for service. If it does, the next step was to determine whether the “unfitness” is “evident”, i.e., whether the offensive conduct is caused by a defect in temperament. (*Id.* at pp. 1442-1445.) A finding of “unfit to serve” can be made if the evidence, taken in the aggregate, shows that retaining the employee would pose a significant danger of psychological harm to students and fellow students (*Id.* at p. 1456.)

18. To establish a teacher is unfit to teach, *Morrison* requires a nexus between government employment and alleged employee misconduct stemming from the principle that “[no] person can be denied government employment because of factors unconnected with the responsibilities of that employment.” (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463.)

19. “Unlike ‘unprofessional conduct,’ ‘evident unfitness for service’ connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to

meet the expectation of the employing school district.”” (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1120, 1142-43.)

20. In determining whether the teacher’s conduct indicated unfitness to teach, such matters as: (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 extenuating or aggravating circumstances, if any, surrounding the conduct, (5) the likelihood of the recurrence of the questioned conduct, and (6) the notoriety and publicity accorded the teacher’s conduct may be considered. (*Jack M., supra*, at p. 702, fn 5.)

Persistent Violation of or Refusal to Obey Laws

21. The word “persistent” is defined by lexicographers as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.) Subdivision (7) pertains to unintentional as well as intentional transgressions, and hence the Legislature has decreed that a single violation is not sufficient to warrant dismissal, apparently to allow for correction; “it is the persistent disregard” of school rules that the subdivision is designed to regulate. (*Id.* At p.84.)

22. A violation of Education Code section 44932, subdivision (a)(7), must also be established by reference to the *Morrison* factors. If unfitness to teach is shown, then the District must further establish that employee’s refusal to follow the laws or regulations was “persistent,” i.e., “stubborn and continuing.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1183.) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317.)

Morrison Factors

23. In *Morrison, supra*, the Supreme Court identified seven factors to consider when evaluating whether the school employee should be dismissed: (1) the likelihood that the conduct adversely affected students or fellow teachers and the degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the teacher; (4) the existence of extenuating or aggravating circumstances and publicity if any, surrounding the conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of recurrence of the questioned conduct; and (7) the extent that the discipline may adversely impact or have a chilling effect on the constitutional rights of the teacher. Those factors are considered in this decision.

24. The *Morrison* factors may be applied to the charges in the aggregate. When a camel’s back is broken, the trier of fact need not weigh each straw in its load to see which one could have done the deed. A trier of fact is entitled to consider the totality of the offensive

conduct. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456-1457.)

25. Only the pertinent *Morrison* factors need to be analyzed. (*Broney v. California Commission on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 476.)

Other Disciplinary Considerations

26. An administrator's loss of confidence in the educator and doubt regarding the educator's ability to serve as a role model for students are factors that may be considered. (*San Diego Unified School District v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1460.)

Evaluation

27. The evidence must not only be sufficient to support a finding that Respondent engaged in the misconduct but also a finding that his misconduct met the criteria for grounds for dismissal.

28. While working as a physical education teacher, in his weight training class, Respondent engaged in the following conduct:

- He touched students when providing exercise instruction instead of modeling proper technique.
- He touched students on the hamstring, which is just below the buttocks.
- He used two fingers and touched student B.P. along and just below the collar bones, a few inches above her breasts.
- He made statements such as: "Work your booty," "Tighten your booty," "You can have the best booty ever" and "Bring the bar down to your nipples" or something similar to that effect rather than using anatomic terms.
- He did not teach students the names of muscles, or muscle groups.
- He emphasized with his students the importance of exercise to improve appearance as opposed to improving health and fitness.

29. In 2012 Respondent engaged in similar misconduct. Among other things, he (1) made inappropriate comments towards a colleague in the presence of students, (2)

displayed images of female celebrities, in reference to these images, he told his students the women were “hot”; (3) downloaded images of National Football League cheerleaders, and engaged in a discussion with the male students, comparing the physical attributes of the women in the presence of female students.

In July 2013, the District provided Respondent with a Plan of Assistance that included among other things, very specific directives, including: (1) to cease and desist all unnecessary physical contact with students, (2) not to engage in conversations or communications in which he referenced a student’s physical attributes or body shape, (3) not to discuss any inappropriate personal matters with students. In the Plan of Assistance, Respondent was informed to correct his performance during the ensuing 45-day period; following the 45-day period, he was directed to maintain compliance with the directives at all times in the future.

In October 2010 and again following the issuance of the Plan of Assistance, Respondent took a seminar entitled “Making Right Choices: Educator Sexual Misconduct.” The course dealt with appropriate touching of colleagues and students.

Despite attending the seminar on two separate occasions, the conduct that occurred during the 2016-2017 school year (until January 24, 2017) was similar to the conduct that occurred in 2012 and that was prohibited by the directives in the District’s Plan of Assistance and also prohibited by District expectations and policies.

38. At no time has Respondent expressed true remorse for his misconduct in 2012 or 2017. At no time did Respondent accept responsibility for his actions. Instead, he blamed his colleague involved in the 2012 incident and sought to justify his conduct that occurred during the 2016 – 2017 school year (until January 24, 2017). There was no evidence presented that Respondent appreciates the wrongfulness of his acts or his bad judgment.

39. Respondent’s misconduct and inappropriate language evidence his disregard for the District’s primary goal and expectations that come with the teaching profession. His pattern and habit of touching, and making inappropriate and unprofessional comments, negatively impacted the work and educational environment. Respondent’s conduct was detrimental to the District and its students. Respondent was fully to blame for his conduct. He is not a model of good behavior. He cannot be relied upon to act morally and uphold the responsibilities of a public educator. Respondent has no appreciation for the wrongfulness of his acts and misconduct; as such, if allowed to retain his position, it is likely that he will engage in the same or similar misconduct again.

Based on the facts and the law, it was established that cause exists to dismiss Respondent for immoral conduct pursuant to Education Code section 44932, subdivision (a)(1).

40. By letter, dated July 2, 2013, the District provided Respondent with a Notice of Unprofessional Conduct pursuant to Education Code section 44938. The Notice

delineated Respondent's unprofessional conduct and provided him with specific directives for improvement and directed him to stop his conduct. Respondent's acts and misconduct during the 2016-2017 school year (until January 24, 2017) established that he failed to comply with the directives as to how to improve his conduct, in particular, in communications to and about students and colleagues, and to stop his sexually harassing, touching, unprofessional and completely inappropriate behavior.

Despite the directives, training and assistance, Respondent failed to improve his conduct to a professional level.

Based on the facts and the law, cause exists to dismiss Respondent for unprofessional conduct pursuant to Education Code section 44932, subdivision (a)(2).

41. The facts and the law have been analyzed to determine whether it was established that Respondent is evidently unfit to serve as a teacher in the District.

In 2013 Respondent was disciplined by the District for sexual harassment of a colleague and making inappropriate comments in the presence of colleagues and students. The District instructed Respondent on how to appropriately interact with teachers, students and colleagues; to not harass students or touch them in a sexual manner; to be respectful towards students and colleagues; to not make inappropriate and derogatory comments to and about students and colleagues; and to execute his job duties in a professional manner. Nevertheless, Respondent engaged in the same or similar conduct during the 2016 and 2017 school year (until January 24, 2017). Respondent provided no evidence to establish that he has learned from the experience or that his conduct would change in the future if returned to the classroom. The District instructed Respondent on how to appropriately interact with teachers, students and colleagues; to not harass students or touch them in a sexual manner; to be respectful towards students and colleagues; to not make inappropriate and derogatory comments to and about students and colleagues; and to execute his job duties in a professional manner. Respondent's conduct showed that he has a defect of temperament or an inadequacy that is a fixed character trait, irremediable, and that renders him evidently unfit to teach.

Based on the facts and the law, it was established that cause exists to dismiss Respondent pursuant to Education Code section 44932, subdivision (a)(6), evident unfitness for service.

42. The facts and the law have been analyzed to determine whether Respondent persistently violated or refused to obey the rules governing his employment.

Respondent knew or should have known of the Governing Board's policies and expectations as a certificated employee of the District, including Board Policy Nos. 0410, 4119.11, 4119.21, 5131.2, 5137, and 5145.7. The District attached copies of the foregoing to the Statement of Charges. Having reviewed the foregoing Board policies and the facts, it

was determined that Respondent repeatedly violated Board Policy Nos. 0410, 4119.11, 4119.21, 5131.2, 5137, and 5145.7.

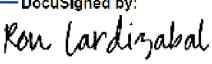
Based on the facts and the law, it was established that cause exists to dismiss Respondent pursuant to Education Code Section 44932, subdivision (8), persistent violation or refusal to obey school laws or reasonable regulations of the District.

43. Upon the filing of the Statement of Charges, the District placed Respondent on immediate unpaid suspension. In his Notice of Defense, Respondent seeks retroactive pay, retirement contributions, lost fringe benefits and/or medical cost reimbursement according to proof. The parties disagree regarding the procedure that must be followed pursuant to Education Code section 44939 and whether the Commission has jurisdiction to issue an order compelling the District for back pay and benefits. Respondent offered no evidence of his back pay or benefits during the hearing. The Commission determined that the charges support dismissal of Respondent on the basis of immoral conduct. As such, he is not entitled to reinstatement of his salary and benefits. Thus, it is not necessary to address the arguments related to the appropriate procedure to file pursuant to Education Code section 44939.

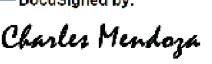
ORDER

The appeal of Joshua Barney's dismissal from employment with the Grossmont Union High School District is denied. The request of the Grossmont Union High School District to dismiss Joshua Barney is granted. Joshua Barney is dismissed from employment with the Grossmont Union High School District. The Notice of Intent to Dismiss and Statement of Charges filed against Joshua Barney is affirmed.

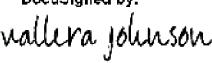
Dated: March 4, 2018

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RON LARDIZABAL
Commission Member

Dated: March 4, 2018

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CHARLES MENDOZA
Commission Member

Dated: March 5, 2018

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VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings