

BEFORE A  
COMMISSION ON PROFESSIONAL COMPETENCE  
WOODSIDE ELEMENTARY SCHOOL DISTRICT  
SAN MATEO COUNTY, STATE OF CALIFORNIA

In the Matter of:

MICHAEL MCCAHERN,  
A Permanent Certificated Employee,

Respondent.

OAH No. 2015060108

**DECISION**

A Commission on Professional Competence (Commission) heard this matter on September 21, 23, 24, 28 and 29, 2015, in Woodside, California. The members of the Commission are Beth A. Kanaly, Joshua Bowie and Jill Schlichtmann, Administrative Law Judge, Office of Administrative Hearings, State of California.

John R. Yeh, Burke, Williams & Sorenson, LLP, represented complainant Elizabeth Polito, Ed.D., Superintendent of the Woodside Elementary School District (District).

Christopher E. Schumb, Attorney at Law, represented respondent Michael McCahon.

The matter was submitted to the Commission for decision on September 29, 2015.

**FACTUAL FINDINGS**

*Introduction*

1. Michael McCahon (respondent) is a permanent certificated teacher. He has taught physical education (P.E.) for the District since the 2009/2010 school year. Prior to being employed by the District, respondent taught P.E. for the Fremont Unified School District for five years. For several years, ending in the 2013/2014 school year, respondent served as the Athletic Director at the District.

2. The District has never had concerns about respondent's ability to teach the P.E. standards. This matter concerns his supervision of students and his handling of students who are absent from P.E. for an extended period.

3. On May 13, 2015, complainant Elizabeth Polito, Ed.D., Superintendent of the District, filed and served on respondent a corrected Notice of Intent to Dismiss, with a Statement of Charges. Respondent timely filed a notice of defense and requested a hearing.

*The District's Charges Against Respondent*

4. In the Statement of Charges against respondent, the District alleged that it has cause to dismiss respondent from his employment as a permanent certificated employee of the District for:

- a. Immoral conduct, pursuant to Education Code section 44932, subdivision (a)(1);
- b. Unprofessional conduct, pursuant to Education Code section 44932, subdivision (a)(2); and,
- c. Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of public schools by the State Board of Education or by the governing board of the school district employing him, under section 44932, subdivision (a)(8).

5. In the Statement of Charges, the District charged respondent with the following acts of misconduct:

- a. Charge A: On October 30, 2014, respondent had one of his P.E. students (ZM)<sup>1</sup> walk a lap “to get her heart rate up” on the day after ZM had casts removed from both of her legs and despite a doctor’s note prohibiting her from participating in P.E. for six months. The District alleged further that respondent had previously ignored the doctor’s note and required the student to walk laps while she was wearing a boot and an air cast. The District alleged that ZM’s mother had previously asked respondent to send her daughter to the library and advised respondent that “the less time on her feet the better.”

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<sup>1</sup> The students will be referred to by their initials to protect their privacy.

Charge B: Respondent received a doctor's note for student JG in December 2014, and withheld JG from P.E. for two weeks without initiating an assessment plan and modified curriculum, or bringing the note to the District's attention.

- b. Charge C: Respondent made inappropriate comments, including the use of profanity, while speaking with a student about other students.
- c. Charge D: In March 2014, respondent disregarded the safety of his students when he left his seventh period students unattended while they were running a "scenic." The District alleged further that during this time, respondent rode a bicycle in front of the school campus, dug through the recycling dumpster in front of the campus, and had an accident when falling off of the bicycle.
- d. Charge E: During respondent's December 2014 Formal Classroom Observation, respondent left his walkie-talkie on the table during his class, putting his students at risk.
- e. Charge F: On January 9, 2015, Dr. Polito observed respondent's class on two occasions and did not see respondent supervising the students.
- f. Charge G: On November 23, 2013, respondent was directed not to use his cell phone during instructional time, and to give the students his undivided attention.

*Charges A & B: Responding to Notes from Parents and Physicians*

6. Students at the District attend P.E. two days one week and three days the next. The District Handbook describes the goals of the P.E. program. The Handbook also provides the following guidelines for students who are unable to participate in P.E. for any reason:

Exclusion for 1-2 days: A verbal request from a parent, either oral or in writing, stating the reason why the child should be excused [from] P.E. is required.

Exclusion for 3-10 days: A note from the doctor explaining the reason why the child should be excused from P.E. is required. The child will go to the library or do an activity assigned by the P.E. teacher.

Long term or permanent exemption: A note from the doctor is required for all grades.

7. Prior to October 2014, the District did not have a formal policy or procedure for handling doctor's notes or extended absences from P.E., other than what was set forth in the Handbook. However, all teachers were trained annually on initiating a 504 plan<sup>2</sup> for students who were unable to participate fully in class.

The practice at the District, prior to October 2014, was for a parent to leave a note or a doctor's note with the office, and the staff would put a copy in the P.E. teacher's box. Sometimes, parents would give notes directly to the P.E. teacher; other times, students would hand notes directly to the P.E. teacher. For short-term exclusions, respondent's practice was to include the students in the activity by having them keep score, or time the mile. If the exclusion was longer than one week, respondent would send them to the library to work on homework or a project.

#### STUDENT ZM

8. One of respondent's students, ZM, was a serious student of ballet outside of school. In the fall of 2014, ZM developed bursitis and her doctor put one leg in a boot and the other in an air cast, to treat the condition. That fall, ZM's mother provided ZM with a note from her doctor stating that she should not participate in P.E. The evidence did not establish that ZM gave the note to respondent or anyone else at the District. ZM's parents happened to see respondent on campus and reinforced to him that ZM was not to participate in P.E. Respondent does not recall this conversation; however, he recalls that ZM was in a boot and an air cast and was aware that she was not participating in P.E.

9. On October 13, 2014, ZM's mother sent an email message to respondent stating: "We would like [ZM] to go to the library during PE class. She is not to do any exercise right now per Dr. orders and the less time on her feet the better. Thanks for understanding." Respondent responded on October 14, 2014, by email message stating: "No worries, Thanks for the update."

10. From October 14 to October 30, 2014, ZM went to the library during P.E. period. On October 30, 2014, ZM came to P.E. class. She had had her boot and air cast removed the previous day. ZM did not participate in P.E. activities; however, respondent recalls that ZM asked to walk a lap with other girls that were not active in P.E. that day. Respondent agreed, but acknowledges that he used poor judgment in allowing her to walk a

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<sup>2</sup> A 504 Plan refers to section 504 of the Americans with Disabilities Act; it is a plan to accommodate students who have an impairment that prevents them from accessing the state standards.

lap without checking with her parents or her doctor first. The evidence did not establish that ZM had walked a lap on other occasions while she was suffering from bursitis.

11. On October 30, 2014, ZM's mother sent an email message to respondent and copied the middle school principal, Steve Frank. The email message stated:

As you are already aware, [ZM] has Doctor's orders to not do any PE classes for 6 months. Several weeks after you had received that note, you had ZM walk a lap so as "to get her heart rate up". As if the note and talking with you face to face previously was not enough, you had her walk the laps while she was wearing a boot and air cast. Then I sent you this previous email I have included and I thought when you replied you understood. Apparently you did not. [ZM] HAS A DOCTOR NOTE TO REFRAIN FROM PE FOR 6 MONTHS. For the last two weeks, she has had both legs in casts in the hopes her feet will [heal]. Yesterday she got the casts removed and today you had her walk a lap.

We would like to know why you again are asking her to walk a lap.

We would like [ZM] to do community service helping other teachers during PE time.

12. On October 30, 2014, Principal Frank sent respondent an email message advising respondent that ZM's mother had just left a furious voicemail as a result of ZM walking a lap. Frank advised respondent that the District was going to put ZM on a 504 Plan with no P.E. Frank instructed respondent to send ZM to the office if she comes to class, and to call ZM's mother.

13. On October 31, 2014, respondent responded to ZM's mother. In his email message, respondent sought to deescalate the dispute with a conciliatory tone and therefore did not disagree with the facts as stated in the message sent by ZM's mother. He wrote:

I want to first apologize for the misunderstanding with [ZM] and her PE. By no means do I want her to re-injure herself or be active during PE. When [ZM] came back to PE I thought she wanted to be around her friends and classmates. I never let [ZM] participate in ANY activities during class. Yesterday I put her in a group to WATCH (not participate) and be with her friends. She did not play football. In fact, she lied down during class while watching her group learn patterns and routes. When

the kids take a warm up jog she chose to walk around the turf while the other students jog. My understanding was [ZM] chose to modify anything she could. I try my best to have [ZM] choose what she wants to do. I even ask her if she wants to go to the library or work on homework. Going forward I clearly understand she should go to [the] library or office. I will talk to [ZM] today and make sure she understands that she does not have to come to PE. She can go directly to the library. In the past she started to go to the Library and work on community service just recently she started staying in PE and modify what she wanted. I'm sorry for misunderstanding in the past.

14. ZM's mother replied by email message on November 2, 2014, copying Frank, stating: "Thanks for your reply and apology. We appreciate your help in this matter. It sounds like we are on the same page. See you Tuesday morning. Thanks." Respondent understood this to mean that his apology had been accepted and they would move forward with a 504 plan.

15. On November 4, 2014, Superintendent Polito met with respondent to discuss ZM's 504 plan and to develop a clear-cut policy with regard to arrangements for students with extended absences from P.E. Dr. Polito directed respondent to obtain a note from ZM's doctor. Dr. Polito also directed respondent to send a list of any other students who might need a 504 plan and an assessment plan. Dr. Polito further instructed that no student should be excused from participating in P.E. more than one or two days without communication with a parent or a doctor's note enroute.

16. On November 7, 2014, respondent advised Frank, Student Services Coordinator Dr. Katherine Peterson, and the school psychologist, Marjorie McDonald, that he had a list of the students who had doctor notes or visible injuries. Respondent stated further that many students came to class with a verbal note or written note, and that pursuant to Dr. Polito's direction, he would use his best discretion with those students. Respondent asked if the group could meet to discuss ideas, thoughts and a common practice to follow, and thanked them for their support.

17. The District had hired a former P.E. teacher, Diane Smalley, in August 2014, to work with respondent on various issues. Frank asked Smalley to help respondent develop a process for implementing 504 plans for students who needed an accommodation. Smalley began working with respondent on lesson plans and ways to assess students on the P.E. standards when they were excused for long periods.

18. Respondent and the team developed a 504 plan for ZM in November 2014. ZM did not attend P.E. for the remainder of the school year. ZM continued to train in ballet four to five days per week and competed in a ballet competition in January 2015.

#### STUDENT JG

19. On December 18 or 19, 2014, which was either the Thursday or Friday before winter break, respondent received a doctor's note from Student JG. Respondent held onto the note over winter break. When school began on January 5, 2015, he was notified that there would be a team meeting on 504 plans for his students on Friday, January 9, 2015. Respondent kept JG out of P.E. that week, and presented the note to the team on January 9, 2015. Dr. Polito had expected that respondent would bring notes to the immediate attention of the administration and she was frustrated that he had not done so.

#### STUDENT EP

20. Sometime after November 2015, student EP brought a doctor's note exempting him from participating in P.E. On February 4, 2015, EP came to P.E. and wanted to participate. Respondent held the student out of P.E. activity and contacted his mother that afternoon asking when EP could return to P.E. activities. EP's mother apologized for not updating respondent and gave him instructions on EP's reentry into P.E.

#### ULTIMATE FINDINGS

21. Respondent allowed Student ZM to walk a lap after being advised that she was not to be active in P.E. for six months pursuant to doctor's orders without first contacting either ZM's parents or her doctor. Respondent appropriately contacted ZM's parent to apologize and to confirm that ZM would not report to P.E. for the balance of the year. Respondent worked with a team at the District to provide for a 504 plan for ZM and to develop a consistent policy for students who would be exempt from P.E. for an extended period.

22. Respondent gave Student JG's doctor's note to the administration within five school days. The District may have preferred that respondent provide the note sooner; however, there was no clear directive requiring him to immediately hand the note to the administration; respondent's decision to give the note to the team at a scheduled meeting while keeping the student out of P.E. was not unreasonable.

23. Respondent appropriately handled Student EP's doctor's note, demonstrating that he learned from his error in judgment with regard to Student ZM.

#### *Charge C: Inappropriate Comments to a Student about Other Students*

24. The District offered only hearsay testimony to support this allegation. Hearsay statements standing alone are insufficient to prove a disputed fact. As a result, the factual allegations contained in Charge C were not established.



*Charges D, E, F & G: Issues Involving a Lack of Supervision*

25. The District is a one-school district providing instruction for grades kindergarten through eighth grade. The students change classes during the day; however, unlike most schools, the district does not have passing periods. When the bell rings at the end of the class period, the next period begins. There is no time allotted for students to move from one class to another, or for teachers to prepare for the next class or use the restroom between periods. The unwritten expectation is for students to reach the next period within two minutes. The District expects teachers to be waiting for the next class to greet the students and for the next class to begin when the students arrive. The lack of passing periods presents issues for P.E. teachers, who may have a fifth grade class that is learning volleyball one period, followed by an eighth grade class learning a different sport the next period. The P.E. teacher must quickly change the equipment needed for the different classes while students walk from one class to the next. Because students come to P.E. from multiple classes, respondent would start class with stretching to allow all students to arrive before describing the day's lesson.

26. In addition to a lack of passing periods, respondent's schedule was made more challenging because on Tuesdays, Thursdays and Fridays, respondent had preparation periods at the end of the school day, and on Wednesdays, respondent had no preparation period. In addition, respondent served on yard duty for the duration of both recess and lunch. He was often checking balls into the storage room and ushering students back to class when the bell rang. As a result of his schedule, respondent had no opportunity to use the restroom, check his school email or respond to communications from other coaches as part of his Athletic Director duties, from the time first bell rang until the end of the school day on Tuesdays, Wednesdays, Thursdays and Fridays. Respondent would use the restroom, check email or retrieve items from his office between periods, as necessary.

27. On April 22, 2015, Principal Frank sent an email message to the entire middle school staff, stating:

I want to make you aware of something that six different parents talked to me about today either through email, telephone or in person. Students are starting to talk about the fact that their classes are left outside after the bell. It was pretty consistent that it is happening 1st, 3rd, and 6th periods, sometimes with the kids being out there for over 5 minutes.

Please do everything in your power to be there when the bell rings or very shortly thereafter to let the kids in. This is really the last thing we need. Thanks.



28. The District's failure to provide a passing period for students places an unreasonable burden on teachers, especially the P.E. teacher. Moreover, respondent's schedule provided no breaks during the day on several days each week, and it was unreasonable to expect him to contact an administrator daily to cover his class when he needed to use the restroom, gather equipment or check messages.

#### BICYCLE/SCOOTER INCIDENT

29. On March 25, 2014, respondent was using a school scooter during instructional time. He left the scooter on the field and when he returned to retrieve it, he could not locate it. Respondent saw the school custodian, Eucadio Martinez, and asked if he had seen it. Martinez advised him that he had seen it on the field, and because scooters were not allowed on the campus, and he was concerned for the students' safety, he had thrown it into the dumpster. When his next period ended, at 11:34 a.m., respondent rode a bicycle to the dumpster to retrieve the scooter. The dumpster is located in the front of the school, out of eyesight of the gymnasium. Respondent estimated it would only take him a few minutes to retrieve the scooter and return for his next class.

30. In the meantime, Martinez decided to retrieve the scooter for respondent so he would not need to leave his class to retrieve it. Martinez went to the gymnasium where the students were stretching. He asked them where respondent was and they indicated he was in his office. Martinez went into respondent's office and did not locate him, so he headed toward the dumpster. After retrieving the scooter, respondent was riding back to the gymnasium when the scooter got caught between the spokes and his bicycle flipped over. Respondent fell on his head and was bleeding. Martinez saw respondent's injury and summoned help. Respondent was sent home for the day to recover.

31. On March 25, 2014, Dr. Polito gave respondent a memorandum in which she stated:

It has come to my attention that your bike accident took place during the beginning of fifth period. Seventh grade students were running a "scenic" in the back part of campus while you were in the front of campus at the recycling dumpster.

Leaving your student[s] unsupervised is a safety violation and is taken very seriously.

You are being directed to not ride your bike on campus during the instructional day and to never leave your students unsupervised during instructional time again.

## WALKIE-TALKIE RADIO USE

32. Office employees, administrators, and P.E. teachers at the District are issued walkie-talkie radios and are expected to keep them on their person throughout the school day. The office communicates with P.E. teachers by walkie-talkie radio concerning questions or a student's need to leave class early for an appointment. In addition, the walkie-talkie radios are important for student safety. At times, administrators have had difficulty communicating over the walkie-talkie radios. In addition, the office has been unable to reach respondent by walkie-talkie radio on several occasions.

33. On December 4, 2014, Principal Frank was evaluating respondent's teaching through classroom observation. Following the observation, Frank commented:

While the overall lesson structure was clear, [respondent] could benefit from several recommendations. First, the area where the students are playing should be much smaller. Students were spread out too far, with barriers between groups. This meant that not every student could be seen at once, and I witnessed several students fall off task. Too many things can go wrong regarding students getting off task or students getting hurt if the teacher cannot see them. Also, the walkie talkie radio must be on [respondent's] person and not on the table. Student safety is a major concern, and this should be addressed.

34. Respondent admits that he placed the walkie-talkie radio on the table while he was demonstrating the lesson and he left it there. Respondent is aware that the walkie-talkie radio should be on him at all times; however, he states that on the date of the observation, it was on the table within earshot, and at times he needs to remove it while trying to demonstrate a lesson because it gets in the way. There is no evidence that respondent failed to keep his walkie-talkie radio on his person following this directive.

JANUARY 9, 2015

35. On January 9, 2015, Dr. Polito was teaching a class while a teacher was at a meeting. She looked out to the field and could see the P.E. students, but could not see respondent. Dr. Polito also testified that on another occasion she saw the kids on the field from the same classroom, and after several minutes saw respondent exit the gymnasium. There was conflicting testimony by Dr. Polito regarding whether these instances happened twice on the same day, or once on January 9 and once on the next day, and whether they both occurred while she was inside of the classroom, or one occurred inside and one occurred outside of the classroom. Dr. Polito did not go out to the field to look for respondent, or call the office to send someone out to look for him.

36. On January 12, 2015, Principal Frank sent an email message to respondent in which he stated:

Dr. Polito notified me that while she was covering Lisa Brown's class last Friday (January 9) morning during 2nd period, she watched the students run the scenic. She said that she couldn't see you at any point for nearly 10 minutes. Where were you? I am concerned because we talked about student supervision during our observation meetings in December.

37. On January 13, 2015, respondent responded to Frank as follows:

On Friday I believe we only did our warm up run outside which is usually no more than 5 minutes. I believe I roamed to the corner of the turf so I can get the best view of the students behind the garden. It is the best spot to have the least amount of blind areas. I have been walking to that spot the last month or so. I don't believe she would have a great view from Mrs. [Brown's] room to the turf but I'm not sure. We worked on shooting fundamentals on Friday so I know we were inside for the majority of the class. I clearly remember our discussions from my observation and yes [I'm] constantly supervising All students the best I can.

38. Respondent believes that he was on the field while the students were running around the field and that if Dr. Polito saw him exit the gymnasium toward the beginning of class he was likely changing the height of the basketball hoops for the next class.

Because of Dr. Polito's inconsistent statements and the discrepancy between what Dr. Polito recalls and what Frank included in his email message to respondent, it was not established that respondent left his students unsupervised on January 9, 2015.

#### CELL PHONE USE

39. While teaching P.E. and in his role as the Athletic Director, respondent used his cell phone as a stop watch and for other instructional purposes.

40. Dr. Polito discussed respondent's cell phone use with him and instructed him not to use his cell phone during instructional time, even for instructional purposes, because it gave the appearance to others that he was not engaged with his students. In a memorandum documenting the conversation dated November 22, 2013, Dr. Polito advised respondent that it had come to her attention from numerous sources that he was using his cell phone during instructional time. She noted that cell phone use had been a topic of conversation with respondent in the past. Dr. Polito stated:

Given the need to ensure that our students receive your undivided attention, I am directing you to not have your cell phone in your possession during instructional time. If there is a need to communicate regarding a safety issue please use your school/district issued walkie talkie.

#### ULTIMATE FACTUAL FINDINGS

41. The District expects teachers to supervise the students at all times. Student supervision is a very important priority. However, the lack of passing periods creates a challenge for teachers, especially P.E. teachers, because they do not have time to prepare between classes. This problem was more significant for respondent because he did not have preparation periods until the end of the school day several days per week, and was on yard duty during both recess and lunch. Respondent's schedule and the lack of passing periods made it very difficult for respondent to meet the District's expectation of constant supervision.

42. Respondent's decision to ride his bicycle to the dumpster between classes to retrieve the scooter on March 25, 2014, showed poor judgment. He left his class unsupervised, he was quite a distance away from the class, and the students did not know where he was located. Respondent should have asked someone else to retrieve the scooter. If the custodian was unable to retrieve it, he should have contacted the office for assistance.

43. Although respondent left his walkie-talkie on the table while he demonstrated a lesson on December 4, 2014, it was not established that he failed to supervise his students in doing so.

44. Respondent used his cell phone for P.E.-related activities prior to receiving the November 22, 2013 directive. There was no evidence that he continued to use his cell phone during instructional time following this directive.

#### *Evidence of Remediation*

45. Respondent was working with Smalley and other District employees to improve P.E procedures and on other issues. Dr. Polito did not hear anything negative about respondent's progress from Smalley.

46. Principal Frank evaluated respondent's performance on January 28, 2015. Following the classroom observation, Frank commended respondent as follows:

[Respondent] clearly spent a great deal of time preparing for this lesson. It was structured in a way that allowed all of the students to participate in a positive, safe environment. Each phase of the lesson was geared toward allowing students the opportunity to

demonstrate their physical education skills (e.g., forehand and backhand swing movements), while at the same time emphasizing teamwork and cooperation.

[Respondent] delivered many effective teaching strategies, such as direct instruction, guided practice, and independent practice. In addition, [respondent] emphasized safety throughout the lesson. The students were very engaged throughout the lesson. Each phase of the lesson moved quickly from one to the next, and the instructions were clear and concise.

[Respondent] emphasized less direct 'teacher' instruction and more opportunities for students to share and be a part of the learning process. This helped keep the students engaged throughout the lesson.

47. Frank noted the following areas for improvement:

While [respondent] had a very solid lesson that was structured to address multiple topics (e.g., safety, fairness, cooperation, etc.) the end of the lesson was rushed. [Respondent] and I discussed in our post-observation meeting how more time was necessary for the last part of the lesson, the backhand swing movement.

By reducing the amount of steps in the lesson, [respondent] could have spent a few more minutes explaining and modeling the peer assessments and give them more time to do a thorough job.

48. Dr. Polito and Principal Frank characterize respondent as pleasant and very receptive to constructive criticism. Respondent never refused to modify his behavior. However, they lost faith in his ability to change his behavior because issues kept resurfacing. It was not until the Notice of Unprofessional Conduct was issued on January 26, 2015, that they observed respondent to take their complaints seriously.

49. After receiving the Notice of Unprofessional Conduct, respondent submitted a very detailed matrix, describing the ways he would change his conduct in order to meet the District's concerns. The District concedes that respondent did not commit any misconduct in the 45 days following the Notice of Unprofessional Conduct; however, by that time, the District had no interest in continuing to employ respondent.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The District has the burden of proof in this matter, since it is seeking to dismiss respondent from employment as a certificated employee. The District must prove its case by a preponderance of the evidence. (*Gardiner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1040.)

### *Statutory Grounds for Dismissal*

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a), or 44939 are established. In the Statement of Charges, the District alleged three of those causes: unprofessional conduct, immoral conduct and persistent violation of school laws or regulations. (Factual Finding 4.)

3. The District's Statement of Charges charged respondent with various acts to support the three statutory grounds for dismissal. (Factual Finding 5.) The District did not establish the facts alleged in Charge C. (Factual Finding 24.) The facts established by the evidence were evaluated pursuant to the three statutory causes for discipline.

### IMMORAL CONDUCT

4. "Immoral conduct" is defined as that which is hostile to the welfare of the general public and contrary to good morals. It includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. Or it can be conduct that is willful, flagrant, or shameless, conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 811.)

The evidence did not establish that respondent's conduct constituted immoral conduct. Cause for dismissal of respondent based on immoral conduct does not exist under section 44932, subdivision (a)(1).

### PERSISTENT VIOLATION OF LAW OR SCHOOL RULES

5. In order for a teacher to be terminated under Education Code section 44932, subdivision (a)(8), for violations of law or school rules, the violations must be either "persistent" or "motivated by an attitude of continuous insubordination." (*Gov. Board of Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 81.) A single violation of a school board's rules is not cause for dismissal; it is the persistent disregard of school rules that the subdivision is designed to regulate. The District argues: 1) respondent persistently violated the rules regarding handling doctors' notes; and, 2) respondent persistently violated the directive not to leave his students unsupervised.



As to the issue of handling doctors' notes, the evidence did not establish that there was a clear directive on whether notes should be immediately given to the administration. After ZM's mother complained about respondent's handling of ZM's doctor's note, a clearly articulated policy was developed to establish 504 plans and curriculum for extended P.E. absences. Respondent participated in developing the procedure and curriculum. The evidence did not establish that respondent persistently violated a school rule or directive concerning the handling of doctors' notes. (Factual Findings 21 through 23.)

As regards student supervision, the evidence did not establish that respondent repeatedly left his students unsupervised, other than to use the restroom, change equipment or check school email between classes. The District did not provide respondent with breaks between classes and the lack of passing periods placed an unreasonable burden on respondent. Placing the walkie-talkie radio on the table while demonstrating a lesson does not constitute a failure to supervise. Respondent did not continue to use his cell phone after being directed not to do so. The District did not establish that respondent left his class unsupervised on January 9, 2015. (Factual Findings 41, 43 and 44.)

Respondent left his students unsupervised when he rode a bicycle to another area of the campus between classes to retrieve the scooter. (Factual Finding 42.) However, this incident does not establish a persistent violation of school rules or law.

Cause for dismissal of respondent based on persistent violation of school rules or law does not exist under section 44932, subdivision (a)(8).

#### UNPROFESSIONAL CONDUCT

6. "Unprofessional conduct" as used in section 44932, subdivision (a)(2), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of a profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.)

Respondent committed unprofessional conduct when he allowed Student ZM to walk a lap after being advised that her doctor had instructed that she not participate in P.E. for an extended period, and should stay off of her feet as much as possible. Respondent should not have allowed ZM to participate in P.E. without contacting her mother or her physician. Moreover, although respondent was aware that ZM would be absent from P.E. for an extended period of time, he did not initiate a 504 plan or contact the administration regarding ZM's condition and her inability to access the state standards. (Factual Findings 8 through 18, 21.)

Respondent also committed unprofessional conduct when he left his students unsupervised in the gymnasium to retrieve the scooter from the dumpster on the other side of campus, as set forth in Factual Findings 29, 30 and 42. Respondent was aware that his



students were to be supervised at all times. The evidence established that his students were left in the gymnasium and did not know where he was located. This conduct put his students' safety at risk and was unprofessional.

#### *Analysis of the Morrison Factors*

7. A teacher cannot be dismissed for unprofessional conduct unless his conduct demonstrates that he is unfit to teach under the factors established by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445; *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 220, fn. 12.) The Commission has broad discretion to determine what constitutes unfitness to teach, and whether dismissal is the appropriate sanction. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220-222.)

8. The *Morrison* factors are: (1) the likelihood that respondent's conduct may have adversely affected students or fellow teachers; (2) the degree of any expected adversity; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by respondent; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of recurrence of the conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of respondent or other teachers. Only the pertinent factors must be addressed. (*West Valley-Mission Community College District v. Conception* (1993) 16 Cal.App.4th 1766, 1777.) The *Morrison* factors may be applied to all of the charges in the aggregate. (*Woodland Joint*

*Unified School Dist. v. Commission on Professional Competence, supra*, 2 Cal.App.4th at 1456-1457.)

9. In this matter, the evidence did not establish that respondent's conduct adversely affected students or fellow teachers. Although respondent should not have allowed ZM to walk a lap, he did not allow her to participate in the P.E. lesson, and there was no evidence that walking the lap on that day caused an injury. Respondent accepted responsibility for allowing ZM to walk a lap and is committed to handling doctor notes differently in the future.

With regard to respondent's decision to retrieve the scooter from the dumpster between classes, respondent used poor judgment and should have contacted the office for assistance; however, it is unlikely that this type of conduct will reoccur. Respondent has learned his lesson.

Respondent has no other disciplinary history with the District and was working with a coach to improve his teaching. The principal and superintendent acknowledge that respondent was very open to constructive criticism and they saw an improvement in his

conduct after he was served with the Notice of Unprofessional Conduct. The District did not establish that respondent's dismissal is necessary to protect students, school employees, or others.

ORDER

The Statement of Charges against respondent Michael McCahon is dismissed.

DATED: October \_\_, 2015

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JOSHUA BOWIE  
Commission Member

DATED: October \_\_, 2015

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BETH A. KANALY  
Commission Member

DATED: October 9, 2015

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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings