

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE FOR THE
LOS ANGELES UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

DENNIS JENKINS (EN 572600),
a permanent certificated employee,

Respondent.

OAH No. 2016060348

DECISION

The Commission on Professional Competence (Commission) heard this matter in Los Angeles, California, on November 1, 2, 3, 4, 7, 8, and 9, 2016. The Commission consisted of Lacey Lemus, designated by the Los Angeles Unified School District (District or Complainant), John Colombo, designated by Respondent Dennis Jenkins (Respondent), and Administrative Law Judge (ALJ) Carla L. Garrett, Office of Administrative Hearings, State of California, who presided.

Reginald Roberts, Attorney at Law, represented the District. Richard J. Schwab and Rosty Gore, Attorneys at Law, represented Respondent. Respondent appeared on all days of the hearing.

The parties submitted the matter for decision on November 9, 2016.

Respondent is a permanent certificated employee of the District assigned as a fifth grade teacher at 15th Street Elementary School. District alleged that Respondent demonstrated unprofessional conduct (§ 44932, subd. (a)(2)),¹ immoral conduct (§§ 44932, subd. (a)(1) and 44949), evident unfitness for service (§ 44932, subd. (a)(6)), persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him (§ 44932, subd. (a) (8)), and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district (§ 44939). District seeks Respondent's dismissal.

¹

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

As set forth in detail below, the Commission has determined that District has failed to meet its burden of establishing that Respondent warrants dismissal.

FACTUAL FINDINGS

Jurisdictional and Background Information

1. On June 10, 2016, District served Respondent with an Accusation executed by Justo H. Avila, Chief Human Resources Officer, acting in his official capacity. On June 1, 2016, Respondent served his Request for Hearing and Notice of Defense.

2. Respondent has been a teacher at 15th Street Elementary School (15th Street School) since 1998, which is a school comprised of children of Hispanic heritage, predominantly, and a small percentage of African-American students. Prior, he served as an outdoor educational assistant for the District in 1986, and a substitute teacher for the District in 1995, 1996, and 1998. Respondent earned a bachelor's degree in history from the University of California at Los Angeles (UCLA) in 1989, a master's degree in history from California State University at Long Beach (CSULB) in 1994, and earned his teaching credential from California State University at Dominguez Hills (CSUDH) in 1998. Over the years at 15th Street School, Respondent has taught every grade from first through fifth. During the 2011-2012, 2012-2013, 2013-2014, and 2014-2015 school years, Respondent taught fifth grade at 15th Street School.

Annual Teacher In-Service

3. At the beginning of each school year, all teachers at 15th Street School were required to participate in an in-service meeting led by Principal Jennifer Mak (Principal Mak). Principal Mak, who testified at hearing, has served as 15th Street School's principal since the beginning of the 2008-2009 school year. One of her primary duties requires her to ensure student safety.

4. During these annual teacher in-service meetings, Principal Mak always provided the teachers with standards, codes, and policies, among other things. Specifically, Principal Mak provided teachers with the California Standards for the Teaching Profession (the Standards), the Code of Conduct with Students (Code of Conduct), the Employee Code of Ethics (Code of Ethics), child abuse reporting policies, and Opening School Bulletins.

5. The Standards covered seven areas, the second of which, Standard 2, addressed creating and maintaining effective environments for student learning. In that regard, Standard 2 listed, in pertinent part, the following:

- 2.1 Promoting social development and responsibility within a caring community where each student is treated fairly and respectfully[;]

- 2.2 Creating physical or virtual learning environments that promote student learning, reflect diversity, and encourage constructive and productive interactions among students[;]
- 2.3 Establishing and maintaining learning environments that are physically, intellectually, and emotionally safe[;]
- [¶]
- 2.5 Developing, communicating, and maintaining high standards for individual and group behavior[;]
- 2.6 Employing classroom routines, procedures, norms, and supports for positive behavior to ensure a climate in which all students can learn[;]
- 2.7 Using instructional time to optimize learning[.]

(Exhibit 6.)

- 6. The Code of Conduct provided the following in its preamble:

The most important responsibility of the [District] is the safety of our students. All employees, as well as all individuals who work with or have contact with students, are reminded that they must be mindful of the fine line drawn between being sensitive to and supportive of students and a possible or perceived breach of responsible, ethical behavior.

(Exhibit 7.)

- 7. The Code of Conduct also provided:

While the District encourages the cultivation of positive relationships with students, employees and all individuals who work with or have contact with students are expected to use good judgment and are cautioned to avoid situations including, but not limited to, the following:

[¶] ... [¶]

- 3. Engaging in any behaviors, either directly or indirectly with a student(s) or in the presence of a student(s), that are unprofessional, unethical, illegal, immoral, or exploitative.

[¶]... [¶]

6. Touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee's/individual's responsibilities and/or duties.

(Exhibit 7.)

8. At hearing, Principal Mak explained that she interpreted Item 6 of the Code of Conduct as "all touching [being] inappropriate." As such, Principal Mak verbally warned the teachers at the annual in-service meetings of what she described as her "no-touch policy," that "touching students was unacceptable and unprofessional and violated district policy." Principal Mak explained she expected teachers not to touch students at any time, except in emergency situations.

9. The Code of Conduct closed by stating the following:

Even though the intent of the employee/individual may be purely professional, those who engage in any of the above behavior(s), either directly or indirectly with a student(s) or in the presence of a student(s), are subjecting themselves to all possible perceptions of impropriety. Employees/individuals are advised that, when allegations of inappropriate conduct or behavior are made, the District is obligated to investigate the allegations and, if warranted, take appropriate administrative and/or disciplinary action.

(Exhibit 7.)

10. The Code of Ethics provided that employees must keep policies, procedures, and rules. Specifically, it stated the following:

Our rules, policies and procedures are the foundation of trust and how our District conducts everyday business. They define our expectations and evaluation criteria. We are committed to following our Code of Ethics, laws, and District rules, regulations, bulletins, policies and procedures, recommending changes required to make them better, and will not tolerate improper conduct.

(Exhibit 8.)

11. Principal Mak also distributed to teachers an "Opening School Bulletin" which discussed District and school policies and procedures. The Opening School Bulletin

discussed in detail opening day procedures, enrollment norms, attendance, home-school communications, work hours, absences, pupil hours, field trip guidelines, student attendance policy, supervision of students, student records procedures, school-wide discipline plan, classroom environment, lesson plans, textbooks and instructional materials, supplies, and equipment and furniture, safety and security, among other things. The Opening School Bulletin did not address physical contact between teachers and students, and mentioned nothing about no-touch policies, age-appropriate touching, or any other permissible or impermissible touching.

12. Principal Mak also reminded her teachers in the in-service meetings that they were required to complete annual child abuse awareness training. Respondent completed such training on September 16, 2013, September 3, 2014, and August 24, 2015.

Principal Mak's Observations

13. During every school year in which Principal Mak has served as 15th Street School's principal, she has made it her custom and practice to visit multiple times per month the classroom of each of her teachers, most times unannounced, and observe her teachers delivering instruction and managing classroom activities. During the times she visited Respondent's classroom, she witnessed him satisfactorily conducting lectures, assisting students one-on-one, and supervising classroom activities.

14. At no time during her classroom observations of Respondent did she witness him engage in conduct that she deemed warranting of an issuance of conference memoranda or the commencement of disciplinary actions.

2011-2012 and 2012-2013 School Years

15. On May 14, 2012, at the end of the 2011-2012 school year, and again on May 21, 2013, at the end of the 2012-2013 school year, Respondent received a performance evaluation from Principal Mak. In both evaluations, Principal Mak concluded Respondent met all expectations in the area of classroom performance. She also commented in both evaluations that Respondent was "aware of and sensitive to the norms of the students' social, cultural, and emotional development," and "model[ed] and promot[ed] fairness, caring, equity, and respect in his classroom." (Exhibit G.)

2013-2014 School Year

16. The 2013-2014 school year commenced on August 13, 2013 and ended on June 4, 2014. Respondent's fifth grade class was comprised of approximately 25 students.

///

///

A. *M.R.*²

17. M.R. was a student in Respondent's fifth grade class during the 2013-2014 school year. M.R., who testified at hearing, explained she felt frustrated for most of the school year, because Respondent made her feel uncomfortable. Specifically, M.R. explained that during classroom instruction and/or classroom activities, Respondent hugged her from behind while she either sat at her desk or stood, and stated Respondent engaged in this unsolicited activity approximately 10 times per week. M.R. testified that when Respondent hugged her as she sat at her desk, he would wrap both of his arms around her and rest his hands on her stomach. During cross-examination, M.R. explained that when Respondent hugged her from behind at her desk, she would be working on a classroom assignment as Respondent commented on her work. She also explained the hug would be brief.

18. M.R. also testified Respondent rubbed her shoulders or biceps during class time, and engaged in this unsolicited conduct approximately twice per week. However, during cross-examination, M.R. stated Respondent would "touch" (as oppose to "rub") her shoulder or bicep for a few seconds, while she worked at her desk. During these instances in which Respondent touched her shoulders and/or biceps, it would be when Respondent commenting on her work.

19. M.R. stated she had had male teachers in the past, but Respondent "was much more physical than [her] other male teachers."

20. During the period in which M.R. was a student in Respondent's class, M.R. never reported to another teacher, Principal Mak, or to her parents that Respondent touched her inappropriately or in a way that made her feel uncomfortable.

B. *I.G. and C.R.*

21. I.G. and C.R. were students in Respondent's fifth grade class during the 2013-2014 school year. Although neither student testified at hearing, Respondent acknowledged that during classroom instruction, he gave I.G., C.R., and other students, male and female, one-armed hugs, also known as "side-hugs," as a gesture of encouragement or praise.³ These side-hugs entailed Respondent standing parallel to the student and Respondent extending his arm to grasp the opposite shoulder or upper arm of the student. Respondent's custom of hugging (i.e., side-hugs) did not include frontal hugging.

///

///

² Students' initials, in lieu of their names, are used in order to protect their privacy.

³ The Accusation did not specify what kind of hug I.G. and C.R. received from Respondent.

22. With respect to I.G., the Accusation alleged that she felt uncomfortable when Respondent hugged her; however, District failed to proffer any competent direct evidence to establish this, as I.G. did not testify at hearing. The Accusation also alleged I.G. felt uncomfortable on an occasion(s) when Respondent placed his hand on top of I.G.'s hand as she wrote; however, District failed to proffer any competent direct evidence to establish this.

2014-2015 School Year

23. Respondent's fifth grade class for the 2014-2015 school year consisted of approximately 26 students, 15 males and 11 females.

A. *M.M.*

24. M.M. was a student in Respondent's fifth grade class during the 2014-2015 school year. M.M., who testified at hearing, explained that she felt uncomfortable and unsafe in Respondent's class, because Respondent would touch her and other female students. M.M. described the incidents of touching as Respondent touching her neck, shoulders, lower back, hands, arms, and hugging her from behind.⁴

25. With respect to her neck, M.M. testified that during class time, Respondent would rub her neck in a circular motion, using both of his hands, which lasted two to three minutes each time, while she sat at her desk. During these episodes, Respondent would be helping M.M. with her classroom assignments. M.M. explained that Respondent would engage in this conduct approximately twice per week.

26. With respect to her shoulders, M.M. testified that during class time, Respondent would use both of his hands to rub her shoulders, which last two or three minutes each time, while she sat at her desk. During these episodes, Respondent would be helping her with her classroom assignments. M.M. explained that Respondent would engage in this conduct approximately three times per week. Additionally, Respondent would sometimes hug her from the side when she stood next to Respondent, and M.M. witnessed Respondent doing the same with other girls in the classroom.

///

///

⁴ The Accusation did not allege that Respondent had touched M.M.'s neck, arms, or had hugged her from behind. As such, the Commission neither considered nor assigned culpability to Respondent regarding those specific allegations in reference to M.M.. However, the Commission did consider M.M.'s overall testimony, including her claims concerning Respondent's touching of her neck and arms, and his alleged incidents of hugging M.M. from behind, when assessing M.M.'s overall credibility, the credibility of other charges and allegations, and/or the potential application of aggravating factors under *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.

27. With respect to her lower back, M.M. testified that during class time, Respondent would stand next to or behind her and move his hand down from her upper back to her lower back. She also testified Respondent would sometimes hug her and then allow his hand to travel down to the small of her back. M.M. explained that Respondent engaged in this conduct once or twice per week, and that each such encounter lasted one or two minutes.

28. With respect to her hands and arms, M.M. testified that during class time, Respondent would come by her desk and touch or rub the top of her hand and then would rub her arm up to her shoulder. During these episodes, Respondent would be helping her with her classroom assignments. M.M. explained that Respondent would engage in this conduct two or three times per week.

29. With respect to hugging her from behind, M.M. testified that Respondent sometimes did this as she stood.

30. M.M. further testified that Respondent would rub or touch the other girls in the classroom the same way in which he rubbed or touched her, and for the same amount of time (i.e., lasting anywhere from one to three minutes each time). She also stated that Respondent would place his hand on the thighs of female students when they sat next to him. She stated Respondent never touched her or any of the other girls in the class when other adults were present in the classroom, and she was never alone with Respondent. M.M. also explained that Respondent would position his face close in proximity to students' faces.

31. The Accusation alleged Respondent "interlocked his hand with M.M.'s when she raised her hand in class." Although M.M. did not offer any specific testimony regarding this allegation, Respondent acknowledged during his testimony⁵ that during classroom time, when students, both boys and girls, worked on classwork and raised their hands, he would sometimes give the students "high-fives," handshakes, or he would interlace his fingers in the hand of a student and give the student's hand a short grip. Respondent explained the contact lasted a second or two, and the contact would often be accompanied by words of encouragement, like "good job," "great," or "keep working."

32. The Accusation also alleged that Respondent rubbed his hands across the top of M.M.'s head; however, District failed to proffer any competent direct evidence to address or prove this allegation.

///

///

///

⁵ Respondent's testimony is discussed in more detail below.

33. M.M. explained that although she felt scared about going to Respondent's classroom and felt unsafe overall, she did not tell Respondent or any other adult how she felt initially. However, she did later tell a campus aide, Jaime Gutierrez, accompanied by her classmate, A.O., about her discomfort in Respondent's class. The circumstances underlying her disclosure to Mr. Gutierrez occurred on November 6, 2014 during recess,⁶ when he overheard her talking to A.O. about Respondent, prompting Mr. Gutierrez to inquire further of her and A.O. about Respondent's touching behavior.

B. A.O.

34. A.O. was a student in Respondent's fifth grade class during the 2014-2015 school year. A.O., who testified at hearing, explained that she felt uncomfortable in Respondent's class, because Respondent was "really weird and awkward." Specifically, A.O. felt uncomfortable on those occasions when she raised her hand and Respondent interlocked his fingers with hers. Each such encounter would last approximately three seconds, but A.O. could not recall the frequency in which those incidents occurred. A.O. also witnessed Respondent engage in this sort of contact with other female students in the classroom.

35. Additionally, A.O. felt uncomfortable on those occasions when she needed help on her work, and Respondent would come to her desk and put his arm around her while he helped her with her work. These incidents lasted approximately one or two seconds. A.O. also witnessed Respondent engage in this sort of contact with other female students in the classroom.

36. Finally, A.O. felt uncomfortable on those occasions when Respondent put his hands on her shoulders. Sometimes Respondent used one hand and sometimes he used two. Each incident lasted approximately a second. A.O. also witnessed Respondent engage in this sort of contact with other female students in the classroom.

37. A.O. also witnessed Respondent hold V.J.'s face by the cheeks, and put his forehead against hers for approximately three or four seconds. A.O. did not offer any testimony describing what precipitated this incident, but did testify that Respondent and V.J. were at the front of the class when it occurred.

38. A.O. testified Respondent never touched her or any of the other girls in the class when other adults were present in the classroom.

///

///

⁶ Testimony from Mr. Gutierrez indicated the disclosure occurred during the lunch period.

39. A.O. claimed to have witnessed Respondent look down the shirt of and stare at the breasts of her classmate, A.S., as Respondent stood next to A.S. sitting at her desk. A.O. explained that A.S.'s breasts were large, and when she witnessed Respondent looking down A.S.'s shirt, he did so for a few seconds. A.O. testified she was approximately 30 feet away when she witnessed Respondent engage in this conduct.

40. A.O. also testified that on one occasion, Respondent told her that if she wanted to be a model, she couldn't be messy. According to A.O., Respondent's reference to her becoming a model stemmed from her past experience performing television work. Respondent then adjusted A.O.'s shirt by buttoning it, and in doing so, his index finger grazed her chest. The incident occurred after Respondent received a call on the classroom telephone indicating that the principal wished for A.O. to come to the office, prompting Respondent to adjust her clothing before A.O. exited the room. A.O. explained that when this incident occurred, she backed away from Respondent.

41. The Accusation alleged Respondent hugged A.O., ran his hand down A.O.'s back, inappropriately touched A.O.'s cheek with his fingers, attempted to pull A.O.'s bra strap from the outside of her clothing, and appeared to favor A.O.; however, District failed to proffer any competent direct evidence to address or prove these allegations.

42. A.O. testified she never told Respondent how she felt, because she was scared. She also never told her parents because she feared her parents would create a big scene. She did not tell any other adult until the campus aide, Mr. Gutierrez, overheard her and her friends on the school yard talking about Respondent.⁷ Mr. Gutierrez collectively questioned her and her friends about what he had overheard.

C. J.G.

43. J.G. was a student in Respondent's fifth grade class during the 2014-2015 school year. J.G., who testified at hearing, explained that she felt uncomfortable in Respondent's class, because sometimes when she raised her hand in class, Respondent would interlock his fingers with hers. Each such encounter would last seconds, and Respondent would do it two or three times per class. J.G. also witnessed Respondent engage in this sort of contact with other female students in the classroom.

⁷ The number and identity of the students present during the discussion with Mr. Gutierrez differed between the student witnesses. While M.M. testified that only she and A.O. were present during the discussion, while A.O. testified that other girls were present as well, including A.S., J.G., and V.J.. Contrary to A.O.'s testimony, J.G. testified she was not present during the conversation between Mr. Gutierrez and some of the girls in her class. Additionally, as set forth in Factual Finding 52 below, S.R. testified she was present during the discussion with Mr. Gutierrez, but neither M.M. nor A.O. mentioned S.R.'s presence during their respective testimonies.

44. J.G. also felt uncomfortable on those occasions when Respondent touched or rubbed her shoulders.⁸ Respondent used one hand to rub her shoulder “just for seconds,” while J.G. sat at her desk. Respondent engaged in this rubbing or touching approximately four times per week. J.G. also witnessed Respondent engage in this sort of contact with other female students in the classroom.

45. J.G. never told Respondent that she felt uncomfortable by his actions.

46. J.G. testified Respondent never touched her or any of the other girls in the class when other adults were present in the classroom.

47. The Accusation alleged Respondent hugged J.G.; however, District failed to proffer any competent direct evidence to address or prove this allegation.

48. J.G. testified that she witnessed Respondent button up the top two buttons of A.O.’s shirt when A.O. “went to ask [Respondent] a question.”

D. S.R.

49. S.R. was a student in Respondent’s fifth grade class during the 2014-2015 school year. S.R., who testified at hearing, explained that she felt uncomfortable in Respondent’s class, because sometimes when she raised her hand in class to ask a question, Respondent would interlock his fingers with hers. Consequently, S.R. disliked asking questions in class. Each such encounter would last seconds, and Respondent would interlock his fingers with hers two or three times per class. S.R. witnessed Respondent engaging in this sort of contact with other female students in the classroom.

50. S.R. also felt uncomfortable on those occasions when Respondent touched or massaged her shoulders. Respondent used both hands to rub her shoulders “for about a couple of seconds,” two or three times per week. During her testimony, S.R. became very upset and cried as she recounted the discomfort she felt in Respondent’s class.

51. S.R. testified Respondent never touched her or any of the other girls in the class when other adults were present in the classroom.

///

⁸ The Accusation did not allege that Respondent had touched or rubbed J.G.’s shoulders. As such, the Commission neither considered nor assigned culpability to Respondent regarding those specific allegations in reference to J.G.. However, the Commission did consider J.G.’s overall testimony, including her claims concerning Respondent’s touching or rubbing of her shoulders, when assessing J.G.’s overall credibility, the credibility of other charges and allegations, and/or the potential application of aggravating factors under *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.

52. S.R. never told Respondent that she felt uncomfortable by his actions, because she was scared. S.R. testified she was present with other female students, including M.M. and A.O., when they described Respondent's conduct to Mr. Gutierrez.

53. The Accusation alleged Respondent "inappropriately touched S.R.'s face"; however, District failed to proffer any competent direct evidence to address or prove this allegation.

E. V.J., A.S., J.L., C.J., and M.C.

54. V.J., A.S., J.L., C.J., and M.C. were students in Respondent's fifth grade class during the 2014-2015 school year. Neither V.J., A.S., J.L., C.J., nor M.C. testified at hearing.

55. With respect to V.J., the Accusation alleged Respondent interlocked his fingers with V.J.'s when she raised her hand in class, which Respondent admitted during his testimony. The Accusation also alleged Respondent held V.J.'s head with his hands and tapped her forehead against his, which A.O. addressed during her testimony. The Accusation, as a separate allegation, additionally stated that Respondent "inappropriately touched V.J.'s face with his hand," presumably in a wholly separate incident, but District failed to proffer any competent direct evidence to address or prove this allegation.

56. With respect to A.S., the Accusation alleged Respondent stared at "[A.S.'s] breasts on numerous occasions which made her feel uncomfortable." District failed to proffer any competent direct evidence to address or prove that Respondent stared at A.S.'s breasts "on numerous occasions" or that A.S. felt uncomfortable.

57. With respect to J.L., the Accusation alleged Respondent interlocked his fingers with J.L.'s when she raised her hand in class, which Respondent admitted during his testimony. The Accusation also alleged Respondent "inappropriately touched J.L.'s cheeks with both hands, but District failed to proffer any competent direct evidence to address or prove this allegation.

58. With respect to C.J., the Accusation alleged Respondent bumped his forehead with C.J.'s forehead when she was standing in line outside of the classroom. However, District failed to proffer any competent direct evidence to address or prove this allegation.

59. With respect to M.C., the Accusation alleged Respondent stared at M.C.'s breasts and rubbed the middle section of M.C.'s back. However, District failed to proffer any competent direct evidence to address or prove these allegations.

///

///

F. Jaime Gutierrez

60. Jaime Gutierrez, who testified at hearing, has been employed as a campus aide at 15th Street School for three years. His job duties include, among other things, supervising children during recess and lunch periods.

61. On November 6, 2014,⁹ several female students from Respondent's class, including M.M., A.O., and J.G., disclosed to him during the lunch period that Respondent had been touching them in ways that made them feel uncomfortable. Mr. Gutierrez had not heard any negative information about Respondent before the students' disclosure to him, and was unaware of any negative reputation concerning Respondent.

62. Mr. Gutierrez did not know whether the students were being truthful or not when they made the disclosure to him, but he believed it was his duty to report the students' disclosure to the administration. In that regard, Mr. Gutierrez reported to Principal Mak that some female students from Respondent's class had just disclosed to him that they felt uncomfortable in Respondent's class, as a result of Respondent's physical interactions with them.¹⁰ Principal Mak immediately called law enforcement and had Mr. Gutierrez report to them the information the female students had shared with him.

63. At no time prior to Mr. Gutierrez's report had Principal Mak received any complaints or reports from any parent or student advising of students' feelings of discomfort concerning Respondent. Additionally, Philip Earl, a volunteer aide¹¹ who, during the 2013-2014 and 2014-2015 school years, worked in Respondent's classroom once per week, reported no concerns to her. Mr. Earl did not testify at hearing.

Police Investigation

64. On November 13, 2014, Detectives Rachel Saavedra and Maria Valdovinos of the Los Angeles Police Department (LAPD) commenced investigation into allegations of possible sexual abuse leveled against Respondent. The detectives first spoke with Principal Mak and advised her to "remove the accused perpetrator" (i.e., Respondent) from the campus until the conclusion of the investigation. As such, Respondent was removed from his classroom on November 13, 2014, and has not been permitted to return.

⁹ Mr. Gutierrez could not recall the exact date of his discussion with the female students, but other evidence established the date of disclosure was November 6, 2014.

¹⁰ Mr. Gutierrez testified that "a group of kids" approached him, but could not recall the exact number of students. Principal Mak testified that Mr. Gutierrez reported to her that two students had approached him.

¹¹ As a volunteer aide, Mr. Earl helped the students with math or reading.

65. The police investigation consisted of interviews of the children alleging the abuse, individual interviews of all the students in Respondent's 2014-2015 class, and individual interviews of students in Respondent's 2013-2014 class. The investigation occurred over a series of approximately six months and required one or both detectives to visit the school approximately seven times to interview the students. Neither detective interviewed Respondent. Detective Valdovinos found no prior criminal complaints filed against Respondent.

66. After the completion of the police investigation, the detectives forwarded the matter to the District Attorney's office. The District Attorney rejected the case and elected not to pursue any criminal charges against Respondent. Instead, the District Attorney's office forwarded the matter to the City Attorney's office. Like the District Attorney, the City Attorney rejected the case and elected not to pursue any criminal charges against Respondent.

District Action

67. After the LAPD concluded its investigation, it provided the District's Student Safety Investigation Team (SSIT) with its report. The SSIT was tasked with investigating the allegations leveled against Respondent and preparing a report. In that regard, SSIT interviewed Principal Mak, Mr. Gutierrez, and Mr. Earl. SSIT also interviewed Respondent, who denied engaging in any inappropriate touching. SSIT did not interview any students. SSIT prepared a report dated November 10, 2015, which summarized LAPD's report, and summarized its interviews of Principal Mak, Mr. Gutierrez, Mr. Earl, and Respondent. SSIT submitted its report to the District's Administrator of Operations, Dr. James Noble, and to Principal Mak.

68. On December 14, 2015, Principal Mak held a conference with Respondent to "address allegations of inappropriate behavior" during the 2013-2014 and 2014-2015 school years, and issued a conference memorandum memorializing the discussions raised during the conference. During the conference, Principal Mak raised allegations that essentially mirrored the information she reviewed in the SSIT report. Specifically, Principal Mak alleged that Respondent engaged in physical contact with students, namely M.M., A.O., J.G., V.J., S.R., J.L., and M.R., that made them feel uncomfortable.¹² This physical contact included Respondent touching students' shoulders, placing his arms around students' shoulders, hugging students, interlocking his fingers with students, and/or massaging the shoulders of students. Additionally, the conference memorandum stated Respondent ran his hand down the small of M.M.'s back, touched the top of A.O.'s chest with his index finger as he manipulated the top of her shirt, told A.O. that she was messy, and stared at A.S.'s breasts.

¹² While the conference memorandum referenced other students in addition to M.M., A.O., J.G., V.J., S.R., J.L., M.R., and A.S., the parties presented direct evidence regarding M.M., A.O., J.G., V.J., S.R., J.L., M.R., and A.S. only. As such, this Decision references those students only.

69. Principal Mak's conference memorandum did not include allegations that Respondent had hugged M.M. from behind, rubbed M.M.'s neck for two or three minutes at a time, rubbed M.M.'s shoulders for two or three minutes at a time, and rub or touch other girls in the classroom for one to three minutes at a time.

70. During the conference, Principal Mak provided Respondent with three areas of assistance, guidance, and directives: (1) Respondent was "not to touch, handle, or grab students, unless [such contact was necessary for a student's] immediate safety;" (2) Respondent was to "maintain appropriate and professional relationships with students at all times;" and (3) Respondent was to "adhere to . . . District policies at all times," including the Code of Conduct, the Standards, the Code of Ethics, the District's "Sexual Harassment Policy," and the District's "Child Abuse and Neglect Reporting Requirements."

71. Ms. Mak's conference memorandum stated that should Respondent fail to follow her administrative directives, he could be subjected to disciplinary action, including, but not limited to, a Notice of Unsatisfactory Act(s)/Service, suspension, and/or dismissal from the District. However, District did not permit Respondent to return to his teaching assignment to follow Ms. Mak's administrative directives. Instead, on January 21, 2016, Principal Mak issued Respondent a Notice of Unsatisfactory Acts, pursuant to Education Code section 44938,¹³ charging, among other things, that Respondent engaged in conduct that made his students feel uncomfortable. Specifically, the Notice of Unsatisfactory Acts repeated the allegations set forth in Ms. Mak's December 14, 2015 conference memorandum, regarding M.M., A.O., J.G., V.J., S.R., J.L., M.R., and A.S..¹⁴ However, District never permitted Respondent an opportunity to remediate the alleged deficiencies.

///

¹³ Education Code section 44938, subdivision (a), provides:

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. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

¹⁴ While the Notice of Unsatisfactory Acts referenced other students in addition to M.M., A.O., J.G., V.J., S.R., J.L., M.R., and A.S., the parties presented direct evidence regarding M.M., A.O., J.G., V.J., S.R., J.L., M.R., and A.S. only. As such, this Decision references those students only.

72. At hearing, Principal Mak testified she knew and understood Education Code section 44938, which appeared on the Notice of Unsatisfactory Acts she issued to Respondent;¹⁵ but when asked to state her understanding of the statute, Principal Mak could not. However, she did state that she expected Respondent to rely on Education Code section 44938, because it appeared in the Notice.

73. At hearing, Principal Mak explained that despite learning the police investigation yielded no evidence of Respondent engaging in sexual abuse or making any comments of a sexual nature, she believed Respondent's termination was necessary, as Respondent failed to adhere to her verbal "no-touch policy" she conveyed to the teachers at the annual teacher in-service meetings, which resulted in some of Respondent's students experiencing discomfort. As such, she recommended to Dr. James Noble that Respondent be terminated.

74. Dr. Noble, who testified at hearing, is responsible for the safety and welfare of children in the District's schools. Dr. Noble reviewed the SSIT report concerning Respondent, as well as the District's discipline policy. He also reviewed the Standards, the Code of Conduct, and the Code of Ethics. Additionally, Dr. Noble considered the absence of prior complaints and the lack of a disciplinary record concerning Respondent, and Respondent's favorable performance evaluations. Thereafter, Dr. Noble decided to sustain Principal Mak's recommendation for dismissal, as he felt troubled that Respondent's physical contact made some of his students feel uncomfortable.

75. District commenced dismissal proceedings against Respondent, and filed an Accusation against Respondent on June 10, 2016.

Respondent's Testimony

76. Respondent testified at hearing. Respondent has resided in South Central Los Angeles his entire life. He attended high school in Reseda as a participant in a voluntary busing program. Upon graduation, Respondent attended the UCLA and earned his bachelor's degree in history in 1989. Thereafter, he attended CSULB, where he earned his master's degree in history in 1994.

77. While he was an undergraduate student at UCLA, Respondent worked at District during the summer of 1986 as an outdoor education assistant. He also worked at a bank and later at a credit union. Additionally, Respondent performed volunteer work at a church in which his father was the minister. Although Respondent enjoyed the banking industry, he wished to pursue teaching because he enjoyed watching children learn, and, much like he had as a church volunteer, he wanted to become a positive role model for African-American youth and for his community. In May 1995, after earning his master's degree, Respondent pursued a career in teaching by securing employment with the District as

¹⁵ References to Education Code section 44938 were preprinted and appeared on the first and last pages of the Notice of Unsatisfactory Acts.

a substitute teacher, and served in that capacity until August 1996. Respondent then pursued his teaching credential at CSUDH. Respondent returned to the District as a full-time teacher in 1998, the same year he obtained his teaching credential, and was assigned to 15th Street School, where he remained until his removal from the classroom in November 2014.

78. Respondent acknowledged attending annual teacher in-service meetings conducted by Principal Mak, in which she distributed bulletins, the Standards, the Code of Conduct, and the Code of Ethics, among other things. During those meetings, Principal Mak highlighted portions of those handouts, and instructed the teachers to review the remainder of the handouts on their own. One of the matters highlighted by Principal Mak concerned the Code of Conduct regarding item 6, cautioning teachers from “touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee’s/individual’s responsibilities and/or duties.” (Exhibit 7.)

79. Respondent also acknowledged that Principal Mak verbally instructed the teachers at the annual in-service meetings that “touching students was unacceptable, unprofessional, and violated district policy.” However, in the context in which Principal Mak presented her “no-touch policy,” Respondent interpreted the policy as addressing touching of an inappropriate, sexual, or abusive nature. Respondent did not interpret Principal Mak’s “no-touch policy” as prohibiting benign touching, such as issuing high-fives, pats on the back or shoulder, or other appropriate touching of the like. This was because the Code of Conduct permitted age-appropriate physical contact, and Respondent had witnessed Principal Mak frequently give students high-fives herself.

80. Consistent with District policy, Respondent tailored his teaching style to develop an age-appropriate rapport with his students such that they felt supported and congratulated when they completed tasks or accomplished goals. Respondent made it his custom and practice to deliver a lesson or instruction to his students, and then circulate around the classroom to ensure the students remained on task. As he circulated the classroom, he typically offered words and acts of affirmation and encouragement, such as saying “good job” or “great” or “keep working,” and by randomly giving his students, both male and female, a quick pat on the back or shoulder, a handshake or high-five, particularly when they completed a task well. Occasionally, Respondent would give students side-hugs.

81. When students raised their hands as he circulated the room, Respondent would sometimes give a student a high-five as his or her hand was raised, or sometimes he would interlace his fingers in his or her hand and give the student’s hand a short grip, reminiscent of a champion’s grasp. Occasionally, he would give the student a quick handshake. Each contact, whether a high-five, an interlaced finger grasp, or a handshake, would last a second or two, and were generally accompanied by verbal praise or encouragement. Also, Respondent would occasionally give students a one or two second side-hug for congratulatory purposes. Although Respondent would not issue high-fives, champion’s grasps, handshakes, or side-hugs every time he approached a student, such conduct played a significant part in his interaction with his students. At no time did any student voice any complaint to Respondent stating such interaction made him or her feel uncomfortable, or

pulled away from his grasp during handshakes or interlaced grips. On the contrary, students in his classroom continued raising their hands his class, and Respondent saw no reduction in the level of participation of any of his students.

82. In order to recapture the attention of students who had veered off task during their class assignment, Respondent sometime touched the top of the student's shoulder or patted the student's back. Occasionally, in an effort to show support, Respondent would give a student's shoulder a quick squeeze for a second or two. At no time did any student voice any complaint to Respondent stating such interaction made him or her feel uncomfortable. On the contrary, students in his classroom appeared content.

83. Respondent did not change his routine or the manner in which he interacted with the students when Principal Mak or other adults entered his classroom. He rarely knew in advance when an administrator, teacher, or any other adult would elect to enter his room during class time, as they generally arrived unannounced.

84. Respondent considered the physical component involved in how he interacted with his students (i.e, high-fives, interlaced finger grasps, handshakes, side-hugs, shoulder touches, shoulder squeezes, or back pats) as age-appropriate contact and within the scope of his responsibilities and duties. By adopting this style of teaching, which he had been executing for years, it was his sole intent to promote a positive and supportive environment for his students. In that regard, Respondent felt successful that he was achieving this goal, because, in his performance evaluations, Principal Mak commended him for his sensitivity to his students' social and cultural norms, emotional development, and his modeling and promotion of fairness, caring, equity, and respect in the classroom.

85. Prior to the investigation, no one, including Principal Mak, any parent, student, teacher, or other administrator complained to Respondent about how his physical interaction with his students left them feeling uncomfortable in his class. Additionally, Mr. Earl, who served as Respondent's voluntary aide during the 2013-2014 and 2014-2015, and who witnessed Respondent's interactions with the students, never reported to Respondent that he felt uncomfortable about how Respondent interacted with the students or received or repeated any reports from students that they felt uncomfortable by Respondent's interactions. Indeed, during the time in which A.O., M.M., J.G., and S.R. attended Respondent's class, they remained good students, experienced no change in grades, and remained enthusiastic and active.

86. Given Respondent's intention of creating and promoting a positive and supportive environment for his students, Respondent suffered great remorse when he learned on November 14, 2014, the day he was removed from the classroom, that some students felt uncomfortable. Respondent wished someone had advised him earlier. Had he known, he would have made adjustments in the manner in which he interacted with his students. Specifically, he would have adopted new approaches to support students that did not involve the use of physical contact. Respondent expressed he would still be very willing to modify his teaching style to omit any touching if afforded an opportunity to return to the classroom.

Respondent has already conducted research and read pertinent books highlighting alternative methods to touching, which similarly encourage and support students.

87. Respondent acknowledged that the Code of Conduct warned that, despite his professional intent, the District was obliged to investigate allegations of inappropriate conduct or behavior, and, if warranted, “take appropriate administrative and/or disciplinary action.” He understood why the District felt it needed to take action against him. Nevertheless, Respondent wishes he had been afforded an opportunity to return to the classroom to correct any alleged deficiencies, and endeavor to follow the assistance, guidance, and directives issued by Principal Mak in her December 14, 2015 conference memorandum.

Respondent’s Denials

88. While Respondent admitted to some of the allegations set forth in the Accusation, namely that he issued high-fives, interlaced finger grasps, handshakes, side-hugs, shoulder touches, shoulder squeezes, or back pats, Respondent categorically denied a number of other allegations. Specifically, Respondent denied running his hand down the small of M.M.’s back or down the back any other student. He also denied hugging M.M. from behind or hugging any other student in that manner, including M.R.. Additionally, Respondent denied rubbing or massaging the neck or shoulders of M.M. or any other student, including M.R. and S.R.. Respondent also denied placing his hand on the thighs of female students, as M.M. testified.

89. Respondent recalled no instance of buttoning A.O.’s shirt, as it was not his habit of touching or manipulating anybody’s clothes. He also denied touching the chest of A.O. or any other female student. Respondent also recalled no instance of holding V.J.’s face and touching his forehead against hers, as A.O. testified. Respondent also denied staring at the breasts of A.S., as A.O. testified, or the breasts of any other student.

90. Respondent also denied a number of other allegations in the Accusation, but District failed to proffer any competent direct evidence to address or prove those allegations.¹⁶ Consequently, Respondent’s denial of those allegations is not listed here.

Character Evidence

A. Imelda Cabral

91. Imelda Cabral provided character testimony on Respondent’s behalf. Ms. Cabral has taught at 15th Street School for more than 21 years, and prior to that, served as a teacher’s assistant there for approximately six years. Ms. Cabral maintains a positive view of Respondent, despite the allegations leveled against him, because she has observed

¹⁶ See Factual Findings 22, 32, 41, 46, 53, 55, 56, 57, 58, and 59.

Respondent interacting with his students, trusts her own daughters (ages 10 and 13) with him, and he is held in high esteem.

92. The copy machine was located right next door to Respondent's classroom, which afforded Ms. Cabral opportunities to stop by Respondent's classroom and observe him interact with his students. Ms. Cabral characterized all interactions she witnessed as "pretty normal" and that the students' reactions appeared normal. Specifically, she observed Respondent giving students a pat on the back and giving students high-fives. Nothing about Respondent's physical contact struck her as inappropriate, and she never witnessed any behavior suggesting Respondent had been conducting himself in an inappropriate way.

93. Ms. Cabral's daughters attended 15th Street School and spent a lot of time in Respondent's class, although Respondent did not serve as their teacher. They often visited Respondent just to say "hi" or to help him in his classroom. Ms. Cabral's daughters love Respondent and affectionately refer to him as "Uncle Jenkins." Ms. Cabral never received any complaints from her daughters about Respondent, and she witnessed nothing inappropriate in the manner in which Respondent interacted with her daughters. Ms. Cabral expressed that she would completely trust Respondent to serve as their fifth grade teacher.

94. Principal Mak respected Ms. Cabral as a teacher.

B. Sylvia Barbas

95. Sylvia Barbas provided character testimony on Respondent's behalf. Ms. Barbas has worked at 15th Street School for more than 35 years, and is currently a categorical program advisor. Prior, she served as a teacher there, and had opportunities to observe Respondent in his classroom.

96. Ms. Barbas characterized Respondent as a very calm, organized, and encouraging teacher. She has witnessed Respondent pat students' backs, both male and female, as he observed their work. Ms. Barbas considered Respondent's physical contact with students as age-appropriate and within the scope of his duties.

97. Ms. Barbas described Respondent as an upstanding, wonderful, encouraging human being, and would fully trust Respondent to teach her own two children.

98. Principal Mak respected Ms. Barbas as a teacher.

C. Diane Dibrell

99. Diane Dibrell provided character testimony on Respondent's behalf. Ms. Dibrell has worked at 15th Street School as a fourth and fifth grade teacher since 1996.

100. Ms. Dibrell's classroom was located directly across the hall from Respondent's. She entered his class unannounced on a daily basis because Respondent's

supply cabinet was routinely stocked with supplies she needed. During those visits, which lasted approximately five minutes, Ms. Dibrell had opportunities to observe Respondent interact with his students.

101. Ms. Dibrell witnessed Respondent give his students high-fives, interlace finger grasps, place his hand on students' shoulders, or pat students' backs, and did not see Respondent engaged in any inappropriate conduct. The students appeared "normal-looking" when Respondent touched their shoulders or backs, and no student ever complained to her about Respondent. Ms. Dibrell never witnessed Respondent stare at any student's breasts, hug any student from behind, or run his hand down to the lower back of any student.

102. On cross-examination, Ms. Dibrell testified she witnessed Respondent give a quick shoulder massage with both hands to female students once or twice for encouragement purposes, which lasted for approximately two or three seconds, but could not recall the name of those students. She also saw him button a girl's blouse collar on picture day, but denied that Respondent touched her chest in doing so. Ms. Dibrell could not recall that student's name either, but did recall that the student smiled after Respondent fixed her collar. Ms. Dibrell found nothing alarming or inappropriate about these or any other instances of physical contact she witnessed, because "many teachers touch" in her experience. Ms. Dibrell also acknowledged that she was a mandated reporter and, as such, was required to report inappropriate contact had she witnessed Respondent engage in it.

103. Principal Mak respected Ms. Dibrell as a teacher.

D. Bradley Mack

104. Bradley Mack provided character testimony on Respondent's behalf. Mr. Mack has worked as a teacher at 15th Street School for 21 years, and has taught fifth grade for the last four years.

105. Mr. Mack and Respondent have observed each other teach class lessons, have attended class field trips together, and have supervised children on the school yard together. Mr. Mack witnessed Respondent's use of physical contact during his interactions with students, including touching a shoulder when leaning in to see what a student was working on, issuing a high-five or grabbing a student's hand, giving a student a squeeze on the neck, and hugging a student from the side. Mr. Mack considered all of Respondent's physical interactions with students as proper and age-appropriate, and acknowledged that teachers use physical contact with students at school.

106. Principal Mak has come into Respondent's class while Mr. Mack was present observing Respondent. Respondent did not change anything about how he interacted with the students in Principal Mak's presence, including touching them.

107. Mr. Mack has never witnessed Respondent bring his hand down the small of a student's back or approach a female student from behind and put his arms around her.

108. Mr. Mack, who is married to Ms. Cabral, confirmed that their two daughters (presently, ages 10 and 13) have been alone with Respondent on a number of occasions. They have never voiced any complaint to Mr. Mack about Respondent.

109. Principal Mak respected Mr. Mack as a teacher.

E. Character Letters

110. In addition to proffering character testimony from some of his colleagues, Respondent proffered character letters from other colleagues. Specifically, Donna P. McGary and Cindy Paieda, who serve as teachers at 15th Street School, described Respondent as a responsible, conscientious, and dedicated teacher, and a very active member of the school community.

*Credibility Findings*¹⁷

A. Respondent

111. The Commission found credible the overall testimony of Respondent, given the forthright and transparent manner in which he responded to questions. The Commission observed Respondent answer questions in a sincere, straight forward manner, without a cloud of prevarication. Respondent's credibility was strengthened by his ready admission to a number of the allegations set forth in the Accusation, including that he gave his students side-hugs, shoulder touches, shoulder squeezes, back pats, and interlaced finger grasps.

112. Respondent provided persuasive and credible testimony about his disagreement with the District's insinuated intent behind his physical interactions with his students, particularly his female students, and its implication that he engaged in such conduct for inappropriate, sexual, or predatory purposes. The Commission, too, disagrees with the District's implication. The evidence shows that Respondent's physical contact with his students was age-appropriate and within the scope of his duties, as collectively attested to by Ms. Cabral, Ms. Barbas, Ms. Dibrell, and Mr. Mack. The evidence shows that Respondent

¹⁷ In this matter, the Commission evaluated the credibility of the witnesses pursuant to the factors set forth in Evidence Code section 780: the demeanor and manner of the witness while testifying, the character of the testimony, the capacity to perceive at the time the events occurred, the character of the witness for honesty, the existence of bias or other motive, other statements of the witness which are consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified, and the attitude of the witness toward the proceeding in which the testimony has been given. The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

did not engage with his students in any way that was sexualized or harassing or otherwise inappropriate for their age. Indeed, if Respondent had wished to engage in such immoral conduct, and was brazen enough to do so in front of the entire class, particularly in the presence of fellow teachers when they visited his class, it is reasonable to believe one of his mandated reporter colleagues would have reported the conduct, if not a brave student.

113. The Commission also found credible the deep regret Respondent expressed upon learning that students in his class felt uncomfortable by his physical contact with them, especially since his purpose for engaging in such conduct was for the innocent purpose of supporting and encouraging his students.

B. Principal Mak

114. The Commission considered Principal Mak a devoted and ardent administrator who cares deeply about the school under her charge. However, the Commission found concerning the apparent lack of understanding of the plain wording of the District policies and procedures she touted, and the inconsistent manner in which she testified. In particular, Principal Mak testified she interpreted Item 6 of the Code of Conduct, which prohibited employees from “touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee’s/individual’s responsibilities and/or duties,” as prohibiting *all* touching. Specifically, she stated that she considered “all touching [as] inappropriate.” However, the plain language of Item 6 clearly permits teachers to engage in “age-appropriate” touching with students, as long as it is within the scope of the teacher’s responsibilities and/or duties. When repeatedly pressed on this issue, and requested to reconcile her interpretation with the “age-appropriate” wording found in Item 6, she acknowledged the presence of the “age-appropriate” wording, but applied a narrow definition of what she considered “age-appropriate touching.” Specifically, she limited “age-appropriate touching” to physical contact designed “to keep students safe.” Principal Mak’s attempt to limit the scope of Item 6 contradicted its plain meaning and was wrong.

115. Additionally, the Commission found troubling Principal Mak’s inability to articulate the meaning of Education Code section 44938 which appeared in the Notice of Unsatisfactory Acts that she issued to Respondent. Despite her inability to articulate the meaning of this section of the Education Code, Principal Mak testified she expected Respondent to rely on it because it appeared in the Notice. Education Code section 44938 addresses, in part, opportunities for individuals to correct or remedy their deficiencies. Yet, as Principal Mak acknowledged, Respondent was not permitted to return to his teaching assignment after she issued the Notice of Unsatisfactory Acts.

116. With respect to Principal Mak’s “no-touch policy,” to which she expected all of her teachers to strictly adhere, she expressed her belief that “touching students was unacceptable and unprofessional and violated district policy.” However, the weight given her testimony, and the District’s burden of proof, was undermined by her failure to identify in any of the materials she distributed to her teachers (i.e., policies, procedures, codes, and bulletins) any language memorializing her “no-touch policy.”

117. The Commission found that Principal Mak sometimes testified in a halting, inconsistent, and confusing manner, particularly when pressed to clarify her beliefs and positions, making it difficult to understand all facets of her testimony. As such, and for the reasons stated above, Principal Mak's overall testimony was not afforded the same weight as testimony and evidence contrary to Principal Mak's testimony.

C. M.R.

118. The Commission considered M.R. a bright young lady who expressed herself well, and found her testimony credible as it related to the discomfort she experienced by Respondent's physical contact. Specifically, the Commission considered credible M.R.'s testimony concerning Respondent's physical contact of her shoulders. While she first testified that Respondent "rubbed" her shoulders, M.R. clarified during cross-examination that Respondent "touched" her shoulder or bicep for a few seconds on multiple occasions per week, when Respondent helped her at her desk. This is consistent with testimony offered by Respondent, who stated he would sometimes touch or squeeze his students' shoulders, as well as with testimony offered by Ms. Dibrell and Mr. Mack, who witnessed Respondent place his hand on students' shoulders when leaning in to observe their work.

119. However, the Commission found incredible M.R.'s testimony that Respondent hugged her from behind, particularly when she stated that Respondent would approach her while she sat at her desk, wrap both of his arms around her, and rest his hands on her stomach. No other witness proffered any testimony suggesting that Respondent engaged in such conduct, despite Respondent purportedly engaging in such conduct in the presence of the entire class. The only witness who alleged Respondent engaged in similar conduct was M.M., but, as set forth in more detail below, the Commission found M.M.'s testimony less than credible on this subject.

D. M.M.

120. The Commission considered M.M. a smart and articulate young lady, and found her testimony credible as it related to the discomfort she experienced by Respondent's physical contact of her and other girls. Specifically, the Commission considered credible M.M.'s testimony concerning Respondent's touching of her shoulder and Respondent's placing his arm around her shoulder. This testimony was consistent with testimony proffered by Respondent, who stated he would sometimes place his hand on the shoulder of his students, as well as give them one-armed side hugs as a gesture of encouragement or praise.

121. However, the Commission did not find credible M.M.'s testimony purporting that Respondent had run his hand down the small of her back. No other witness proffered any testimony in that regard, despite Respondent purportedly engaging in such conduct in the presence of the entire class. Additionally, as discussed above, Respondent's denial of this allegation was deemed credible, given the overall transparent and unequivocal manner in which he testified.

122. In its consideration of M.M.'s testimony that Respondent reserved his acts of physical contact for the girls in the class only, and that Respondent never touched her or any of the other girls in the classroom when other adults were present, the Commission considered A.O.'s, J.G.'s, and S.R.'s testimony, which were similar to M.M.'s in that regard. However, the Commission also considered the more credible and persuasive testimony of Respondent, who credibly testified he physically interacted with both the male and female students in the classroom, and of Ms. Barbas, who credibly testified that she witnessed Respondent touch both male and female students as Respondent observed their work. Inherent in their observations, as well as in the credible testimony of Ms. Cabral and Ms. Dibrell, who also observed Respondent engage in physical contact with the students, is that Respondent continued to engage in physical touch while adults were present. Indeed, according to the credible testimony of Mr. Mack, who also testified he witnessed Respondent engage in physical contact with the students, also witnessed Principal Mak come into Respondent's class while Mr. Mack was present, and saw that Respondent did not change anything about how he interacted with the students in Principal Mak's presence, including touching them. These collective testimonies corroborated Respondent's testimony that he did not alter his routine when adults entered the room. Balancing these testimonies, the Commission did not find M.M.'s, A.O.'s, J.G.'s, and S.R.'s versions more persuasive than Ms. Barbas', Ms. Cabral's, Ms. Dibrell's, Mr. Mack's, and Respondent's in this regard.

123. The Commission found incredible M.M.'s testimony that Respondent hugged her from behind, rubbed her neck for two or three minutes at a time, rubbed her shoulders for two or three minutes at a time, and rub or touch other girls in the classroom for one to three minutes each time. It appears M.M. raised such allegations for the first time during hearing, and not anytime during the six-month investigation conducted by LAPD or during the dismissal process undertaken by the District. Consequently, no such allegations were included in Principal Mak's December 14, 2015 conference memorandum, in the January 21, 2016 Notice of Unsatisfactory Acts, or in the Accusation itself. As such, M.M.'s testimony in this regard is deemed unreliable.

E. A.O.

124. The Commission considered A.O. an intelligent and dynamic young lady, and found her testimony credible as it related to the discomfort she experienced by Respondent's physical contact of her and other female students. Specifically, the Commission considered credible A.O.'s testimony concerning instances of Respondent placing his arm around her shoulder and instances of him interlocking his fingers with hers when she raised her hand in class. This testimony was consistent with testimony proffered by Respondent, who stated he would sometimes give his students one-armed side hugs as a gesture of encouragement or praise. Additionally, Respondent proffered testimony that when students worked on classwork and would raise their hands, he would sometimes give the students "high-fives," handshakes, or he would interlace his fingers in the hand of a student and give the student's hand a short grip.

125. Although Respondent could not recall adjusting A.O.'s shirt at one time, the Commission found credible A.O.'s testimony that Respondent made a reference about the messiness of her shirt and buttoned her collar, because J.G. corroborated A.O.'s testimony in that regard. Additionally, although it is not conclusive, the Commission surmises that Ms. Dibrell witnessed the same when she saw Respondent button a girl's collar on what she believed to be picture day. The Commission found understandable Respondent's failure to recall this incident, given the time that has elapsed since the incident, the number of students in his class, and the fact that such an occurrence was a rare one. The Commission declined to assign an inappropriate meaning to this incident. Specifically, the Commission believed that when Respondent made reference to the messiness of A.O.'s shirt, he did not mean it in a demeaning way. Rather, it appeared he wished to take care of his student. Consequently, when Respondent helped to button A.O.'s shirt, the Commission did not believe Respondent did so with an inappropriate purpose, especially given the fact that he did so in front of the entire class, and potentially in front of Ms. Dibrell.

126. Although Respondent could not recall the incident, the Commission found credible A.O.'s testimony that she witnessed Respondent hold V.J.'s face with his hands and tap his forehead against hers. The Commission found understandable Respondent's failure to recall this incident, given the time that has elapsed since the incident, the number of students in his class, and the fact that such an occurrence appeared to be a rare one. However, the District did not proffer any competent direct evidence to explain the context in which the act took place, other than it occurred at front of the class. Specifically, A.O. offered no testimony describing what precipitated the act, and the District failed to present V.J. as a witness to describe the details and effects of the incident. Consequently, the Commission declined to assign an inappropriate meaning to this conduct, as insufficient evidence existed to determine whether or not the physical contact occurred within Respondent's scope of duties.

127. The Commission found incredible A.O.'s testimony that she witnessed Respondent look down the shirt of and stare at the breasts of her classmate, A.S. S. The Commission was unclear what A.O. could see and interpret from her desk, which was located 30 feet away. Additionally, Respondent's categorical denial of this allegation appeared credible, and the District failed to present V.J. as a witness to establish otherwise.

F. J.G.

128. The Commission considered J.G. a smart and pleasant young lady, and found her testimony credible as it related to the discomfort she experienced by Respondent's physical contact of her and other female students. Specifically, the Commission considered credible J.G.'s testimony concerning instances of Respondent interlocking his fingers with hers when she raised her hand in class, as Respondent proffered testimony that he would sometimes interlace his fingers in the hand of a student when the student raised his or her hand.

///

129. Although the District did not allege in the Accusation that Respondent touched or rubbed her shoulders “for just seconds,” the Commission found her testimony credible in that regard, as it was consistent with Respondent’s acknowledgement that he sometimes touched or squeezed his students’ shoulders, as well as with others’ observations that he did so only for a few seconds.

G. S.R.

130. The Commission considered S.R. an anxious, though brave, young lady, and found her testimony credible as it related to the discomfort she experienced by Respondent’s physical contact of her and other female students. Specifically, the Commission considered credible S.R.’s testimony concerning instances of Respondent interlocking his fingers with hers when she raised her hand in class, as Respondent proffered testimony that he would sometimes interlace his fingers in the hand of a student when the student raised his or her hand. Additionally, the Commission considered credible S.R.’s testimony concerning instances of Respondent touching her shoulders, as it is consistent with Respondent’s testimony that he would sometimes touch or squeeze the shoulders of his students.

H. Ms. Cabral, Ms. Barbas, Ms. Dibrell, and Mr. Mack

131. The Commission found credible the testimony of Respondent’s colleagues, Ms. Cabral, Ms. Barbas, Ms. Dibrell, and Mr. Mack, given the clear, concise, and direct manner in which they individually testified, buttressed by the corroborating nature of their collective testimonies, and their individual and collective experience in the teaching profession. As such, the Commission afforded great weight to the testimony of these witnesses.

LEGAL CONCLUSIONS

Burden of Proof

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

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040; Evid. Code, § 115.) “The phrase ‘preponderance of evidence’ is usually defined in terms of probability of truth, e.g., ‘such evidence as, when weighed with that opposed to it,

has more convincing force and the greater probability of truth.’ (BAJI (8th ed.), No. 2.60.)” (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

Section 44938 Considerations

3. Section 44938, subdivision (a), provides:

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. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

4. Respondent asserts that, in light of section 44938, he should have been given an opportunity to return to his teaching assignment and correct any perceived deficiencies. Courts have held that the Commission may consider the lack of opportunity to correct deficiencies during its evaluation of the evidence. (*Blake v. Commission on Professional Competence* (1989) 212 Cal.App.3d 513 (*Blake*); *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334 (*Crowl*).)

Dismissal Authority

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

6. Under section 44944, subdivision (c), the dismissal hearing must be conducted by a three-member Commission on Professional Competence, unless waived by the parties. Two members of the Commission must be non-district teachers, one chosen by the employee (Respondent) and one by the governing board (District), and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

7. When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (§ 44944, subd. (d)(3).)

///

///

8. Section 44932 provides, in pertinent part:

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

(1) Immoral conduct, including, but not limited to, egregious misconduct. For purposes of this chapter, “egregious misconduct” is defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 or 44011 of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code.¹⁸

(2) Unprofessional conduct.

[¶] . . . [¶]

(6) Evident unfitness for service.

[¶] . . . [¶]

(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 of Education or by the governing board of the school district employing him or her.

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

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

///

///

¹⁸ Education Code section 44010 addresses sex offenses. Education Code section 44011 addresses controlled substance offenses. Penal Code sections 11165.2 to 11165.6, inclusive, address child abuse and neglect reporting offenses.

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

12. “Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing her,” which concerns Education Code, section 44932, subdivision (a)(8), requires a “showing of intentional and continual refusal to cooperate.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) In order for a teacher to be terminated under Education Code section 44932(a)(8), for violations of law or school rules, the violations must be either “persistent” or “motivated by an attitude of continuous insubordination.” (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81 (*Seaman*).) “The word ‘persistent’ is defined by lexicographers as ‘refusing to relent; continuing, especially in the face of opposition ... stubborn; persevering ... constantly repeated.’ And, in the judicial decisions of this, as well as other states, the word has been interpreted to mean ‘continuing or constant.’” (*Id.* at p. 82.) It is the persistent disregard of school rules that the subdivision is designed to regulate.” (*Id.*)

13. Section 44939, subdivision (b), provides in part:

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

14. Even where immoral conduct or evident unfitness for service are established, it must also be established that such immoral conduct or evident unfitness renders the Respondent unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230 (*Morrison*); *Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208 (*Fontana*); *Woodland, supra*, 4 Cal.App.4th at 1444-1445.) In *Morrison*, the California

Supreme Court set forth guidelines (eight factors) to aid in determining whether the conduct in question indicates such unfitness:

- (1) The likelihood that the conduct may have adversely affected students, fellow teachers, or the educational community, and the degree of such adversity anticipated.
- (2) The proximity or remoteness in time of the conduct.
- (3) The type of credential held by the person involved.
- (4) The extenuating or aggravating circumstances surrounding the conduct.
- (5) The praiseworthiness or blameworthiness of the motives resulting in the conduct.
- (6) The likelihood of the reoccurrence of the questioned conduct.
- (7) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.
- (8) The publicity or notoriety given to the conduct.

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

Analysis

16. District failed to establish, by a preponderance of the evidence, that Respondent engaged in unprofessional conduct (§ 44932, subd. (a)(2)), immoral conduct (§ 44932, subd. (a)(1) and § 44939), evident unfitness for service (§ 44932, subd. (a)(6)), persistent violation of or refusal to obey reasonable regulations (§ 44932, subd. (a)(8)), and willful refusal to perform regular assignments without reasonable cause (§ 44939). As such, as set forth in more detail below, no cause exists to dismiss Respondent from his position as a permanent certificated employee of District.

///

///

A. *Unprofessional Conduct*

17. As set forth in Legal Conclusion 9, unprofessional conduct may be defined as conduct that violates the rules or ethical code of a profession or is unbecoming a member of a profession in good standing. District contends Respondent engaged in unprofessional conduct by individually and/or collectively violating Principal Mak's "no-touch policy," the Code of Ethics, the Code of Conduct, and the Standards. Each argument is discussed below.

1. *"No-Touch Policy"/ Code of Ethics*

18. District asserts Respondent engaged in unprofessional conduct when he failed to adhere to Principal Mak's "no-touch policy," which led to the discomfort and frustration felt by several female students in his class. Such defiance, District contends, not only demonstrated unprofessional conduct, but it subjected the students to conduct negatively impacting their learning environment and overall experience as a student. Additionally, District asserts that such conduct violated its Code of Ethics requiring employees to keep policies, procedures, and rules. A minority of the Commission agrees with District's assertion in this regard.

19. The majority of the Commission rejects the notion that Principal Mak's verbal "no-touch policy" was, in fact, a District rule or policy. Although Principal Mak testified that she told her teachers that she considered touching to be "a violation of District policy," the evidence simply does not support that assertion. The record shows that Principal Mak could not identify, in any of the policies, procedures, codes, and bulletins distributed to teachers, any language memorializing her "no-touch policy." That's because no such language existed. The Commission majority maintains that converting or elevating a principal's verbal edicts to a policy or rule recognizable under Education Code dismissal provisions circumvents an essential purpose of the Code: to prevent arbitrary firing of tenured teachers. If principals are permitted to characterize their self-described codes of conduct as district or state policy, it could encourage arbitrary and capricious personnel decisions, and undermine basic due process protections.

20. Additionally, Respondent's dedicated and credible colleagues, Mr. Mack, Ms. Barbas, Ms. Dibrell, and Ms. Cabral, affirmed a culture of supporting 15th Street School students through the practical application of age-appropriate physical touch, despite Principal Mak's "no-touch policy," evident from their collective testimonies. They affirmed that teachers sometimes use physical contact with students, and acknowledged that such contact in the form of side-hugs, shoulder touches, shoulder squeezes, back pats, interlaced finger grasps, high-fives, and handshakes, was age-appropriate and within the scope of duties. Indeed, Principal Mak herself frequently issued high-fives to students, according to Respondent's credible testimony. The existence of such commonly used affirmations gives credence to Respondent's belief that when Principal Mak discussed no touching, it was in reference to touching of an inappropriate, sexual, or abusive nature.

///

2. *Code of Conduct*

21. District asserts that as a result of Respondent's conduct, which caused the discomfort and frustration of several female students, Respondent violated the Code of Conduct. A minority of the Commission agrees with District's assertion in this regard.

22. With respect to the Code of Conduct, District contends that Respondent's conduct, which violated Principal Mak's "no-touch policy", demonstrated a disregard for the warnings set forth in its preamble and closing. Specifically, District asserts Respondent ignored its preamble reminding employees that "they must be mindful of the fine line drawn between being sensitive to and supportive of students and a possible or perceived breach of responsible, ethical behavior." (Exhibit 7.) Additionally, District asserts Respondent ignored its closing, advising that "the District is obligated to investigate allegations and, if warranted, take appropriate administrative and/or disciplinary action" should "allegations of inappropriate conduct or behavior" be leveled against an employee. (Exhibit 7.) In other words, District contends that Principal Mak made Respondent aware of the potential consequences should Respondent or any other teacher violate specific items of the Code of Conduct, particularly as related to violations of her "no-touch policy;" yet, Respondent assumed the risk and violated her policy anyway.

23. However, irrespective of these warnings, the majority of the Commission finds District failed to establish by a preponderance of the evidence that Respondent, in fact, violated any item of the Code of Conduct, notwithstanding his failure to adhere to Principal Mak's verbal "no-touch policy." Contrary to District's claim, insufficient evidence exists to establish that Respondent violated Item 6, as District has claimed, which prohibits "touching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee's/individual's responsibilities and/or duties." Insufficient evidence also exists to demonstrate that Respondent violate Item 3 of the Code of Conduct, which prohibits employees from "engaging in any behaviors, either directly or indirectly with a student(s) or in the presence of a student(s), that are unprofessional, unethical, illegal, immoral, or exploitative." The overwhelming evidence established by the record demonstrates Respondent engaged in age-appropriate physical contact with his students, male and female, as discussed in detail above. Age-appropriate contact under the Code of Conduct cannot simultaneously be considered unprofessional, unethical, illegal, immoral, or exploitative contact under a different section of the same District code.

3. *The Standards*

24. With respect to the Standards, which addresses creating and maintaining effective environments for student learning, District contends Respondent violated six subsections of Standard 2. Specifically, District asserts Respondent violated subsections 2.1, 2.2, 2.3, 2.5, 2.6, and 2.7 by engaging in physical contact that caused the girls to feel uncomfortable, thereby negatively impacting the promotion of a socially caring environment; the creation of an environment promoting student learning; the maintenance of a physically, intellectually, and safe learning environment; the development of maintaining high

standards; the employment of classroom routines, procedures, norms, and supports ensuring a climate in which students can learn; and the utilization of instructional time to optimize learning. A minority of the Commission agrees with District's position.

25. The Commission majority cannot deny the significance of students feeling uncomfortable in their own classroom, and the overall impact it must have had on them. However, the totality of the record suggests that of Respondent's classes during the 2013-2014 and 2014-2015 school years, which included a total of approximately 50 students, a very small minority expressed feelings of discomfort, according to the credible direct evidence presented at hearing. Specifically, only five students testified at hearing and expressed their experiences in Respondent's class. However, an equal number of witnesses (i.e., Mr. Mack, Ms. Dibrell, Ms. Cabral, Ms. Barbas, and Respondent) provided persuasive testimony describing the supportive and encouraging environment Respondent promoted. Indeed, Respondent, who had been working at 15th Street School since 1998 with an unblemished disciplinary record, received multiple performance evaluations from Principal Mak describing Respondent as "aware of and sensitive to the norms of the students' social, cultural, and emotional development." Principal Mak also stated Respondent "model[ed] and promot[ed] fairness, caring, equity, and respect in his classroom." Given these factors, the Commission majority finds no violation of the Standards.

26. In light of the foregoing, District has failed to meet its burden of establishing Respondent engaged in unprofessional conduct under Education Code section 44932, subdivision (a)(2).

B. Immoral Conduct

27. While District established that Respondent's physical interaction with his students left some of his female students feeling uncomfortable, the Commission unanimously determined that District failed to establish that such physical interaction constituted conduct inconsistent with rectitude, indicative of corruption, indecency, depravity, dissoluteness, or shameless conduct showing moral indifference to the opinions of respectable members of the community, as describe in Legal Conclusion 10. The evidence showed that Respondent gave his students side-hugs, shoulder touches, shoulder squeezes, back pats, interlaced finger grasps, high-fives, and handshakes, conduct objectively viewed as appropriate and within the purview of his role as a teacher, according to the credible testimony of Ms. Cabral, Ms. Barbas, Ms. Dibrell, and Mr. Mack. While District implied that Respondent's intent behind his interactions with his female students stemmed from an inappropriate, sexual, or predatory purpose, District simply did not prove that assertion. Instead, the evidence established Respondent incorporated physical contact into his teaching style to help create a supportive and encouraging environment for his students. Given the above, District failed to establish Respondent engaged in immoral conduct under Education Code sections 44932, subdivision (a)(1) and 44939.

///

C. *Evident Unfitness for Service*

28. As set forth in Legal Conclusion 11, evident unfitness for service addresses whether a teacher is unfit or unsuitable for teaching, by reason of temperamental defect or inadequacies. Legal Conclusion 11 also describes unfitness for service as that which connotes a fixed character trait, presumably not remedial upon receipt of notice that one's conduct fails to meet the expectation of the District. While District expressed concern about how some of Respondent's female students felt in Respondent's class as a result of his physical contact with them, the Commission unanimously determined that such concern does not constitute a demonstration that Respondent suffered a temperamental defect, inadequacy, or a fixed character trait resistant to remediation. On the contrary, as set forth in more detail below, the Commission strongly believes District's perceived concerns about Respondent's conduct can be remedied very easily by a simple modification of his teaching style, which he testified he would be willing to implement. Given the above, District failed to establish Respondent's evident unfitness for service under Education Code section 44932, subdivision (a)(6).

D. *Persistent Violation of or Refusal to Obey School Laws*

29. As set forth in Legal Conclusion 12, cases interpreting whether a teacher has persistently violated or refused to obey school laws require a showing of intentional and continual refusal to cooperate. Here, the Commission unanimously determined that the evidence did not demonstrate a showing that Respondent persistently violated or refused to obey school laws or intentionally or continually refused to cooperate, though for two different reasons. The same Commission majority that concluded Respondent engaged in no unprofessional conduct, reasoning Respondent had not violated any official District codes or policies, has hence concluded that Respondent, by definition, could not have committed a violation of the present cause. In other words, District failed to meet its burden of establishing that Respondent engaged in the persistent violation of or the refusal to obey school laws, because it failed to establish that Respondent violated any official school laws or policies in the first place.

30. The Commission minority that concluded Respondent had engaged in unprofessional conduct for violating Principal Mak's "no-touch policy," the Code of Conduct, the Code of Ethics, and the Standards, also concluded District failed to meet its burden of proving Respondent committed a violation of the present cause. Specifically, the minority reasoned that a violation of Education Code section 44932, subdivision (a)(8), requires a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.). The minority concluded there was no showing of an intentional and continual refusal to cooperate, because Respondent had been teaching for years, had been receiving positive evaluations from Principal Mak, and District proffered no evidence demonstrating that any administrator, colleague, student, or parent had advised him that any pertinent facet of his teaching style required remediation. Given the above reasons, District failed to

establish Respondent's persistent violation of or refusal to obey school laws under Education Code section 44932, subdivision (a)(8).

E. Willful Refusal to Perform Regular Assignments

31. As set forth in Legal Conclusion 13, a teacher's willful refusal to perform regular assignments is actionable when done without reasonable cause. The Commission unanimously finds that District presented no evidence that Respondent refused to perform regular assignments without reasonable cause. On the contrary, the evidence showed that Respondent was fully dedicated to his role as a teacher, and performed accordingly, as evidenced by Respondent positive performance evaluations. Given the above, District failed to establish Respondent willfully refused to perform regular assignments under Education Code section 44939.

Conclusion

32. Based on the foregoing, District failed to demonstrate Respondent engaged in unprofessional conduct (§ 44932, subd. (a)(2)), immoral conduct (§ 44932, subd. (a)(1) and § 44939), evident unfitness for service (§ 44932, subd. (a)(6)), persistent violation of or refusal to obey reasonable regulations (§ 44932, subd. (a)(8)), and willful refusal to perform regular assignments without reasonable cause (§ 44939). Accordingly, District's Accusation shall be dismissed.

Morrison Factors

33. Usually when deciding whether cause for dismissal exists, it also must be established that a teacher's misconduct relates to his fitness to teach, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The court concluded that a teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the conduct indicated that a teacher is unfit to teach. (*Id.* at p. 229.) The court set forth guidelines to aid in determining whether the conduct in question indicated this unfitness.

34. In this case, because it was not established that Respondent's conduct supported any of the charges, examination of the *Morrison* factors is unnecessary. Nonetheless, it is doubtful that the *Morrison* factors would support cause for discipline if applied to any of the causes, including the cause for unprofessional conduct. Specifically, while it is evident that some students felt negatively impacted by the physical component of Respondent's teaching style,¹⁹ Respondent's conduct was not driven by any negative or

¹⁹ See Legal Conclusion 14, *Morrison* factor (1).

impure intent.²⁰ On the contrary, Respondent's conduct was driven by a desire to provide his students with a positive, encouraging, and supportive environment.²¹ In that regard, and as further example of his commitment to his students, Respondent has researched and explored alternative teaching methods that will help in the furtherance of his endeavor to promote a positive environment and meet District expectations.²²

ORDER

The Accusation against Respondent Dennis Jenkins is dismissed. Respondent shall be retained by the Los Angeles Unified School District as a permanent certificated employee.

DATED: February 17, 2017

DocuSigned by:
Carla L. Garrett
40D88C3B895043D...

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings
Commission on Professional Competence

DATED: February 16, 2017

DocuSigned by:
Lacey Lemus
EA540C740D28401...

LACEY LEMUS
Commission Member
Commission on Professional Competence

DATED: February 17, 2017

DocuSigned by:
John Colombo
BBEA869117B5483...

JOHN COLOMBO
Commission Member
Commission on Professional Competence

²⁰ See Legal Conclusion 14, *Morrison* factor (5).

²¹ See Legal Conclusion 14, *Morrison* factor (5).

²² See Legal Conclusion 14, *Morrison* factor (6).