

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT

In the Matter of the Dismissal of:

OAH No. 2013070054

ALVARO NOVOA,
A Permanent Certificated Teacher,

Respondent.

DECISION

This matter was heard on October 14, 15, 16 and 17, 2013, in Los Angeles, California, before the Commission on Professional Competence, Los Angeles Unified School District (Commission). The Commission consisted of Kathy Jarvey, Araceli Torres and Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, State of California. The Los Angeles Unified School District was represented by Michelle K. Meek, with Liebert, Cassidy, Whitmore. Alvaro Novoa (Respondent) appeared and was represented by Daniel J. Kolodziej and Mogeh Tala-Ahmari, with Trygstad, Schwab & Trygstad.

Prior to presentation of the evidence, the parties made several motions in limine. The ALJ considered and ruled on those motions in limine as reflected on the record. Oral and documentary evidence was received, and argument was heard. The matter was submitted for decision on October 17, 2013. The Commission on Professional Competence considered the matter in executive session on October 17, 2013. After due consideration of the entire record herein, the Commission makes the following factual findings, legal conclusions, and order.

FACTUAL FINDINGS

Jurisdiction

1. Respondent is a permanent certificated employee of the Los Angeles Unified School District (District).
2. On May 31, 2013, the Accusation and Statement of Charges, setting forth the grounds for dismissal, was brought by Vivian K. Ekchian in her official capacity as Chief Human Resources Officer of the District.

3. On June 19, 2013, Respondent was served with: a Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension (Notice of Intent to Dismiss); a copy of the Accusation and Statement of Charges; a blank Request for Hearing; and copies of the relevant Education Code and Government Code sections. The Notice of Intention to Dismiss informed Respondent that the Board of Education intended to dismiss him in 30 days unless he requested a hearing.

4. On August 7, 2013, Respondent filed and served a Notice of Defense requesting a hearing.

Allegations of Sexual Abuse

5. During the 2010-2011 school year, Respondent was a preschool teacher at Nora Sterry Early Education Center (Nora Sterry).¹ During that school year, G [REDACTED] M. and J [REDACTED] V. were students in Respondent's classroom.²

6. The Accusation contends that Respondent should be dismissed from his employment with the District for immoral conduct, dishonesty and evident unfitness for service. These contentions are based on factual allegations that, between September 1, 2010 and May 2011, Respondent sexually and physically abused preschool students G [REDACTED] M. and J [REDACTED] V., and threatened to harm G [REDACTED] M. or his mother if they reported the abuse. The details of the alleged sexual abuse and threats are specifically set forth in paragraphs 1 through 11 of the Accusation. Paragraph 12 of the Accusation alleges that, on several occasions, Respondent called G [REDACTED] M. a "crybaby." As more fully set forth below, Complainant failed to establish any of the factual allegations in paragraphs 1 through 12 of the Accusation.

7. In its case-in-chief, Complainant called only G [REDACTED] M. to testify.³ G [REDACTED] M. is five years old. At the time of his testimony, he was able to distinguish between truth and a lie and between reality and fantasy. Consequently, he was deemed competent to testify. However, his testimony regarding his recollection of events that transpired when he was three years old was not credible for the reasons set forth below in Factual Findings 8, 9, 10 and 11.

¹ Nora Sterry has since been closed due to budget cuts.

² Students' last initials are used in lieu of their surnames in order to protect their privacy.

³ Pursuant to a pretrial motion and order, Respondent viewed the testimony of G [REDACTED] M. by closed circuit video/audio feed in another room. Commission panel members were instructed that nothing should be inferred from Respondent's absence from the courtroom during this witness's testimony.

8. G [REDACTED] M.'s testimony, by itself, lacked credibility because it became embellished to the point of implausibility. Initially, G [REDACTED] M. testified that while he was in school, Respondent "put coins in [his] butt," "put a robot in [his] butt," and "peed and threw up in [his] mouth." According to G [REDACTED] M., the robot was miniscule (indicated the size by placing his index finger and thumb together), and was blue with red tentacles on its head, red arms and red legs. G [REDACTED] M. recalled that the coin had a picture of Beethoven on it. He also testified that Respondent told his preschool friends, J [REDACTED] and H [REDACTED] to place coins in G [REDACTED] M.'s "butt," and that he saw Respondent hurting his preschool friends. However, when expounding on these statements, both on direct and cross examination, the details became less credible. For example:

(a). G [REDACTED] M. testified that Respondent put a coin in his "butt," in "a lot of spots in the school," and when he was asked on direct examination if Respondent put the coin in his "butt" more than once, he voluntarily testified that Respondent did that same thing to everyone every day at school. On cross examination, he affirmed that Respondent put a coin in G [REDACTED] M.'s "butt" every day. He also affirmed that he saw Respondent place a coin in J [REDACTED]'s "butt" and H [REDACTED]'s "butt" every day. He further affirmed that Respondent made J [REDACTED], H [REDACTED], N [REDACTED], J [REDACTED], and "all the kids in the class" put coins in G [REDACTED] M.'s "butt."

(b). G [REDACTED] recalled seeing Respondent place a robot in J [REDACTED]'s "butt." When asked on direct examination what else Respondent did to J [REDACTED], G [REDACTED] M. responded that Respondent "did the same thing that happened to [G [REDACTED] M.] to everybody." On cross examination, the story expanded further. G [REDACTED] M. affirmed that Respondent put a robot in all the other kids' "butts" and that he did so every day.

(c). G [REDACTED] M. stated that Respondent "threw up" in his mouth and "peed" in his mouth more than once. On cross examination, the story magnified, and G [REDACTED] M. affirmed that H [REDACTED] and J [REDACTED] saw Respondent "pee" in G [REDACTED] M.'s mouth and that Respondent "peed" and "threw up" in G [REDACTED] M.'s mouth every day.

9(a). G [REDACTED] M.'s testimony also lacked credibility because it was contrary to credible evidence indicating that Respondent had no opportunity to be alone with G [REDACTED] M. or the other children in order to commit the multiple acts alleged.

9(b). G [REDACTED] M. insisted that there were no other adults in the room when Respondent placed the coin and the robot in his "butt" or when Respondent "peed" or "threw up" in his mouth. Although he admitted that there were three adults in the classroom, two women and Respondent, G [REDACTED] M. testified that the "ladies" were only with him before lunch time, and that they were not present after lunch time. He also testified that, when he had to go to the restroom, Respondent took him, at least some of the time. This testimony was inconsistent with the credible testimonies of former Nora Sterry Principal, Johanna

Fletes Curd, and former teacher's assistants (TAs) Maria Contreras and Manika Herron, along with other corroborating evidence, including the declarations of former TAs Lisa Love and Sima Ghonsulaisa.⁴

9(c). The evidence from Ms. Curd, Ms. Contreras, Ms. Herron, Ms. Love, Ms. Ghonsulaisa, and other supplemental evidence established the following:

(1). Ms. Curd was the Principal of Norry Sterry during the 2010-2011 school year. As the principal, she very clearly communicated her expectations and the District policies and procedures to her employees. She sought to ensure that everyone followed protocol. Staff was trained on policies and protocols at staff meetings.

(2). Per school policy, teachers were not permitted to be left alone with students. A teacher was required to be constantly accompanied by a TA in the classroom. The ratio used was one teacher and two TAs per a classroom of 24 students. This policy was enforced during the 2010-2011 school year. If a TA was absent, a substitute TA would always take their place.

(3). If students went outside to the playground, the teacher and a TA accompanied them. The playground was visible from the street, and there was heavy traffic on the street, making the playground an unlikely place to sexually abuse a child.

(4). During the 2010-2011 school year, at least four regular TAs worked in Respondent's classroom. Maria Contreras worked from 7:30 a.m. to 4:30 p.m. Sima Ghonsulaisa worked from 9:00 a.m. to 12:00 p.m. Manika Herron worked in Respondent's classroom from approximately 2:00 to 4:30 p.m. Lisa Love was the closing TA. Her start time was 9:00 a.m., and after 4:30 p.m., she brought all the remaining children to Respondent's room to assist him with closing, and she stayed there until the last child was picked up. Although 5:45 is the latest time for pick up, the teacher and closing TA were required to remain at the school until the last child was picked up. Additionally, from January 17, 2011, TA Esmeralda Baza worked with Respondent from 11:00 a.m. until 5:00.

(5). A TA's duties included watching the children at all times. There were no obstructions in Respondent's classroom to prevent the TAs from continually viewing the entire classroom. The classroom included a children's restroom which could be observed by others in the classroom. There were stalls for privacy, but no doors on the stalls. The door to the restroom remained open at all times when students were present.

⁴ Following objection, these declarations were admitted as "administrative hearsay," pursuant to Government Code sections 11514, subdivision (a), and 11513, subdivision (d), for the purpose of supplementing or explaining other evidence but not to independently establish any factual finding.

(6). A TA's duties included taking the students to the restroom. The TAs never saw Respondent escorting students to the restroom. This would have been noted, since this duty was designated for the TAs only.

(7). None of the TAs ever observed Respondent alone with any student, including G [REDACTED] M. This would have been noted, since school policy forbade him from being alone with any student.

(8). Parents arrived at varying times during the day to pick up their children from Nora Sterry. When picking up their children, the parents walked directly into the classroom without knocking, and there were parents going in and out of the classroom freely.

10. G [REDACTED] M.'s testimony also lacked credibility because investigations conducted by three separate agencies (the Department of Social Services, the Los Angeles Police Department and the District) failed to uncover any physical evidence or other corroborating evidence to indicate that G [REDACTED] M. had suffered sexual abuse or that Respondent had abused him. Senior Investigator Tiffany Brunelli with the Department of Social Services (DSS), Detective Lucy Nunez with the Los Angeles Police Department (LAPD), and Detective Ray Jordon with the District all testified credibly at the hearing. Their combined testimonies, along with supplemental evidence, established the following:

(a). In May and June of 2011, G [REDACTED] M., underwent two forensic examinations by a trained interviewer at Stuart House, affiliated with the Rape Treatment Center at the Santa Monica -UCLA Medical Center. Stuart House is a facility which specializes in handling cases of suspected child sexual abuse and works in conjunction with law enforcement and child protection agencies. In both of the interviews, G [REDACTED] M. did not qualify as a witness because he was unable to tell the difference between a truth and a lie. Although a second interview is highly unusual, it was conducted after G [REDACTED] M.'s mother reported that G [REDACTED] M. had informed her of new allegations that Respondent had placed his penis in G [REDACTED] M.'s "butt." During the second interview, G [REDACTED] M. did not make any such disclosures of sexual abuse by Respondent.

(b). Several of the students named by G [REDACTED] M. as Respondent's purported victims, including H [REDACTED] and J [REDACTED], were questioned by the DSS and LAPD investigators. The LAPD investigator interviewed five of the children, and none of them knew of the alleged incidents or reported any abuse. The DSS investigator interviewed H [REDACTED] and J [REDACTED]. Neither H [REDACTED] nor J [REDACTED] disclosed any abuse or witnessed abuse by Respondent. The students disclosed only positive experiences with Respondent.

(c). The TAs were interviewed, and none of them observed Respondent committing any sexual or physical abuse or saw him do anything inappropriate. Parents were interviewed and none of them expressed any concerns regarding Respondent.

(d). The investigations confirmed that there were clear sightlines throughout Respondent's classroom, so nothing could obstruct the occupants' views of the entire classroom. The restroom was located in the classroom, visible to those in the classroom, contained stalls with no doors, and the restroom door was left open at all times. The totality of the interviews with Norry Sterry staff indicated that it is the TA's responsibility to take children to the restroom and they had never seen Respondent take a child to the restroom. The staff confirmed that teachers must always have a TA with them and are never left alone with the children, even on the playground. They confirmed that they never observed Respondent alone with the children. The DSS investigator observed that parents were continually and freely going in and out of Respondent's classroom to pick up children. She also observed that the playground was visible from a heavily traveled street, making the playground an unlikely place to sexually abuse a child.

(e). Respondent was interviewed by the DSS investigator, LAPD investigator and District investigator. He denied abusing G [REDACTED] M. The DSS investigator and District investigator found Respondent to be credible during the interviews.⁵

(f). Physical examination of G [REDACTED] M. at the Rape Treatment Center produced no physical evidence of sexual abuse.

11(a). G [REDACTED] M.'s testimony also lacked credibility because he identified another individual as the perpetrator of the sexual abuse. During his cross examination, G [REDACTED] M. was shown a picture of registered sex offender, Arthur Novoa, taken from the Megan's Law website. Arthur Novoa is not the same individual as Respondent. In 2011, G [REDACTED] M.'s mother had mistakenly asserted that Respondent was the individual pictured on the Megan's Law website, and continued to make this assertion even after being told by the LAPD investigator that Respondent was not the individual pictured on the Megan's Law website. G [REDACTED] M. admitted that his mother had shown him the picture of Arthur Novoa "on the computer." G [REDACTED] M. testified that the picture of Arthur Novoa was a picture of Respondent, and that the man in the picture was the man who hurt him. He admitted that his mother told him that the man in the picture was the man who hurt him.

11(b). G [REDACTED] M. was not asked by Complainant to identify Respondent as the perpetrator because Respondent was not present during G [REDACTED] M.'s testimony. (See footnote 3, above.)

12(a). In an effort to examine why G [REDACTED] M. would consistently repeat such appalling allegations despite their implausibility, Respondent presented the testimony of Mitchell Eisen, Ph.D., Professor of Psychology, and Director of the Forensic Psychology Program at the University of California Los Angeles. Dr. Eisen, an expert in memory and suggestibility, provided an explanation of suggestibility and false memory in children.

⁵ The LAPD investigator did not opine about Respondent's credibility.

12(b). Dr. Eisen explained that, without adults to help them define reality, children cannot distinguish between what is real and what is not. Preschoolers are very susceptible to suggestibility. One type of suggestibility involves a child responding to a leading question, which may result in the immediate acceptance of misinformation. The other type of suggestibility involves delayed misinformation and retrieval errors, such as false memories. A false memory is a false narrative which someone has been convinced is true and becomes part of their memory. It is impossible for outside observers to tell the difference between the truth and a false memory because the person holding the false memory truly believes it. With children, it is easier to suggest that a non-existent event actually occurred, and when the suggestion comes from a parent, it is more powerful. When later retrieving their memories, they confuse elements of the false event with their autobiographical memory. The false event can then become part of their autobiographical memory even though they did not believe the story when they first heard it.

12(c). Respondent presented several pieces of evidence which hinted at the possible impetus and driving force behind G [REDACTED] M.'s testimony. It was noted that G [REDACTED] M.'s older brother had previously swallowed a coin and passed it through his anus. It was also noted that G [REDACTED] M. had admitted watching movies with his older brother containing scenes with "naked people" who were "shaking." It was further noted that G [REDACTED] M.'s mother had filed a civil lawsuit against the District and was quite vehement in her campaign against Respondent. It was not established that any of these were the genesis of G [REDACTED] M.'s assertions.

12(d). To make a finding regarding the origin of G [REDACTED] M.'s memories of sexual abuse would be speculative. Such a finding is also unnecessary since Complainant bore the burden of proving its allegations of sexual abuse by Respondent and has failed to meet its burden.

LEGAL CONCLUSIONS

Pursuant to the foregoing factual findings, the Commission on Professional Competence makes the following Legal Conclusions:

Jurisdiction

1. The Commission has jurisdiction to proceed in this matter pursuant section 44944. (Factual Findings 1 through 4.)

Burden of Proof

2. The District has the burden of proof in this matter since it is seeking to dismiss Respondent from employment as a certificated employee. The standard of proof is preponderance of the evidence. (*Gardiner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

Causes for Dismissal

4. Cause for dismissal of Respondent, Alvaro Novoa, does not exist under Education Code section 44932, subdivision (a)(1), based on immoral conduct, as set forth in Factual Findings 5 through 11.

5. Cause for dismissal of Respondent, Alvaro Novoa, does not exist under Education Code section 44932, subdivision (a)(3), based on dishonesty, as set forth in Findings 5 through 11.

6. Cause for dismissal of Respondent, Alvaro Novoa, does not exist under Education Code section 44932, subdivision (a)(5), based on evident unfitness for service, as set forth in Findings 5 through 11.

7. Given that Complainant has failed to prove any of the factual allegations in the Accusation, no cause for discipline exists and the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 need not be considered.

ORDER

Respondent, Alvaro Novoa, shall not be dismissed.

COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT

DATED: October 27, 2013

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

I concur with the Decision and Order set forth above:

COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT

DATED: October ____, 2013

KATHY JARVEY
Commission Member

I concur with the Decision and Order set forth above:

COMMISSION ON PROFESSIONAL COMPETENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT

DATED: October ____, 2013

ARACELI TORRES
Commission Member