

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

In the Matter of the Dismissal of:

TUSHANA HOWARD,

a Permanent Certificated Employee,

Respondent.

OAH No. 2020010166

DECISION

The Commission on Professional Competence (Commission) heard this matter by videoconferencing on March 1 through 12, 2021 (excluding the weekend).¹ The Commission consists of Dr. Allison V. Steppes, Pasadena Unified School District; Carolynne Kleier, Los Angeles Unified School District (retired); and Administrative Law Judge Eric Sawyer, Office of Administrative Hearings (OAH), State of California, who presided.

¹ Videoconferencing was due to the COVID-19 pandemic.

Susan Hyman, Assistant General Counsel II, represented complainant Los Angeles Unified School District (District).

Tamra Smith, Esq., represented Tushana Howard (Respondent).

The parties presented opening statements, oral and documentary evidence, and closing arguments. The case was submitted for decision at the conclusion of the hearing on March 12, 2021. The Commission thereafter conducted its deliberations in executive session.

SUMMARY

The District seeks to dismiss Respondent, a high school secondary counselor, for allegedly making unauthorized grade changes for a varsity football player and by making two class changes for him that allegedly violated District policy. The District contends Respondent took these actions to maintain the student's eligibility to play football. However, while many unauthorized grade changes were made for the student on Respondent's computer, Respondent was not the one who made them. Respondent made one class change for the student that violated District policy, but there were many mitigating circumstances, including the change was motivated by concern for the student's personal welfare, not his athletic eligibility. The Commission concludes there is no legal cause for terminating Respondent's employment, and the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 do not demonstrate Respondent is unfit to act as a secondary counselor. Therefore, Respondent's dismissal is not warranted.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (Board) is the duly elected, qualified, and acting governing board of the District, organized and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a certificated, permanent employee of the District and, at all times relevant, was assigned as a secondary counselor at Narbonne High School (Narbonne).

3. On November 7, 2019, a Statement of Charges against Respondent, alleging factual and legal grounds for termination of her employment with the District, was signed on behalf of Jose R. Cantu, Ed.D., the District's Assistant Chief Human Resources Officer. (Ex. 1, pp. A3-A9.)

4. By letter dated December 4, 2019, Mr. Cantu advised Respondent the Statement of Charges had been filed with the Board, and, during a closed session Board meeting held on December 3, 2019, the Board decided to dismiss Respondent within 30 days, unless she requested a hearing. (Ex. 1, p. A2.) On January 2, 2020, Respondent timely requested a hearing. (Ex. 3.)

5. On April 16, 2020, the District filed an Accusation with OAH and served it on Respondent, which included the allegations made in the Statement of Charges. (Ex. 2.)

Respondent's Relevant Background Information

PERSONAL

6. Respondent grew up in Los Angeles County and attended elementary and secondary schools within the District. Cheryl Nakata, a retired District educator and administrator, testified she taught Respondent in high school. Respondent has two children who both attended Narbonne.

EDUCATION AND CREDENTIAL

7. Respondent earned a Bachelor of Science degree in Human Services in 2008. She earned a Master's Degree in Educational Counseling in 2014.

8. Respondent obtained a clear Pupil Personnel Services (PPS) credential from the California Commission on Teacher Credentialing. The PPS credential authorizes Respondent to develop, plan, and implement a school counseling and guidance program for the academic, career, personal, and social development of students, among other things.

TEACHING EXPERIENCE WITH THE DISTRICT

9. Respondent has worked her entire educational career for the District.

10. The District first hired Respondent in 1998 as a children's center aide. In 1999, she became a special education assistant. In 2008 or 2009, Respondent was hired as Narbonne's Healthy Start Coordinator. In 2015, after obtaining her PPS credential, Respondent was hired as a secondary counselor at Narbonne.

Relevant Background Information About Narbonne and Student John Doe²

11. Narbonne has one of the leading football programs within the District, having won several California Interscholastic Federation (CIF) City Section and State football championships. The football program is a source of pride for students and staff of Narbonne. However, there were rumors within some quarters of the District of favoritism by Narbonne administrators and faculty toward student-athletes who play football.

12. John Doe, then a high school junior, moved from Hawaii to California with his father in April 2018. John Doe was a successful varsity football player in Hawaii, but by the end of his junior season he had received no scholarship offers to play for a Division I college football program. John Doe's father had played Division I college football, and the two shared the dream of John Doe becoming a collegiate scholarship athlete. The two believed John Doe would receive more recruiting attention by playing football in Southern California, particularly at a major football program like Narbonne.

13. John Doe's father had a number of football contacts such as Chris Maumalanga, who played seven seasons in the National Football League. John Doe and his father ended up moving near where Mr. Maumalanga lived, which was served by Narbonne.

² The name of the student is omitted as confidential.

14. John Doe enrolled in high school at Narbonne in the middle of the Spring 2018 semester. Respondent was John Doe's assigned counselor.

15. John Doe fit in at Narbonne and was happy. He was described by classmates as quiet but a "jokester." His grades during the Spring 2018 semester were mixed, with some B's, one A, one D, and an F in Algebra 2B. John Doe was enrolled in Algebra 2B in summer school to make up that credit. (Exs. 32 & 33.)

16. In June 2018, John Doe's father suddenly and unexpectedly passed away. John Doe was devastated. John Doe went back to Hawaii for several weeks for his father's funeral and therefore had to withdraw from summer school.

17. When John Doe returned to California, he was not the same person. All of the witnesses who knew him uniformly testified that upon his return from Hawaii, John Doe was depressed, withdrawn, and frequently cried over the death of his father. He often told fellow students and teachers he wanted to quit school and stop playing football.

18. John Doe's Fall 2018 semester class schedule was prepared not by Respondent, but by Eric Magee, another counselor at Narbonne. Mr. Magee prepared the schedule because he had experience and training pertaining to collegiate athletic eligibility requirements, and it was hoped John Doe would play college football.

Charges Against Respondent Related to Grade Changes

JOHN DOE'S SITUATION

19. John Doe continued to struggle with the death of his father throughout the 2018-2019 school year. The death of his father essentially left John Doe home alone, with Mr. Maumalanga and a few relatives living in the Inland Empire as his only

support. John Doe's emotional problems were exacerbated when later he learned his mother was diagnosed with breast cancer. In the early part of the Fall 2018 semester, John Doe also got into a fight on campus and was arrested. His attendance throughout the school year was almost non-existent. He did few, if any, of his assignments, and his grades suffered.

20. Despite his emotional and academic problems, John Doe continued to excel on the football field. He rarely missed practice and he was a starting player on Narbonne's vaunted varsity football team. The team had another successful season, making the play-offs, and ultimately winning another CIF City Section football championship in November 2018. John Doe also received various scholarship offers his senior year. In early December 2018, John Doe was offered and accepted a full scholarship to play football at the University of Southern California (USC), one of the top Division I football programs in the country. John Doe and his family were excited about the opportunity, and the Narbonne community was proud one of its players had received such an honor.

UNAUTHORIZED CHANGES TO JOHN DOE'S GRADES DISCOVERED

21. On March 12, 2019, during the Spring 2019 semester, Stuart Moore, an English teacher at Narbonne, went into the District's My Integrated Student Information System (MiSiS) computer program to enter grades for his students. John Doe was in Mr. Moore's year-long Expository Reading and Writing Course (ERWC), but had done few assignments and had been failing the course the entire year. Mr. Moore noticed someone had entered a mid-term grade of B for John Doe that semester. Mr. Moore was shocked because he had not entered the grade and John Doe was failing the course.

22. Mr. Moore was suspicious, so he reported the situation to Narbonne's Assistant Principal Agnes Pitlik. Ms. Pitlik quickly notified Mira Pranata, the Operations Coordinator of Local District South. Ms. Pitlik also was in contact with Peter Hastings, the Operations Administrator of Local District South. Ms. Pitlik's preliminary research indicated the change in John Doe's grade in Mr. Moore's class had come from Respondent's computer. Ms. Pitlik explained her preliminary findings to Narbonne's Principal, Gerald Kobata. Mr. Kobata asked Ms. Pitlik to assign the investigation to Earlondra Jackson-Grant, an Assistant Principal of Secondary Counseling, and Respondent's direct supervisor. Because Ms. Pranata and Mr. Hastings of Local District South were expected to arrive on campus within the hour, Ms. Pitlik told Ms. Jackson-Grant she had less than 40 minutes to find out what happened.

23. Assistant Principal Jackson-Grant took expedited investigatory steps, including interviewing Respondent, reviewing MiSiS, watching school security video covering the entrance to Respondent's office, and interviewing John Doe.

24. It was soon discovered grades had been changed in many of John Doe's classes, mostly from Respondent's computer, but also a few on the computer of Narbonne's Athletic Director, Kyla Berman. However, based on anomalies she saw with some of the grade changes, and her knowledge of Respondent, Assistant Principal Jackson-Grant was not convinced Respondent made the changes. Although John Doe denied making the changes when she interviewed him, Ms. Jackson-Grant still felt he may have done so; she was not sure.

25. When Mr. Hastings and Ms. Pranata arrived on campus, they took over the investigation. However, Mr. Hastings approached the investigation with a jaundiced eye toward Narbonne's administrators and faculty, based on his suspicions about the football program. He ultimately concluded Respondent and Ms. Berman had

made the unauthorized grade changes in order for John Doe to maintain his athletic eligibility to play football at Narbonne.

THE UNAUTHORIZED GRADE CHANGES – CHARGES 4-16

26. During the investigation, it was discovered that on the dates below the following unauthorized grade changes had been made for John Doe:

- a. On October 9, 2018, from D to A in Chemistry A for the five week grading window of the Fall 2018 Semester. A “grading window” is the period of time a teacher has to enter grades for that particular grading period.
- b. On October 9, 2018, from F to A in Principles of American Democracy for the five week grading window of the Fall 2018 Semester.
- c. On October 9, 2018, from F to C in ERWC A for the five week grading window of the Fall 2018 Semester.
- d. On December 7, 2018, from D to A in Chemistry A for the ten week grading window of the Fall 2018 Semester.
- e. On December 7, 2018, from F to A in Chemistry A for the 15 week grading window of the Fall 2018 Semester.
- f. On December 7, 2018, from C to B in ERWC A for the five week grading window of the Fall 2018 Semester.
- g. On December 7, 2018, from C to A in Service Hours for the 15 week grading window of the Fall 2018 Semester.

- h. On December 7, 2018, from F to A in Business Economics for the 15 week grading window of the Fall 2018 Semester.
 - i. On February 25, 2019, from F to C in Economics for the 5 week grading window of the Spring 2019 semester.
 - j. On February 25, 2019, from F to A in Chemistry B for the 5 week grading window of the Spring 2019 semester.
 - k. On February 25, 2019, from F to B in ERWC B for the 5 week grading window of the Spring 2019 semester.
 - l. On February 25, 2019, from an M (meeting standards) to A in Intro to Sociology for the 5 week grading window of the Spring 2019 semester.
27. Most of the grade changes described above raised John Doe's letter grade in each class by three or four letters.

RESPONDENT DID NOT MAKE THE UNAUTHORIZED GRADE CHANGES

28. It was established by a preponderance of the evidence that the unauthorized grade changes were made on Respondent's computer. However, for the reasons described in more detail below, it was established by a preponderance of the evidence that Respondent did not make the unauthorized grade changes. In fact, the unauthorized grade changes were probably made by John Doe.

29. John Doe had the opportunity to make the unauthorized grade changes. He was in the immediate vicinity of Respondent's office on each of the three occasions when the unauthorized changes were made. John Doe also was proficient with computers. For example, John Doe occasionally assisted Ms. Berman with her Athletic

Department tasks. Ms. Berman was impressed with John Doe's ability to quickly master District software.

30. John Doe had motives to make the unauthorized changes. Specifically, he knew he needed a 2.0 or better grade point average (GPA) to be eligible to play football at Narbonne. He also knew USC required him to have a 3.0 or better GPA to be eligible for the scholarship.

31. The timing of most of the unauthorized changes, or the way they were made, indicate the unauthorized changes were executed by someone unfamiliar with MiSiS or the grading process, like a student. For example, some changes were made for the 5 week grading windows, which were not used to determine athletic eligibility and would not be reported on a transcript sent to a college.

32. After initially denying to District staff investigating the matter he made the grade changes, John Doe later told Mr. Maumalanga he had made the grade changes. Mr. Maumalanga insisted John Doe tell the District he made the grade changes because he knew District employees, including Respondent, were being blamed for them. Mr. Maumalanga persuaded John Doe to join him on a telephone call to District staff to make this admission. In light of his past denials, and refusal to answer other questions during the telephone call to the District staff member, the District was not convinced by John Doe's confession.

33. Counselors at Narbonne who did not teach a class, like Respondent, had no reason to have MiSiS access allowing them to enter or change grades. Respondent was not told and did not know she had access to enter or change grades in MiSiS. In fact, Respondent's supervisor, Assistant Principal Jackson-Grant, did not know Respondent had such access until she conducted her abbreviated investigation. She

was shocked to find out Respondent had such access. It is unclear how Respondent would have made unauthorized grade changes if she did not know she had the access to do so in the first place.

34. Counselors at Narbonne, including Respondent, knew well MiSiS left digital fingerprints showing each time someone accessed the system and what activities they performed when they accessed it. It is unlikely Respondent would have jeopardized her career by making unauthorized grade changes knowing that activity quickly could be traced to her.

35. Respondent was out of her office supervising during the nutrition break, and then attending an IEP meeting, during the time window when the unauthorized changes were made on one of the days in question. During the time window of another round of unauthorized changes, security video clearly shows Respondent had left her office but John Doe remained in the immediate vicinity.³ Respondent did not have a documented alibi for the third round of unauthorized changes made on her computer, but the fact she does have an alibi for the other two makes it unlikely she was involved the third time.

36. In January 2019, Respondent sent John Doe's transcript to an admissions counselor at USC. The transcript showed John Doe's GPA was well under 3.0. If Respondent had been involved in a scheme to make John Doe's grades look better,

³ Although the timing between the District's MiSiS system and Narbonne's security video system may not have been perfectly in sync at the time in question, and was not in sync when the video was reviewed one year later, the timing between the two systems was close enough to be persuasive.

she likely would not have made unauthorized changes insufficient to boost John Doe's GPA to 3.0.

37. In aggravation, the unauthorized changes in question were made possible, in part, because Respondent was not diligent in protecting her computer. For example, Respondent typically did not log off of MiSiS when she left her office, but rather minimized the window. That would have allowed someone direct access to MiSiS in her absence. Respondent frequently allowed students, including John Doe, to do school work on her computer. Respondent should have logged off of MiSiS whenever she left her office. She also could have used a more secure password for access to her computer.

38. In mitigation, the District also is to blame for the unauthorized access to Respondent's computer. Respondent's office did not lock from the outside, just the inside. This meant she could not lock her office when she left. She should have been given a proper door lock for her office because she had to keep confidential student information in it. Her office was located in a high traffic area where a number of students were allowed to remain for significant periods of time. Because Respondent was not told she had access to enter or change grades on MiSiS, she did not know this was a danger that needed to be protected against. Finally, the District provided no in-person mandatory training on MiSiS; the training that was made available was inadequate.

Charges Related to Class Changes

39. The Local District South's investigation also revealed two anomalous class changes Respondent made for John Doe during the Fall 2018 semester. The changes were made later in the semester than usual, and John Doe was moved from

classes in which he was doing poorly. Mr. Hastings concluded the class changes violated several District policies, and Respondent made the class changes in order to replace John Doe's poor grades with better ones in new classes, sometimes called "grade washing."

CHARGE 1 – CLASS CHANGE TO BUSINESS ECONOMICS

40. The District established by a preponderance of the evidence that, on September 20, 2018, Respondent changed the classroom enrollment for John Doe, moving him from Intro to Psychology to Business Economics A. At the time of the class change, Respondent was failing the Intro to Psychology class.

41. Respondent had a legitimate reason for making this class change. As explained above, Counselor Eric Magee made John Doe's schedule for the Fall 2018 semester. As the semester progressed, Respondent realized John Doe had taken Business Economics B in the prior semester. She believed taking one full year of Business Economics would be more beneficial to John Doe's transcript for purposes of college evaluation than taking one semester of Business Economics and one semester of an elective (Intro to Psychology). Moreover, John Doe already had enough credits to graduate on time, so the Intro to Psychology course was superfluous.

42. A. In addition, the District failed to meet its burden of establishing by a preponderance of the evidence that, as alleged, Respondent violated applicable District policy by not obtaining her supervisor's timely consent to make this class change.

B. Given the timing of the change so late in the semester, Respondent needed her supervisor's permission, Assistant Principal Jackson-Grant. During the investigation conducted by Local District South, Ms. Jackson-Grant consistently stated

she did not recall giving Respondent permission to make this change. However, at no time during the investigation, or while testifying, did Ms. Jackson-Grant affirmatively state she did not give such consent. During the hearing, Ms. Jackson-Grant testified it was possible she had given such consent and forgot about it. Ms. Jackson-Grant also testified Respondent had never before made a class change under these circumstances without obtaining her consent.

C. The timing of this change is noteworthy. This was a routine class change frequently done in the beginning of a semester. Ms. Jackson-Grant would have been approached by various counselors with various class changes at this time. Given the fact Respondent and Ms. Jackson-Grant were friends, a discussion concerning this particular class change for John Doe likely would have been a fast, unmemorable event. Because this type of class change was not particularly unusual, and Ms. Jackson-Grant affirmed Respondent did not make late class changes like this without her consent, the Commission has no reason to believe Respondent made this class change without Ms. Jackson-Grant's consent.

43. A. However, Respondent did not document in MiSiS the circumstances of this class change or Assistant Principal Jackson-Grant's consent. Respondent and other counselors at Narbonne had been repeatedly advised by Ms. Jackson-Grant they should do so. While it was not District policy to document such a change in MiSiS, it was a best practice strongly emphasized by Ms. Jackson-Grant.

B. In mitigation, Respondent had documented some events that semester in MiSiS for John Doe, such as on September 24, 2018, when she documented meeting with him concerning his individual graduation plan. Narbonne counselors were not given adequate training on MiSiS and the system was often plagued by technical problems and crashes. Narbonne counselors had high student caseloads and were

extremely busy, sometimes making it nearly impossible to document major events in both a student's mini-cumulative file (or mini-cum) and MiSiS. Brian Spencer, a retired Local District South administrator who formerly oversaw Narbonne's counselling corps, testified that, due to these problems, student mini-cums were considered the primary documenting source, with MiSiS as the secondary source.

C. The District confiscated Respondent's mini-cum for John Doe during the investigation but never returned it to her after the investigation concluded. The District has never provided an explanation for the whereabouts of Respondent's mini-cum for John Doe, which is troubling considering it returned to her all of her other papers. Respondent convincingly testified she made all appropriate documentation for John Doe, including this class change, in her mini-cum. Under these circumstances, the Commission finds it is likely Respondent documented in her mini-cum for John Doe that Ms. Jackson-Grant approved this class change.

CHARGES 2 & 3 – CLASS CHANGE TO SERVICE CLASS

44. The District has a course referred to as Service Class. It is not considered to have educational content. Instead, a student enrolled in Service Class assists a teacher, librarian, or similar staff member, with his or her daily duties. Service Class enrollment is reserved only for academically proficient students and, as explained below, has eligibility criteria that must be met for enrollment. (Ex. 12, pp. A192-A193.)

45. The District established by a preponderance of the evidence that, on October 5, 2018, Respondent, without her supervisor's permission, as required by school policy and practice, changed the classroom enrollment for John Doe from Art to Service Class. At the time of this class change, John Doe was failing the Art class.

46. Respondent had a legitimate reason for moving John Doe out of the Art class. John Doe had already taken art classes in Hawaii and thus met the District's art requirement. Many students were enrolled in this Art class. So there was no reason to have John Doe in this class. Given John Doe's emotional problems, and the close proximity of the Service Class to the Counseling Department offices, putting John Doe in Service Class meant a greater level of supervision over him during this period.

47. On the other hand, the District met its burden of establishing by a preponderance of the evidence that Respondent made this change without Assistant Principal Jackson-Grant's consent. This change was done during the grading window, which would have interfered with the grading process and issuance of report cards. There would have been multiple layers of staff involved in this change due to the impact it had on grades. Ms. Jackson-Grant testified she would have contacted Mr. Spencer of Local District South about this type of change. Neither Ms. Jackson-Grant nor Mr. Spencer testified that happened. This tends to show Respondent did not involve Ms. Jackson-Grant in this change. During the hearing, Ms. Jackson-Grant testified she did not remember being contacted by Respondent about this change, something Ms. Jackson-Grant would have remembered.

48. The District has specific criteria of eligibility a student must meet in order to be enrolled in Service Class. (Ex. 12.) In this case, the District established by a preponderance of the evidence that Respondent enrolled John Doe in the Service Class, even though he was not eligible for it, as follows:

a. The Principal or Assistant Principal must authorize the move. Neither Principal Kobata nor Assistant Principal Jackson-Grant authorized this change.

b. The move cannot be made during a grading window when the student is receiving a failing grade. The move was made during a grading window when John Doe was receiving a failing grade in two classes.

c. The student could not have received a failing grade in the prior semester. John Doe had received a failing grade in Algebra 2B in the prior Spring 2018 semester.

d. The student meets the District's attendance criteria. John Doe had a poor attendance record well below the District's attendance criteria.

e. The student must be in good standing with the school's Code of Ethics. John Doe was not in good standing at Narbonne, as he had gotten into a fight on campus and been arrested.

49. In mitigation, Respondent had a legitimate motive for making this change. Mr. Spencer, formerly of Local District South, testified such changes were often made at Narbonne, even when the involved students did not meet Service Class eligibility. Mr. Spencer also testified moving John Doe into Service Class as a way of addressing his emotional crisis was a valid objective, even though John Doe was not qualified to be in the class.

CHARGES 19 & 20 – POLICIES INVOLVED IN THE SERVICE CLASS CHANGE

50. For the reasons explained below, the District failed to establish by a preponderance of the evidence, as alleged, that Respondent's conduct in making the enrollment change for John Doe from Art to Service Class violated the following reasonable rules and regulations of the District:

a. Code of Conduct with Students. Respondent did not have improper motives in making this one class change.

b. Employee Code of Ethics. This was not an ethical breach and therefore did not violate this policy.

c. School Counseling Framework Standards. It was not established the counseling standards cited in the Conference Memorandum dated August 23, 2019 issued to Respondent (Ex. 5, pp. A75-A78) were violated as follows:

3.7 Helping Students Establish Goals through the Graduation/Culmination Planning Process - Students understand culmination or graduation requirements and are clear about their own progress. On September 24, 2018, Respondent had an individual graduation plan meeting with John Doe. She also mailed grade deficiency notices showing his progress to John Doe's known home address.

3.8 Implementing School-Wide Positive Behavior Supports [SWPBS] - Positive behavior supports are promoted and sustained by counselor actions. The District did not provide evidence of Narbonne's SWPBS, so the Commission cannot make a finding. However, bringing John Doe into close proximity with the Counseling Department offices in order to increase supervision over him was a way to address the SWPBS.

4.4 Adhering to Ethical Standards - The counselor exhibits professional demeanor and actions and complies with all rules and regulations of the profession. As explained above, Respondent's conduct was not unethical. The Commission concludes it was not unprofessional either.

4.5 Maintaining Accurate Records - Documentation of practice is accurate, up to date, organized and complete. Respondent was required to update enrollment in Service Class on MiSiS. (Ex. 12, p. A192.) But, as explained above, MiSiS had a number of technical problems, and Narbonne counselors had caseloads large enough to make difficult updating both their mini-cums and MiSiS. Because the District last had possession of Respondent's mini-cum for John Doe, but did not return it to her or provide it during the hearing, a finding cannot be made in that regard.

d. Discipline Foundation Policy. Insufficient evidence of such a policy was presented, so no finding can be made.

e. Human Resources Class Description for Secondary Counselors. The District was not specific as to which part of the policy was allegedly violated. However, Respondent kept her mini-cums updated and completed other required documents. MiSiS is not mentioned in this policy. Respondent did not falsify any records.

f. Administrative Policy Regarding Falsification. Respondent did not falsify any records.

51. A. However, the District established by a preponderance of the evidence that Respondent's conduct in making the enrollment change for John Doe from Art to Service Class violated the policy stated in *Marking Practices and Procedures in Secondary Schools*.

B. In closing argument, the District only focused on sections X and E of the policy. Respondent violated those two sections because she moved John Doe from

classes not within the same department or into another academic elective with educational content. As a practical matter, it was too late in the semester for Respondent to make this kind of class change, especially without her supervisor's consent.

C. In mitigation, however, Service Class was the only course available to John Doe at the time of the change, because he would have missed too much material if he were moved into a class with educational content. As explained above, this change was made for John Doe's welfare, not to inflate his grades. John Doe did not need the Art class to graduate or for any other purpose.

52. Respondent's conduct in making the enrollment change for John Doe from Art into Service Class was not a breach of public trust in violation of the District's *Code of Ethics*, as explained above in Factual Finding 50.b.

Impact of Grade and Schedule Changes – Charges 17-23⁴

53. A. The District failed to establish by a preponderance of the evidence, as alleged, that Respondent's moving John Doe into the Service Class was motivated by a desire to raise John Doe's GPA in order to maintain his eligibility to play football.

B. Instead, Respondent moved John Doe into the Service Class to address his emotional crisis, increase the level of supervision over him, and to keep him around adults (the Narbonne counselors) who could support him.

C. Although Respondent had some involvement with the Narbonne football program, it was not enough to show she was motivated to make this class

⁴ Charges 21 and 24 are addressed in the Legal Conclusions.

change to inflate John Doe's grades to maintain his eligibility for football. For example, Respondent worked security on the sidelines of Narbonne football games because she had a friendship with Narbonne's Athletic Director, Ms. Berman. Respondent supported all varieties of sports and extra-curricular activities at Narbonne, not just football. In addition, Respondent had an adversarial relationship with Narbonne's head football coach, and would not have jeopardized her career to help him.

D. John Doe was failing the Art class at the time of the class change. He later received an A in Service Class. Because Respondent was not responsible for the unauthorized grade changes, and her other class change for John Doe did not violate District policy, it cannot be concluded, as alleged, that moving John Doe into Service Class was what kept him eligible to continue playing football.

54. After John Doe was moved into the Service Class, he competed in the remainder of Narbonne's regular season football games, play-offs, and the CIF City Section Open Division Championship game, which Narbonne won. As explained above, it cannot be concluded, as alleged, that Respondent's moving John Doe into the Service Class was what allowed him to continue playing football.

55. A. In 2019, after Local District South completed its investigation, the District self-reported to the CIF City Section that John Doe should have been academically ineligible to play football as of October 4, 2018. This self-report was substantially based on Mr. Hastings' conclusions Respondent had made the unauthorized grade changes, and Respondent's two class changes for John Doe violated District policy.

B. On November 1, 2019, CIF ruled the Narbonne football team had to forfeit seven wins from the 2018 season occurring after October 4, 2018, as well as the

2018 CIF City Section Open Division Championship. Narbonne also was banned from participating in the play-offs for the next two football seasons.

C. However, as discussed above, Respondent did not falsify John Doe's grades. She did not violate District policy by moving John Doe into the Business Economics A class.

D. Respondent's misconduct only relates to moving John Doe into Service Class. The teacher of Respondent's Service Class, Mr. Orozco, initially gave John Doe a C. After discussing the matter with Respondent, Mr. Orozco decided to give John Doe an A. It was not established Respondent exercised any undue influence on Mr. Orozco or said anything improper to him. Ultimately, it was Mr. Orozco who made the grading decision for John Doe.

E. The District self-reported far different information to the CIF than was established in this case. It would be sheer speculation to conclude the CIF would have issued the same sanctions against Narbonne had it been reported John Doe made the unauthorized grade changes himself, and Respondent only violated District policy with one of John Doe's class changes, but under mitigating circumstances.

56. A. The District did not establish by a preponderance of the evidence, as alleged, that inaccurate grades were transmitted in an official transcript from Narbonne to one or more universities as a result of Respondent's conduct.

B. As discussed above, Respondent did not change John Doe's grades. The one class change she made for John Doe in violation of District policy resulted in John Doe receiving an A in Service Class for the Fall 2018 mid-term. As discussed above, that grade was given by Mr. Orozco. Thus, Respondent's conduct did not cause John Doe to receive an inaccurate grade.

C. John Doe's official transcript only was sent to an admissions counselor at USC, Katie Fuller. The official transcript sent to Ms. Fuller had John Doe's correct grades, including two F's and two Incompletes. In any event, USC later rescinded its scholarship offer to John Doe.

Other Relevant Facts

57. The CIF sanctions against Narbonne were widely reported in Southern California newspapers and social media, which shed negative light on Narbonne and its football program.

58. Mr. Moore, John Doe's ERWC teacher, testified students were shocked to hear news of the scandal and became upset there was seemingly a double-standard for football players. Mr. Hastings testified similarly.

59. The entire Narbonne administration was replaced the following school year, and the head football coach was fired. Mr. Hastings attributes the changes as fallout from the scandal. However, there were other explanations for the movement of some of the administrators in question, such as retirement or promotions, and none of the administrators were disciplined over these events.

60. Respondent has no other record of discipline by the District. She has consistently received positive evaluations from her supervisors. The only evidence of a poor evaluation for Respondent was the one completed just after the John Doe scandal broke out, and was based essentially on Mr. Hastings' conclusions.

61. By all witnesses' accounts, Respondent is a dedicated, hard-working, productive counselor, who has made a difference in the lives of many young people she has encountered while working for the District. Her supervisors have nothing but

praise for her performance, and all would hire her without hesitation. Respondent has a passion for counseling and is able to connect with students. She is firm but fair, which students respect and appreciate.

62. Mr. Spencer found Respondent open to asking questions during staff meetings. Ms. Jackson-Grant remembers Respondent always followed her directives. Overall, Respondent demonstrated her willingness and capability of correcting her mistakes established in this case.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving the charges by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038–1039.) Preponderance of the evidence means “the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Cause for Termination

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Education Code sections 44932, subdivision (a), 44939, and 44942⁵ are established by a preponderance of the evidence.

⁵ Further undesignated statutory references are to the Education Code.

IMMORAL CONDUCT

3. A. Certificated employees are subject to dismissal for immoral conduct pursuant to section 44932, subdivision (a)(1).

B. 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.)

C. In this case, the District did not establish by a preponderance of the evidence that Respondent engaged in immoral conduct pursuant to section 44932, subdivision (a)(1). Respondent did not make any unauthorized grade change for John Doe or otherwise falsify his grades. She made one class change for John Doe that violated District policy, but she did so out of concern for the student's emotional welfare, not to maintain his athletic eligibility by artifice. Thus, Respondent did not act with corruption or moral indifference. (Factual Findings 11-52.)

DISHONESTY

4. A. Certificated employees are subject to dismissal for dishonesty pursuant to section 44932, subdivision (a)(4).

B. The word dishonesty is not defined in this part of the Education Code. However, when examining use of the word in teacher discipline cases under the prior statutory framework, the California Supreme Court noted "[a]n approved definition of

dishonesty connotes a disposition to deceive." (*Midway School Dist. of Kern County v. Griffeath* (1946) 29 Cal.2d 13, 18.)

C. In this case, the District did not establish by a preponderance of the evidence that Respondent acted with dishonesty pursuant to section 44932, subdivision (a)(4). Respondent did not falsify John Doe's grades. Although she made one class change without obtaining her supervisor's consent, it was not proven she did so in order to hide the move. In fact, moving John Doe into Service Class put him in the immediate vicinity of the Counseling Department's offices, where everyone could see him, including Respondent's supervisor. Respondent had a legitimate reason for the class change in question. She simply violated District policy in making the change. Such activity does not connote a disposition to deceive. (Factual Findings 11-52.)

EVIDENT UNFITNESS FOR SERVICE

5. A. Certificated employees are subject to dismissal for evident unfitness for service pursuant to section 44932, subdivision (a)(6).

B. "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 Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 [*Woodland*].) "'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." (*Ibid.*)

C. In this case, the District did not establish by a preponderance of the evidence that Respondent is evidently unfit for service pursuant to section 44932, subdivision (a)(6). Respondent's lone instance of misconduct was not the result of a fixed character trait. Moving John Doe into a Service Class in violation of District policy

was an isolated incident, not part of a larger pattern. Respondent had no prior, similar problem of following District policy in her class changes. To the extent Respondent's lone instance of misconduct in this case is a problem, it is easily remediable. It must be remembered Respondent was a fairly new counselor during the events in question. Her mistakes largely can be attributed to that. All of the administrators and teachers who testified agree Respondent is a model counselor and good employee. Thus, Respondent has demonstrated a willingness and capability to remedy her mistakes. The Commission concludes it is highly unlikely Respondent will repeat her misconduct in the future.⁶ (Factual Findings 11-52.)

PERSISTENT VIOLATION OF SCHOOL LAWS

6. A. Certificated employees are subject to dismissal for 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, pursuant to section 44932, subdivision (a)(8).

B. Cause for dismissal under section 44932, subdivision (a)(8), may be based on the violation of school rules or district policies. (*San Dieguito Union High School Dist. v. Commission On Professional Competence* (1985) 174 Cal.App.3d 1176, 1180–1181.) However, there must be a "showing of intentional and continual refusal to

⁶ As explained below, the Commission also analyzed the factors set forth in the case of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227–230, in determining whether Respondent is fit for service as a secondary counselor for purposes of section 44932, subdivision (a)(6).

cooperate." (*Id.*, p. 1196.) The violation must be 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, 81-82.) Isolated events or incidents involving an issue unresolved over a period of time are generally not considered persistent. (*Bourland v. Commission On Professional Competence* (1985) 174 Cal.App.3d 317.)

C. In this case, the District did not establish by a preponderance of the evidence that Respondent persistently violated District rules or policies pursuant to section 44932, subdivision (a)(8). Respondent violated District policy in one of John Doe's two class changes. Her misconduct therefore is isolated to just one event. Under these circumstances, it cannot be concluded Respondent was insubordinate or persistently violated District rules or policies. (Factual Findings 11-52.)

Analysis of the *Morrison* Factors

7. A. In deciding whether cause for dismissal exists under the amorphous concepts of immoral conduct, dishonesty, and evident unfitness for service, it also must be established a teacher's misconduct relates to her fitness, within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230 [*Morrison*]. The *Morrison* analysis does not apply to a cause for dismissal of persistent violation of school rules, laws or policies, because such theory, by definition, has a direct nexus with teaching. (*Id.*, pp. 227-230.)

B. As noted above, the Commission considered the *Morrison* factors in determining whether Respondent is fit to serve as a secondary counselor within the meaning of section 44932, subdivision (a)(6). That analysis is explained below. However, not all *Morrison* factors need be present for the *Morrison* test to be satisfied. (*Governing Board 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, supra*, 2 Cal.App.4th at p. 1457.) In this case, it is concluded the *Morrison* factors demonstrate Respondent is fit to serve as a secondary counselor. (Factual Findings 6-62.)

i. The likelihood the conduct may adversely affect students or fellow teachers. The Commission cannot speculate whether Respondent's lone policy violation would have led the District to self-report Narbonne to the CIF, or whether the CIF would have imposed the same sanctions on Narbonne. While students became upset when the scandal first broke out, it is unclear they would have had the same reaction if they suspected John Doe changed his grades and knew Respondent's motivations for moving him into Service Class.

ii. The degree of such adversity. See (i) above.

iii. The proximity or remoteness in time of the conduct. The misconduct was limited to one incident in October 2018 and thus proximate.

iv. The type of teaching certificate held by the party involved. Respondent operated under the confines of her secondary counselor credential. While she violated District policy with one class change, she had a legitimate reason for the class change and did not otherwise abuse the authority granted to her by the credential.

v. The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Extenuating circumstances explain why Respondent made the one class change in violation of District policy. For example, Respondent made the change out of concern for John Doe's emotional welfare. The District gave Respondent grade change access to MiSiS without advising her of it, so Respondent did not know she had to protect her computer from that danger. In aggravation, Respondent could do

better safeguarding her computer. She also needs to do better documenting her actions on MiSiS, even if that means working more slowly. Overall, the extenuating circumstances outweigh the aggravating circumstances.

vi. The praiseworthiness or blameworthiness of the motives resulting in the conduct. Respondent's motivation in caring for a student's emotional welfare is praiseworthy.

vii. The likelihood of recurrence of the questioned conduct. It is highly unlikely Respondent will repeat her misconduct.

viii. The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. This does not apply.

Disposition

8. A. "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343–344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

B. In this case, no legal cause for termination was established pursuant to section 44932. Therefore, dismissal of the Accusation against Respondent is warranted. (Factual Findings 1-62; Legal Conclusions 1-7.)

ORDER

The Accusation against Respondent Tushana Howard is dismissed.

DATE: 04/22/2021


Allison Steppes (Apr 22, 2021 14:31 PDT)

Dr. ALLISON V. STEPPES

Commissioner

DATE: 04/23/2021


Carolynne Kleier (Apr 23, 2021 16:09 PDT)

CAROLYNNE KLEIER

Commissioner

DATE: 04/23/2021


Eric C. Sawyer (Apr 23, 2021 16:10 PDT)

ERIC SAWYER

Commissioner

Administrative Law Judge

Office of Administrative Hearings