

BEFORE THE
COMMISSION ON PROFESSIONAL PERFORMANCE
STATE OF CALIFORNIA

In the Matter of the Accusation:

VERONICA GRANDE,

Respondent.

OAH No. 2014100641

CORRECTED DECISION

This matter was heard on August 19, 20, 25 and 26, 2015, in Los Angeles, California, before the Commission on Professional Competence (Commission). The Commission consisted of Patricia Fujii Carberry, Gordon Brown and Eileen Cohn, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), State of California.

The Los Angeles Unified School District (the District) was represented by L. Carlos Villegas of Fagan, Friedman & Fulfrost, LLP.

Veronica Grande (respondent) appeared and was represented by Daniel J. Kolodziej of 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 August 28, 2015.¹ The Commission on Professional Competence considered the matter in executive session on September 3, and September 22, 2015. After due consideration of the entire record herein, the Commission makes the following Factual Findings, Legal Conclusions, and Order.

The panel signed the Decision on December 2, 2015. The Decision was erroneously issued with a signature date of December 2, 2014. This Corrected Decision corrects the signature date. No other changes were made to the Decision.

¹ The parties timely re-submitted illegible exhibits marked and admitted as Exhibits 13, 17, and 19. Respondent timely submitted her response to Exhibit 17, which was marked and admitted as Exhibit 17A. The parties also submitted a stipulation to seal Exhibit 6. Exhibit 6 was marked as confidential and placed under seal. The parties also timely submitted a stipulation, marked and admitted as Exhibit 24, confirming the date of respondent's termination.

INTRODUCTION AND STATEMENT OF THE CASE

The District seeks to terminate respondent for failing to properly supervise her sixth grade elementary school students during a one-hour period, June 6, 2013, the day before sixth grade culmination and three school days before the end of the 2012-2013 school year. District described the nine minute videotape of portions of that one-hour as “Lord of the Flies,” and a brutal display of bullying and sexual harassment. During the 2012-2013 school year respondent’s sixth grade class was located on the third floor. All the events on June 6, 2013 occurred in the first floor classroom which was assigned to respondent for the 2013-2014 school year. While respondent was across the room unpacking boxes, many students in front of the room were engaged in a variety of behaviors, including throwing a beach ball, sitting and running across tables, and physical exchanges, which included one student rubbing his clothed buttocks back and forth on the heads of a male and female classmate. The District claims respondent violated school policies by failing to report bullying and sexual harassment. The District also claims respondent violated school policies by engaging in an e-mail exchange with a student. The District claims that respondent failed to report what happened in her classroom. To further support its Causes, at hearing, the District claimed respondent lied about what happened on June 6, 2013 during District’s investigation. The District claimed that respondent’s defiance of school policies fostered a culture in the classroom which resulted in sexualized and bullying behavior recorded on a student’s cellphone that day. As such, the District contends that it has met its burden of proof on all charges in its Accusation, including: unprofessional conduct; immoral character; dishonesty; a fixed character unfit for teaching; and persistent failure to abide by school rules or policies. The District requested the Commission dismiss respondent from employment as its permanent certificated employee.

Respondent disagreed with the District’s characterization of her conduct. Respondent maintained that she was a hardworking and dedicated teacher who was unfairly treated by her immediate removal from the class during the 2012-2013 school year and the District’s refusal to place her back in the classroom at any time thereafter. She maintained the District wrongfully generalized unruly student behavior during a brief portion of a one-hour time period, the day before sixth grade culmination, to a pattern of teacher misconduct, and ignored respondent’s overall conduct as a teacher and fidelity to school policies and rules. Respondent maintained that the brief time period where a few of her students engaged in inappropriate behavior occurred when she had moved her class from their third floor classroom to a first floor classroom assigned to her for the next school year, and was distracted while unpacking boxes. Respondent claimed she had not been aware of her students’ most egregious conduct, but made attempts to report what she knew that same day. Respondent maintained she was not deceitful and never intended to mislead the District during its investigation but was not fully aware of her students’ conduct until she had the opportunity to review the videotape months later in December 2013. Respondent maintained she was engaged with her students and succeeded in moving them forward to sixth grade culmination.

Respondent moved to dismiss the cause for unprofessional conduct. The motion was granted because the evidence established that the District failed to provide respondent an opportunity to remediate her conduct when it did not allow her to return to the classroom at any time after June 6, 2013.

Based upon the Factual Findings and Legal Conclusions, the Commission dismisses the cause for unprofessional conduct and the Accusation, and orders the District to retain respondent as a permanent certificated employee.

FACTUAL FINDINGS

Parties and Jurisdiction

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

2. Respondent is a permanent certificated employee of the District.

3. On June 6, 2013, the day before sixth grade culmination, and three school days before the end of the 2012-2013 school year, June 10, 2013, respondent was removed from the classroom and was assigned to the District administrative office where she was given no work, but was required to remain at an assigned desk throughout the school day. On December 9, 2013, the District supervisory personnel held a conference with respondent to discuss the events of June 6, 2013, and served her with a Notice of Unsatisfactory Service and Notice of Suspension (15 days). The District suspended respondent without pay for fifteen days beginning September 17, 2013. The District did not return respondent to a classroom teaching position after June 6, 2013, and did not provide respondent an opportunity to work again as a classroom teacher.

4. The District suspended respondent without pay on September 17, 2014. Respondent reported each school day to the District administrative office. During the 2013-2014 school year and the 2014-2015 school year, until the day respondent was suspended without pay.

5. On or about August 2014, Vivian K. Ekchian, in her official capacity as the District's Chief Human Resources Officer, verified on information and belief a Statement of Charges against respondent, alleging factual and legal grounds for respondent's immediate suspension without pay and termination of her employment as a result of incidents occurring in her classroom on June 6, 2013, and an e-mail communication during March 2013.

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7. On September 30, 2014, respondent requested a hearing and objected to the Statement of Written Charges and Notice of Intention to Dismiss, and requested the Board rescind its Resolution formulating Charges and Notice of Intent to Dismiss pursuant to Code section 44943.

Respondent's Background Information

7. Respondent has a valid multiple subject clear teaching credential with a across-cultural language and academic development (CLAD) emphasis. Respondent's credential authorizes her to teach all subjects in a self-contained sixth grade class.

8. Respondent's entire teaching career has been with the District. Respondent graduated from California State University, Los Angeles with a Bachelor of Arts in child development. In her first teaching job from September 2004 through June 2012 respondent worked as a sixth grade math, science and art teacher at Nightingale Middle School (Nightingale). During that time she worked in after-school programs tutoring and advising students in math. Between September 2006 and June 2009 she was a math engineering science achievement (MESA) advisor and math tutor recruiting and preparing students for the MESA math competition and working with students to encourage learning and college achievement.

9. Respondent was dedicated to teaching and thus far her career has been devoted to teaching lower-income and multi-cultural populations within the District. Respondent pursued additional professional development training. She pursued training: as a sixth grade common core state standards "Lead" teacher; in the District's educator growth and development cycle program (EGDC) designed to learn effective observation and teacher planning practices; and by attending courses at the University of San Diego extension program for educators.

10 During the 2010-2011 school year respondent had a large number of male students and students with special needs on individual education program (IEP) plans. During November 2010 respondent sought advice from Principal Enrique Gonzalez after being approached by her male students when exiting her car with offers to help her carry items to the classroom. In a memo, Mr. Gonzalez "suggested" ways respondent could reduce the familiarity students were exhibiting by restricting her interactions with them to class time, refraining from engaging in personal conversations with them or allowing them to share confidential information with her (Exhibit 2). Mr. Gonzalez referred her to the District Code of Conduct Policy for guidance. There was no evidence that respondent was engaging in the conduct referenced in Mr. Gonzalez's suggestions.

11. At Nightingale respondent received mostly positive reviews as a teacher and was well liked by her students and peers. With few exceptions respondent met all benchmarks in her written review. Mr. Gonzalez used a standard evaluation form which addressed five areas of performance and included a total of 27 benchmarks. Respondent met benchmarks for supporting student learning, including using assessments, guiding students to

self-asses, engaging students in critical thinking and problem solving, using a variety of instructional strategies and resources. She met all benchmarks for planning and designing instruction. During the 2010-2011 for the first time received “needs improvement” in two of the 27 benchmarks. The two benchmarks were among six measurements for classroom performance and included: maintaining standards for student behavior and a climate promoting fairness and respect; planning and implementing classroom procedures and routines supportive of student learning and fairness in the classroom. Respondent met the other measurements of classroom performance which included using instructional time effectively and providing an effective classroom environment. Respondent objected to the “needs improvement” explaining that she had a large number of pupils with special needs which affected the behaviors in the class. She also disagreed with any suggestion that she favored certain students over others.

12. On May 18, 2012, at the end of her tenure at Nightingale, Mr. Gonzalez signed a letter of recommendation where he affirmed respondent’s positive contribution to her students’ success and wholeheartedly endorsed her employment to prospective educational employers.

13. In August 2012, respondent was one of three teachers hired to teach sixth grade at Lawrence H. Moore Math/Science/Technology Academy (Moore), an elementary school located in South Los Angeles.

The District policies during the 2012-2013 school year

14. The District accused respondent of persistent violation of school policies and procedures. The District and Moore provided its teachers, including respondent, with its policies and procedures for student and teacher conduct. Moore met with its teachers and students to discuss its policies and procedures. The District and Moore policies and procedures were provided in the areas of sexual harassment, bullying, school safety, and the student’s code of conduct, among other areas.

15. The District’s Discipline Foundation Policy: School-Wide Positive Behavior Support provided goals for teachers, students, parents, office staff and administrators for the purpose of developing school-level discipline plans (Exhibit 13). Teachers were required to use effective management strategies to create an environment conducive to learning and prevent misconduct by, among other things, reinforcing appropriate behavior, providing corrective feedback and re-teaching behavioral skills when misconduct occurs, working with families through meetings and correspondence, teaching the district or state-approved violence prevention curriculum or other approved programs in the school, reporting the behavior to the school administrator responsible for discipline at the school-site for a student who engages in ongoing misconduct despite appropriate intervention. Under this policy directive, the school administration and school administrative staff are responsible for developing and implementing consistent discipline designed to correct the behavior.

16. The District-wide “Bullying and Hazing Policy: Student-to-Student and Student-to-Adult” (Bullying Policy) (Exhibit 13) provided guidelines for addressing and preventing bullying and hazing, defined as a “continuum of aggressive or violent behaviors.” The Bullying Policy defined bullying as “any severe or pervasive physical or verbal acts or conduct that can be reasonably predicted to have the effect of: (1) reasonable fear of harm to person or property; (2) substantially detrimental effect on physical or mental health; (3) substantial interference with academic performance; and (4) substantial interference with the ability to participate in or benefit from school services, activities or privileges. Unwelcome physical acts of beating, fighting, hitting, kicking, poking, pushing, shoving and tripping, come under the definition of bullying when the physical acts meet the threshold definition or “impact criteria” of bullying (Exhibit 13). The District administrators are required to investigate and document all reports of bullying.

17. The District-wide guidelines for addressing and investigating sexual harassment were also included in the Bullying Policy, but the District referred teachers to its one-page sexual harassment policy referencing Education Code section 212.5, and defining sexual harassment as any unwelcome sexual advances, visual or verbal conduct under conditions which include, among other things, conduct which has “the purpose and effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.” (Exhibit 11, Attachment C.) The District disciplinary policy included suspension of the offending employee, or suspension or expulsion of the offending student. (*Ibid.*) The District administrators and staff were required to investigate and document all reports of sexual harassment.

18. The District-wide nondiscrimination guidelines provided direction for preventing and reporting harassment based upon differential treatment against any protected group identified under Education Code sections 200 and 212, and Government Code section 1135, including actual and perceived sexual orientation, gender identity or expression and race, among other categories. (Exhibit 11, Attachment A.) Discrimination in the educational setting interferes or limits the individual’s ability to participate or benefit from the services and activities provided by the District and occurs when: (1) the target is subjected to unwelcome conduct related to a protected category; (2) the harassment is both subjectively offensive to the target and would be offensive to a reasonable person of the same age and characteristics under the same circumstances; and (3) the harassment is sufficiently severe, pervasive, or persistent so as to interfere with or limit an individual’s ability to participate in or benefit from the services, activities, or opportunities offered by the District. (*Ibid.*)

19. The District-wide Code of Conduct with Students (Student Code) was designed to ensure the safety of students and guide personnel in behavior toward students, particularly the “fine line” between being sensitive and supportive of students and a possible or perceived breach of responsible, ethical behavior. (Exhibit 14.) The Student Code expects teachers to use “good judgment” and avoid certain situations, including: meeting with students individually, behind closed doors; remaining with students after the last administrator leaves the school site; engaging in unprofessional behaviors, unethical,

immoral or exploitive behaviors in front of students; making comments that are not age-appropriate; giving gifts to students; touching or having physical contact with students; transporting students in a personal vehicle; and meeting with students off campus.

20. On March 5, 2013 there was a faculty meeting where the LAUSD policy on school and staff safety and the Student Code was discussed. On March 22, 2015, Isabel Perez, Moore's principal, directed respondent to further limit her interactions with students beyond the requirements of the Student Code and school safety policy by not having any students in her classroom outside of academic instruction at any time. (Exhibit 4.) Respondent abided by Ms. Perez's directive.

21. The Student Code bars teachers from communicating with students in any way that is not school-related, including e-mail, phone, and Internet. Except for specific school-related purposes, the Student Code bars teachers from calling students at home or on their cell, and from providing students with their personal contact information, including their personal e-mail address.

22. Teachers are also required to comply with the District-wide Employee Code of Ethics (Ethics Code) which provides for a general goal of creating a "culture that fosters trust, commitment to excellence and responsibility, personal and institutional integrity, and avoids conflicts of interest and appearances of impropriety." (Exhibit 15.) The District acknowledges that the Ethics Code provides "general guidance" but does not include a "definitive answer to every possible ethical situation." (*Ibid.*) To further the District's commitment to excellence the Ethics Code reinforces the goal of developing a culture that provides for an environment "where hard work, creativity and innovation are the norm." (*Id.*) To educate students to their maximum potential the District's teachers are required to set an example, create an environment of trust, respect, and non-discrimination; provide honest, accurate and timely information to supervisors (particularly regarding falsification and cheating); identify problems and develop solutions; keep policies, procedures and rules; report improper conduct which challenges "our integrity or reputation," including threats to safety; and keep colleagues who make good faith complaints safe from retaliation. Teachers are required to keep appropriate relationships with students. (*Id.*)

23. Teachers throughout the District are also required to abide by the California Standards for the Teaching Profession (CSTP) (Exhibit 16). The CSTP provides standards organized around six interrelated areas of teaching: engaging and supporting all students in learning; creating and maintaining effective environments for student learning; understanding and organizing subject matter; planning and designing instruction; assessing students; and teacher development. With regard to engaging and supporting all students, the CSTP acknowledges that "teachers know and care about their students in order to engage them in learning"; connect their backgrounds and interests, use various instructional strategies; and promote critical thinking.

24. Respondent implemented District policies in her classroom. She reviewed the rules with her class at the beginning of the school year and mid-year. She also posted important rules in the classroom.

Respondent's performance as a teacher at Moore during the 2012-2013 school year

25. Moore was a “feeder” school for sixth graders who had previously attended Miramonte Elementary School, which had been the focus of a sexual abuse scandal. Respondent was chosen by an interview committee which included Ms. Perez, who became its principal at the start of the school year.

26. Respondent was an enthusiastic teacher respected by her students and, until the incidents herein, considered a competent classroom teacher. She volunteered and participated in many school committees. Respondent designed the sixth grade culmination program. Her students performed well compared to the other sixth grade classes. Respondent willingly accepted challenging students from other sixth grade classes, including CG,² who was not responding well to his teacher. Respondent had the opportunity to speak with CG's mother who advised her that he was the only male in the family not incarcerated. Respondent knew her students well. Consistent with District and school protocols, she provided her students her District e-mail address so either they or their parents could contact her with school issues. Respondent did not have a Facebook account, or any social media account, and there was no evidence that respondent communicated with student on the phone, or through e-mail or any other Internet network that was not school-related.

27. Throughout the 2012-2013 school year, respondent was vigilant about school discipline. She posted school policies in her classroom. From her experience as a middle school teacher she was accustomed to referring students to the administrative office at Nightingale for discipline and she continued this practice at Moore. Respondent implemented a consistent disciplinary policy beginning with a verbal warning. When students failed not abide by the verbal warning they were sent to the Principal's office. Consistent with District and school policies and procedures, respondent filled out the required discipline referral slips and sent students to the office when she received reports of incidents of student misconduct. Respondent made several referrals to the Principal's office based upon her observations or student reports. Student witness MD confirmed that respondent created a safe and positive learning environment. If students behaved badly she would speak with them, speak with their parents and refer them to the office. Respondent gave verbal warnings when students cursed or misbehaved and they would stop. Generally, respondent's verbal warnings were sufficient to stop students from cursing or misbehaving.

28. Respondent's former students respected her, considered her to be an excellent teacher, and when they testified three years later, as ninth graders, would welcome her as their teacher again. Students who testified at hearing considered her as an excellent teacher and their testimony was confirmed by affidavits of other students.

² Initials are used for the students' names to protect their privacy.

29. Respondent was observed by her supervisors, including Ms. Perez and another District administrator, on a few occasions and found competent. Ms. Perez had observed respondent on approximately three occasions. During one of those occasions she observed that respondent's students' desks were messy, but respondent explained that they were getting ready for parent conference. The District administrator who observed respondent also approved of her classroom performance. In addition to observations Ms. Perez also conducted what she referred to as "walk-throughs" for two minutes on approximately 20 occasions throughout the school year. In writing, Ms. Perez confirmed her observations of respondent's students as "engaged in learning" (Exhibit 517). Ms. Perez also thanked respondent for "implementing a strong instructional programs where data shows academic growth." (*Ibid.*) At hearing, Ms. Perez highlighted some deficiencies she found in her observations, but these were minimal and did not contradict respondent's overall teaching history or reputation. Ms. Perez noted that one time she observed respondent it did not appear that respondent was following the lesson plan by allowing the students to take a physical education recess break at a different time.

30. Ms. Perez was found to be less credible than respondent with regard to respondent's performance and fitness as a teacher. Ms. Perez's demeanor and tone did not advance her credibility, in that she appeared to rigidly adhere to a view about respondent's behavior that was not realistic or fair. Ms. Perez was dismissive of respondent's volunteerism and her election to participate on school committees, remarking that no one else would volunteer. Ms. Perez refused to acknowledge that the positive performance of respondent's class was due to respondent's efforts instead of a statistical anomaly based purely on class composition. The Accusation primarily focuses on the events during one hour of the school day on June 6, 2013, which was the day before culmination. Ms. Perez insisted that instruction was required and expected throughout the school day, including the day before culmination which was not found credible. Aside from an incident where respondent changed the time for physical education, or gave a short physical education break, the District failed to provide any evidence that respondent failed to follow a lesson plan.

March 2013 E-Mail: Charge 11.

31. District charged respondent with violating District-wide policy on School Staff Safety and the Student Code of Conduct by communicating by e-mail to with her students between March 1, and March 30, 2013. Although referred to as separate policies, school staff safety was addressed in the Student Code and at hearing was not addressed separately.

32. District only established one e-mail communication between a student and respondent. On March 7, 2013, respondent knowing she would be absent from school the next day, March 8, 2013, advised her class to behave with the substitute teacher, and asked one of her students, KG, to report back to her about class instruction during her absence. The District charged respondent with failure to follow school rules when on March 7, 2013, KG emailed respondent's school e-mail account "Hi" just before noon, and respondent e-mailed

back five minutes later, “Hi! Do your Work!!!” On Friday, March 8, 2013, at noon, during the school day, KG sent another e-mail with a subject line that said, “We are doing really good so far.” KG limited his communication to the subject line of the e-mail and did not write anything in the message area of the e-mail. Respondent did not respond to KG’s e-mail on March 8.

33. Respondent provided credible and persuasive testimony explaining that she assigned KG a leadership role to report back about any classroom behavior incidents during her absence on Friday, March 8, 2015. Respondent did not ask him to e-mail her. She expected KG to report back to her on Monday when she returned from class.

34. Based on KG’s e-mail communications, the District charged that respondent failed to follow the Student Code which was designed for student safety, particularly to protect students from teachers who do not respect “the fine line drawn between being sensitive to and supportive of students and a possible or perceived breach of responsible, ethical behavior.” District failed to provide any credible evidence that KG’s e-mail communications violated the District’s Policy on School and Staff Safety and the Student Code or any school or District policy. The e-mail communications from KG was sent to respondent’s district e-mail and was strictly school-related.

35. During March 2013 Ms. Perez expressed other concerns about either the conduct of respondent’s students or respondent’s conduct, including the noise respondent’s students made in the hall or on the stairwell and respondent’s upset with another teacher about his interaction with her student, CG. Ms. Perez’s concerns were not made part of the Accusation, but were raised during the hearing as aggravating circumstances supporting various causes for termination. These isolated incidents did not advance the District’s causes, but did show that there was growing tension between Ms. Perez and respondent unrelated to the Charges in the Accusation.

36. Ms. Perez’s concerns about respondent’s respect for the school protocols for technology use were unfounded. Moore was a technology-rich school. Moore provided laptops for use in the classroom and had access to the wi-fi system during school. At times, respondent allowed her students to use their cell phones, to access web-sites for school-related English Language Arts instruction, including Dictionary.com. Otherwise respondent barred her students from using their cell phones or any technology for personal purposes. Ms. Perez was informed respondent had authorized her students to access school-related web-sites on occasion and did not tell her to ban cellphones altogether. Although Ms. Perez received a report that respondent’s students, who remained unidentified, on one occasion had accessed Facebook and printed their conversations during class time on a school printer, respondent was unaware of the reported conduct, and was surprised to learn that anyone under 13 years of age could qualify for a Facebook account. Respondent’s students confirmed her edict barring them from using technology, including their cell phones, for personal use and her warnings to them which they knew was the first step before their phones were confiscated.

June 6, 2013: Charges 1-10

Effective use of instructional time: Charge 10

37. In mid-May Ms. Perez notified respondent that her room assignment for the 2013-2014 school year would be changed from the third floor to the first floor. Respondent would be responsible for moving her materials and coordinating the move with the custodial staff and the teacher currently occupying and teaching a class on the first floor. Respondent did not want to move her class from the third floor where the other sixth grade classes were situated but Ms. Perez did not change her mind. Ms. Perez considered the move appropriate and thought it would resolve discord between the sixth grade classrooms and their pupils, including complaints that respondent's students made too much noise in the hallways and stairwells and thought this would resolve the situation. Ms. Perez's concerns about student behavior were not limited to respondent, but were expressed to the whole "sixth grade team," in an e-mail in March 2013 (Exhibit 510).

38. Ms. Perez testified that respondent should not have used instructional time to move classrooms and she had ample time to move between the rooms, and could do so after school, on Saturdays, and on the last day of school which was pupil-free, Monday, June 10. Ms. Perez's testimony was not convincing or credible. Ms. Perez described her own efforts as a teacher to pack up her class after school hours. However, Ms. Perez only removed her belongings from her class, and was not required, as respondent was, to pack and move all her classroom materials to another classroom.

39. Respondent's version of events was more persuasive and was consistent with student testimony, and the heightened level of activity associated with the last month of school. Prior to June 6, respondent finalized her sixth graders' school grades for culmination, and prepared individual records for each student required by the middle school, attended committee meetings and planned for culmination. During the week of June 3, 2013, respondent's students attended field trips on June 3 and June 5, 2015, prepared for culmination and developed powerpoint presentations of their job aspirations. The school day ended early each day, at 1 p.m.

40. Respondent was not told she could not use school time or her students to move classrooms. Based on the School Safety Policy, Student Code and Ms. Perez's direct order issued to respondent in March, respondent could not have students in her room during recess or after school and as such, the students were only available during the instructional day to assist her. The administration provided her students with boxes to bring to respondent for the move. The administration also provided respondent with a substitute teacher for two hours during class-time, which she availed herself of to supervise the students in the class while she packed boxes. Respondent had a total of 30 boxes to move and unpack. It was her understanding from speaking with the custodial staff that she needed to unpack the boxes and remove all boxes from the floor, or risk having them discarded. She was advised that the new class would be empty on June 6 and that she could unpack her boxes at that time. Having students help her move during the school day was not barred by District policy.

41. District disputed that respondent was required to move on June 6, 2013, but failed to offer credible evidence that respondent intentionally misrepresented her time restrictions. Respondent understood from the custodial staff that her new room, room one, which was generally occupied by another class, was available on June 6, and that any boxes that remained on the floor and were not unpacked would be discarded.

42. On June 6, at 8:15 a.m., on a school day that was otherwise typical for the day before culmination, respondent with her students went to room one so she could finish moving and unpacking boxes. Respondent's students were excited because it was the last day of school and they were looking forward to the summer. Respondent with the help of a few students began unpacking the boxes and placing the contents in cabinets. The first floor classroom was set up with rows of tables. The tables in the front of the class were set up in a horseshoe-like arrangement, with a short table loaded with music equipment and speakers on one side closest to the window, a long table facing the front of the classroom, and another table facing away from the door and toward the music table. In the middle of the horseshoe was a carpet.

43. Respondents and her sixth grade class stayed in the first floor room for no more than 60 minutes before they returned to their third floor classroom. Respondent told students to read a book, which was customary in the a.m., or do crossword puzzles, but otherwise trusted that they would behave. She allowed them to play music, which they did. Some students volunteered to assist respondent with unpacking boxes in the back of the room and on the side of the room where the entrance to the room was located. Other students sat in the rows of chairs. Three students were sharing a laptop to obtain academic information and develop their biographies for respondent's powerpoint assignment. Respondent did not spend the whole school day in the first floor classroom unpacking boxes. The students returned to their third floor classroom where respondent prepared them for culmination.

44. Respondent's class was comprised of 28 to 32 students. The videotapes capture images of a small group of students who were actively involved in misbehavior or were witnessing the conduct. Respondent's students acknowledged that they took advantage of her distraction with boxes to have fun which respondent would never have permitted and which would ordinarily be subject to discipline. Students generally stopped their behavior when respondent looked over from the back of the room or approached them.

45. Respondent's student MD, now a ninth grader, confirmed that students were generally happy and "chill" or relaxed that day and excited about graduating. The students were not angry at each other and were not trying to hurt anyone. They all got along. MD described the physical exchanges between students as "wrestling," or "horseplaying." No one reported any inappropriate behavior to respondent. MD described respondent as strict with rules of class conduct and the students were conscious of avoiding detection by stopping when she approached. MD provided credible testimony about respondent's classroom rules, the general mood of respondent's class, and his own incident. Otherwise, his testimony

regarding other incidents was mostly reliant on his review of videotapes and not his recollection and was given little weight.

Failure to prohibit the use of an I-POD: Charge 9

46. With respondent's attention diverted, one Student, SG, took out her I-POD, and began recording five incidents described below which form the basis of Charges 1-5. SG did so to record memories of her class. If she had known, respondent would not have tolerated SG's use of the I-POD to record the class as she was consistent throughout the year with implementing a strict technology policy.

Failure to supervise: Charge 6

47. The incidents set forth in Charges one through five below accounted for a total of nine minutes of time within a total of 45 to 60 minute period of time when respondent was with her students in the first floor classroom, and while she was admittedly distracted and moving boxes. During the time her class was on the first floor, respondent focused her attention almost exclusively on unpacking boxes with occasional attention to her students. She looked over frequently but not attentively. At hearing, respondent conceded that she was distracted and should have paid more attention to her class, but she trusted them from working with them all year, and focused on getting the boxes unpacked. On reflecting on the events of that day, respondent offered that she would not have trusted her students or given them as much latitude to regulate their own behavior, and would have requested assistance to supervise them. On further reflection, she would have investigated the incidents further by asking the students more questions.

48. There was no dispute that the videotaped incidents occurred and that respondent failed to adequately supervise students during the time they were in the first floor classroom to prevent the incidents from transpiring. District's characterization of the incidents as bullying, or sexual harassment, giving rise to a duty to report, or whether these charges support the Causes, are disputed. The incidents are described in the order of the Charges, not in chronological order.

The videotaped incidents

49. Charge One. There was sufficient evidence that respondent failed to timely intervene when students were engaged in the following inappropriate physical contact during a one minute, 36-second videotape, described as follows: CG, HA, and PG grabbed BS by her legs and forcibly pulled her from the desk where she was seated and onto the floor; CG sat on BS's face for over a minute and began to move his clothed buttocks up and down in a repetitive manner for a period of more than a minute; while CG was on BS's face, HA, and PG, threw themselves on BS's lower body and exclaimed "dogpile." BS was not hurt, but it was clear that the force with which she was pulled from the desk to the ground could have caused her injury. BS smartly removed her glasses and handed them off to another student to make sure

they would not get broken. She felt uncomfortable by CG's conduct but did not consider him a bully or his conduct sexual.

50. By the time respondent walked over HA and PG were no longer on top of BS, and CG was not on top of BS's face. Respondent was distracted with unpacking and did not observe anything but CG and BS on the floor tousling, when she walked over to unpack boxes at the front of the room near the students. Respondent's recollection changed over time as to whether she actually saw CG on top of BS at any time, or whether she thought BS had just tripped, but she did not see CG on BS's head. The variance in respondent's recollection did not undermine her credibility but was consistent with her admitted distraction at that time, the passage of time, and her later review of the video footage. When respondent reached BS and CG she exclaimed "Oh my God, CG," helped BS off the floor, asked if she was alright or needed to go to the nurse's office. BS did not tell her that CG sat on her head. Respondent told BS to use the restroom and sent another student with her for company. BS and CG returned to their seats. BS wrote a statement at the time of the incident where she stated that CG sat on her head and that she informed respondent. However at hearing BS did not recall the statement or what she told respondent. BS did not know whether respondent could see what was going on. Consistent with BS's poor recollection and hearing testimony, respondent clearly and credibly recalled BS informing her that she lied to the District when she stated she informed respondent about CG's conduct.³

51. The District failed to provide sufficient evidence that CG's conduct toward BS was bullying. BS testified that she felt "uncomfortable" but did not feel she was being bullied. Given that this was the last classroom day of school before culmination and summer break, the incident was more appropriately described as a single incident of tousling or horseplaying between CG and BS. CG's conduct toward BS was not consistent with the definition provided in the District's bullying policy.

52. The majority of the Commission determined that District failed to provide sufficient evidence that CG's conduct toward BS was sexual or fell within the definition of sexual harassment under the District's policies. CG's behavior was physical but the majority of the Commission observed the behavior to be pre-sexual at most and part of the students' tousling behavior during a brief period of time when respondent was distracted. Viewing CG's behavior within the context of the last instructional day of school, the apparent familiarity of the students with each other, and CG's use of this same maneuver during a short period of time on two students during their tousling, one male and one female, his behavior was inappropriate, but not sexual. The minority of the Commission agreed with SC's and later, respondent's characterization (Exhibit 521) of CG's conduct as "twerking," and sexualized.

53. Regardless of the characterization of CG's behavior, the full Commission determined that CG's behavior did not require respondent to report sexual harassment

³ The students' written statement to the District were admitted as administrative hearsay.

because she did not observe CG sitting on BS's head, and the students did not report his behavior to her at the time as required by District's policy (Factual Finding 17). At most respondent observed the students on the ground, but not CG's "twerking," or any sexualized or harassing behavior.

54. Charge Two. Respondent conceded she was distracted and there was sufficient evidence that she failed to intervene when students engaged in the following inappropriate conduct during the 40 second videotape: PG and HA tackled BS to the floor; PG threw himself on top of BS's upper body and HA proceeded to gently kick his foot about five times, into or around BS's rectum; BS stood up, shoved PG, who proceeded to tackle BS to the floor again; and while BS was still lying on the floor, HA rolled BS onto her side and spanked her twice on her buttocks.

55. The Commission agreed that the behavior of PG toward BS was not sexual. The majority of the Commission determined that HA's behavior toward BS was not sexual, and the whole incident including PG's behavior, was characteristic of tousling between classmates who shared a class throughout the year, were restless on the last day of class, and engaged in mischief when respondent was not looking. The minority of the Commission determined that the conduct of HA toward BA was sexual.

56. Regardless of the characterization of the conduct, the full Commission determined there was insufficient evidence that respondent was aware of incident, or any student provided her information which would have required her to report sexual harassment pursuant to the District's policies.

57. Charge Three. Respondent conceded she was distracted, but there was insufficient evidence that respondent failed to appropriately intervene when students were engaged in the following physical contact during the two minute, 12 second videotape, described as follows: PG used his foot to stomp on MD, while MD was lying on the floor; CG sat on MD's face and proceeded to move his clothed buttocks up and down and down repetitively on MD's face. As CG was sitting on MD's face PG jumped on MD's lower body and punched him on the leg and stomach five times; and one or more students sitting close to the I-Pod used or shouted vulgar language. Despite describing his reaction to being tackled as "uncomfortable" MD confirmed he was laughing and happy after it was over and was not hurt. When respondent looked in their direction she did not see CG on MD's face but only saw some sort of "horseplaying." The students appeared jovial and MD did not appear to be upset and did not report he was hurt.

58. Respondent did not hear the vulgar language either spoken by SG who was recording this incident on her I-POD, or someone sitting next to her. Persuasive evidence was provided of respondent's intolerance of vulgar language and the students were careful to make sure she did not hear them.

59. Respondent's admonishment of "stop ok," was persuasive evidence of appropriate intervention given her limited observations of their interactions, her students'

demeanor and respondent's history of providing successful warnings prior to further discipline. The students immediately disbursed when respondent admonished them.

60. Charge Four. Respondent conceded she was distracted when she was unpacking boxes and the District provided sufficient evidence that respondent failed to intervene as students engaged in the following inappropriate behaviors during the 36 second videotape: PG shoved JS on the floor and PS and JS proceeded to wrestle on the floor. Respondent did not see the incident the day it occurred. The recorded incident was short, no one was hurt and no one reported it to respondent.

61. Charge Five. Respondent was admittedly distracted when she was unpacking boxes, but the District failed to provide sufficient evidence that respondent failed to intervene during the four minute videotape, as described in Charge Five. The four- minute videotape describes the following: CG., HA., PG., and LC tossing a beach ball to each other in the classroom; about five students sitting on desks; SG or another student close to the audio on her cellphone video using vulgar language in Spanish and English, and calling out "gay ass" and stating "I'm going to fucking hit your ass, nigger!"; one or more students sitting on top of a classroom desk and one student running on top of a classroom desk. Respondent stopped them from playing with the beach ball and deflated the beach ball.

62. In contrast to the description of the videotape, the student's engaged in the beach ball toss, displayed a sense of community and a spirit of cooperation that demonstrated their familiarity and respect for each other. All students who wanted to participate were included and despite the words used by SG and maybe another student sitting next to her, there was no evidence of ill-will or abuse toward each other. The students' interaction was generally positive. Students were clearly enjoying their last day of school. Under the circumstances, and given that throwing the beach ball did not present a clear safety risk, some latitude in enforcing school rules was appropriate and it was not a deficit in judgment or a material violation of school policy for the students to toss the beach ball or sit on desks.

63. Respondent did not observe students sitting on top of the desks or running on the desk. Given that this was not the students' main room where they had assigned seats, sitting on top of the desks for a short period of time while interacting with other students did not constitute a material break from classroom rules. One student running across a desk was a sign of restlessness, and could be a safety hazard. However, one incident during a short break from classroom routine, while respondent was unpacking boxes, did not constitute a material breach of school rules. Some latitude in enforcing the rules was appropriate in view of the temporary nature of the room assignment and that it was the day before culmination. Under these circumstances, there was insufficient evidence of a clear violation of any school policy or a deficit in professional judgment.

64. Consistent with her unauthorized use of the I-POD, SG did not want respondent to know she was recording, and her vulgar language or that of her classmates was loud because it was close to the I-POD speaker, but not loud enough for respondent to hear.

There is no evidence that respondent heard the vulgar or discriminatory language. SG confirmed that respondent could not hear her statements.

Reporting obligations for sexual or bullying behavior: Charges 7 and 8

65. The students returned to their classroom on the third floor sometime between 9 and 9:30 a.m. Respondent worked with her class on culmination exercises. During recess, which began at 10:20, SG showed the videotapes of the incidents to other students. Ms. Perez was in the process of investigating a rumor she had heard that CG and a few other students were planning to throw rocks at her car. During her interview with students she learned of the videotapes and SG provided the videotapes to her for review. After recess several students were called from respondent's class to Ms. Perez's office and interviewed. Some students were asked to write statements of their observations. Ms. Perez consulted with a District administrator who reviewed the videotapes.

66. Respondent did not avoid reporting the incident. Respondent was not told about the content of the videotapes and what they displayed, but she was advised that Ms. Perez was investigating what occurred in her class that day and tried to unsuccessfully contact Ms. Perez in person to inform her of what she had observed. The parties disputed the timing of respondent's attempt to contact Ms. Perez, and whether she followed the correct protocols for communicating to Ms. Perez student misconduct, particularly through e-mails or in-person. However, the more persuasive evidence of the incidents and respondent's limited knowledge of what transpired established that respondent made a responsible attempt to communicate in person even though her duty to communicate the classroom incidents was not established by the evidence. Under the circumstances, District and school policies did not require respondent to report her students' conduct as bullying or sexual harassment. Students' conduct did not constitute bullying behavior as it is defined in District policy. The majority of the Commission also determined that the students' conduct was not sexual and did not constitute sexual harassment triggering respondent's duty to report. The minority of the Commission determined that the conduct in Charges one and two was sexual, but agreed with the majority of the commission that under the circumstances respondent did not have a duty to report.

67. Based on the videotapes the District removed respondent from her classroom and Moore that day. Respondent was not allowed to attend culmination. Moore was respondent's first experience working with a sixth grade class in an elementary-school setting and working with them through culmination to middle school. When the District removed respondent from her class she was deprived of the opportunity to share with her students their culmination. Respondent provided emotional and heartfelt testimony of her experience. During her placement at the District offices respondent was never given any opportunity to contribute her expertise as a teacher in anyway.

Other Proffered Evidence of Violations of the School Policy or inappropriate or dishonest conduct

68. The District submitted evidence at hearing of other transgressions not expressly included in the Accusation, but related to the Charges and further supporting the Causes, including evident unfitness for service, dishonesty and persistent violation of school rules. The additional evidence at hearing was not persuasive or credible.

69. In an effort to communicate its bullying policy clearly to students Moore sent an administrator to each classroom to speak directly with the students. Respondent had previously worked at a middle school where she came to know the language used by sixth grade students to communicate with each other. She had also heard and observed students use the term “slap-ass Friday” to refer to their practice of hitting each other on the buttocks at the end of the school week. During the administrator’s presentation to the class about the District’s bullying policy, respondent’s turned to the class and told them the policy meant no “slap-ass Fridays.” Respondent’s statement was an attempt to clarify the policy to her students in their language; her use of a colloquialism “slap-ass” was at most an incidental, not material, transgression of school policies used only to ensure student understanding of District’s bullying policy. Respondent was not engaged in an overfamiliar dialogue with her students; she used the expression correctly to support District’s bullying policy, not to undermine any District policy.

70. Ms. Perez also insisted that respondent displayed a card from a student thanking her for being a “bitchin teacher.” Respondent more persuasively and credibly denied she ever displayed such a card. Ms. Perez’s observation was not otherwise corroborated and was not credible. Ms. Perez was not regularly present in respondent’s classroom and her dismissive attitude toward respondent’s contributions and general demeanor demonstrated a bias that undermined her credibility. Ms. Perez’s purported and incidental observation was discounted.

71. Between March and June respondent and Ms. Perez engaged in several conversations and meetings regarding what Mr. Perez considered respondent’s inappropriate use of her students to deliver notes to other teachers or verbally communicate her concerns to the other teachers. On one occasion respondent summoned a substitute teacher after he pulled CG’s beanie over his head and chastising the teacher in front of her class. This was the subject of a conference memo (Exhibit 5). There was no evidence provided that further incidents occurred of this nature after the conference memo.

72. District claims that respondent’s after-the-fact reaction to the incidents in her classroom on June 6, 2015, support the Charge of dishonesty. Respondent’s perspective changed as she gained further understanding of the incidents by viewing the videotapes and further reflecting on events. Respondent was understandably under stress as a result of District’s investigation beginning on June 6, 2015, her removal from the classroom and placement in the District’s office. Under the circumstances, respondent’s responses did not change in a material way and her after-the-fact response to District’s conference memos did not support a charge of dishonesty.

LEGAL CONCLUSIONS

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 thus on 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).)

3. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in section 44932, subdivision (a),⁴ are established. In this case, the District seeks Respondent’s dismissal based on subdivision (a)(1) [immoral conduct], (a)(2) [unprofessional conduct] (a)(4) [dishonesty]; (a)(6) [evident unfitness for service], and (a)(8) [persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her].

Witness Credibility

4. It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

5. The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary

⁴ Section 44932 was also amended effective January 1, 2015. While there were no substantive changes to any of the subdivisions relied upon by the District for discipline, many of the subdivisions were renumbered and thus vary from the operative pleading.

of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal.295, 304.)

Unprofessional conduct.

Respondent's motion to dismiss the Cause of unprofessional conduct is granted.

6. Respondent's motion to dismiss the complainant's cause against respondent for unprofessional conduct pursuant to Education Code (Code) sections 44932, subdivision (a)(2), and 44933 was denied without prejudice before the hearing commenced, but based upon the evidence at hearing, is granted.

7. Respondent's motion asserts that the District and the Commission lack jurisdiction to proceed on the charges of unprofessional conduct because respondent was deprived of the notice and opportunity to remediate any unprofessional conduct on her part after receipt of the 45-day notice in Code section 44938, subdivision (a), along with a "Stull" evaluation. 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.

8. In *Tarquin v. Commission on Professional Competence* (Tarquin) (1978) 84 Cal.App.3d 251 the court interpreting a prior version of section 44938, concluded that service of the notice and evaluation were jurisdictional, and that the claim could not be pursued before a Commission on Professional Competence if the notice and evaluation were not timely served. (*Tarquin, supra*, 84 Cal.App.3d at 259.) According to *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, at 1446 (*Woodland*), "where a school district seeking the dismissal of a permanent certificated employee on charges of unprofessional conduct fails to comply with the notice provision of section 44938, subdivision (a), it lacks jurisdiction to proceed, and any action subsequently taken against the employee is invalid. [Citations]."

9. The District provided respondent written notification and held a meeting on December 9, 2013, after she had been removed from her classroom and was reporting to the District offices. Nevertheless, District failed to satisfy the notice requirements when it failed to provide respondent an opportunity to remediate any defects in her performance. District's technical adherence to the notice requirements by providing a written document setting forth the Causes and Charges was made meaningless by the District's actions. By failing to provide respondent an opportunity to exercise her rights under Code section 44938, subdivision (a), it was as if no notice had been served. Put another way, the District did not "furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (Ed. Code § 44938, subd. (a).) To allow the notice that was served in 2013 to suffice would be to place form over substance, which is disfavored in the law. (Civ. Code, § 3528; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 237 [purported budget plan deemed a reorganization plan, and voided on constitutional grounds].)

10. The District removed respondent from her classroom on Thursday, June 6, 2013, the day before culmination, and three school days before the end of the 2012-2013 school year, Monday, June 10, 2013. It is undisputed that respondent was not assigned to a classroom at any time thereafter. Instead, she was assigned to the District offices, until the time that she was suspended without pay on September 17, 2014, and these proceedings instituted. As such, the District failed to comply with section 44938, subdivision (a), and the Cause for unprofessional conduct is dismissed.

11. Alternatively, even assuming District was entitled to proceed with the Cause for unprofessional conduct application of the *Morrison* factors (discussed in more detail in Legal Conclusions 27 and 28) would not support dismissal or any discipline. District met its burden of proof that respondent's conduct failed to meet the standards of the profession on the basis of Charge 11, based on her failure to adequately supervise her students, and in certain instances to intervene. However, respondent's conduct during a narrow window of time on an atypical day was incidental to her overall teaching record and did not justify dismissal under the *Morrison* factors below.

12. Respondent also moved to dismiss the other Causes. The *Tarquin* case makes clear that where a school district does not comply with section 44938, subdivision (a), it is not barred from pursuing other statutory grounds for termination. That analysis is supported by other cases, such as *Woodland, supra*. Here, the other Causes, including dishonesty, are related to, if not expressly described, in the Charges set forth in the Accusation. A pleading is sufficient and comports with due process when it provides the respondent with enough notice of the charge to enable him or her to prepare a defense. (*Dymont v. Board of Medical Examiners of State of Cal.* (1922) 57 Cal.App. 260, 265.) No prejudice will be found if it appears from the record that the respondent was in fact able to prepare a defense. (*Jaramillo v. State Bd. for Geologists and Geophysicists* (2006) 136 Cal.App.4th 880.). Accordingly, the Cause against respondent for unprofessional conduct is dismissed, and respondent's motion to dismiss the Causes of dishonesty and persistent violation or refusal to obey school laws is overruled.

Immoral Conduct

13. The Second Cause for dismissal for immoral conduct was not established by a preponderance of the evidence within the meaning of sections 44932, subdivision (a)(1).

14. 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.)

15. In this case, the charge of immoral conduct in the Accusation mainly arises from the conduct of respondent’s students during a one-hour time period on June 6, 2013, the day before sixth grade culmination. The Accusation charges respondent with failing to intervene, failing to supervise her class, failing or purposely avoiding reporting her student’s inappropriate sexual and bullying behavior pursuant to District and school policies and procedures, and failing to use her instructional time effectively. In addition to the one-hour period of time on June 6, 2013, the Accusation charges respondent of violating school policy in e-mail communications in March 2013. Not all the conduct on June 6, 2013 involved serious bodily contact. Notably, the beach ball video showed classmates working together and cooperating in a joyful manner, typical of young people who know and respect each other. Other conduct may have been inappropriate, obnoxious and mischievous, but typical of sixth graders about to graduate, including running on the desks, and videotaping. The more serious physical contact between students displayed on the videotape and the cursing, was clearly inappropriate to the classroom, but again not unusual for sixth graders close to graduation who knew each other. The evidence also showed that not every student was engaged in inappropriate behavior. While a few students were helping respondent unpack boxes, three students were reviewing material on a laptop computer, and several students were sitting on chairs at long tables.

16. As to any of the behaviors described, innocent, mischievous or inappropriate, there was no evidence that respondent participated in it, encouraged it, condoned it, celebrated it or intentionally hid the behaviors from administrators. At most, the evidence showed that respondent failed to adequately supervise several students for a few minutes when she was unpacking boxes the day before culmination. Respondent’s conduct did not connote any immoral intent as defined in Legal Conclusion 14.

Dishonesty

17. The Third Cause for dismissal for dishonesty was not established by a preponderance of the evidence within the meaning of Code section 44932, subdivision (a)(4). “Public service provides no hiding place for the dishonest and those lacking integrity.” (*Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 364.) The definitions of “dishonest” and “dishonesty” (Webster’s Seventh New Collegiate Dict. (1969) p. 239),

include references to willfulness, intent and fraud such that it may be reasonably concluded that there can be no dishonesty where there is no intent to deceive.

18. The District failed to show by a preponderance of the evidence that respondent intended to deceive administrators. The District's position that respondent was dishonest was primarily based upon respondent's failure to report sexual or bullying behavior in her class on June 6, or in her recollection of events after-the-fact. The weight of the evidence demonstrated that respondent did not intend to deceive the District at any time. Students' behavior did not match the definition of bullying, and the majority of the Commission determined that CG's conduct did not constitute sexual harassment. The weight of the evidence also established that respondent did not observe the physical and verbal conduct which might have triggered a duty to report based upon bullying or sexual harassment. With regard to respondent's responses to the District's investigation, when confronted with events, respondent's characterization of events was not completely accurate. Her responses to the events of June 6, 2015 changed after she had an opportunity to review the video in full and reconsider the events. At most her version of events reflected a different point of view or faulty recollection, not any intent to deceive.

Evident Unfitness for service

19. The fourth Cause for evident unfitness for service was not established by a preponderance of the evidence within the meaning of Code section 44932, subdivision (a)(6).

20. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland, supra*, 2 Cal.App.4th at p. 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." (*Ibid.*)

21. In this case, it was not established that respondent possesses any sort of fixed character trait rendering her unfit for service as a teacher. If anything, respondent is a good teacher. Respondent was invested in her students' success. Her students clearly appreciated her teaching. Her students considered her an excellent teacher and would welcome having her as their teacher again. Respondent was carefully interviewed and selected by Ms. Perez to teach sixth grade after having the opportunity to vet her past. Respondent demonstrated her willingness to take on challenging students mid-year, including CG, who had been clashing with his previous sixth grade teacher. Other than this case, there is no evidence that she had anything other than an unblemished record as an educator since she became credentialed. In addition to her teaching responsibilities, respondent also willingly contributed her time to school committees. Notwithstanding Ms. Perez cynical testimony that respondent's participation in school committees was welcome because no one else would volunteer, respondent willingly contributed her time after the school day ended. Respondent engaged in continuing education and ongoing activities focused on expanding her skills. The events upon which the District seeks discipline were isolated to essentially several minutes during one hour of one day, and one e-mail. District's attempt to show a

pattern failed. Respondent had expressed concern about students being overfamiliar with her when she taught at Nightingale, a middle school, and was given guidance. However, respondent received a commendable review from the Nightingale principal and her performance met expectations.

22. The District's attempt to suggest that respondent's involvement with her students was a negative and fixed character that rendered her unfit to teach was not supported by the evidence. There may have been some problems between the sixth grade team as evidenced by Ms. Perez's decision to move respondent's class downstairs, but there was insufficient evidence that there was a consistent pattern that reflected a fixed character, or was not remediable upon receipt of notice. Ms. Perez remedied the problems she perceived with the sixth grade team by moving respondent's classroom downstairs for the next year. The evidence suggested that Ms. Perez was concerned with the amount of time students spent with respondent after class, but the situation was remediated by Ms. Perez's directive that respondent not allow students to stay after class. After Ms. Perez directed respondent not to use Students to communicate her concerns to other teachers, there was no evidence of any further incident. Thus, respondent was able to remediate areas of concern when she was made aware of them. While respondent was not perfect, her commitment to her students and the school was genuine, and it cannot be concluded that she had a negative or fixed character trait that made her unfit to teach.

Persistent violation of school laws

23. The Fifth Cause for 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 the District was not established by a preponderance of the evidence within the meaning of Code section 44932, subdivision (a)(8).

24. Cause for discipline may be based on the violation of school rules. (*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 cooperate." (*Id.* at 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.)

25. Respondent demonstrated fidelity to the District's and school's policies set forth in Factual Findings 14 through 23. School policies provide for the exercise of judgment in drawing the line between professional and personal relationships. Respondent was a caring teacher. There was no evidence that she did not abide by policies and practices designed to keep her student's safe and productive. Respondent sought out advice at Nightingale when middle school students became overly familiar with her, and she followed Ms. Perez's instructions, which went beyond the policy guidelines, to never have students in her classroom during noninstructional times. Respondent regretted the conduct in her class,

and admitted after working with these students for a long time, she incorrectly assumed they were trustworthy.

26. In this case, it was not established that respondent engaged in the sort of insubordinate behavior typically associated with this statute. It was not established that respondent violated several District policies, including sexual harassment and bullying, as a result of the events on June 6, 2013, or the event involving her e-mail exchange. It was also not established that respondent's conduct was "intentional," "continual," or "persistent" for purposes of this statute or the cited cases. Respondent may have failed to sufficiently supervise her class during nine minutes of a one-hour period of time but her conduct was not persistent or motivated by insubordination. Respondent's distraction and the resulting misbehavior of a small cadre of students, was the result of her understanding that she had to unpack her boxes in her new classroom that day. District's attempt to show a pattern of insubordination by citing her purported delay in reporting the events of June 6, or use of the term "slapass Friday" during an isolated lecture on bullying, or her upset with a substitute teacher, did not support a conclusion that respondent was motivated by an attitude of continuous insubordination. On the contrary, the evidence showed that respondent faithfully complied with school rules by reporting unacceptable conduct to the office on many occasions, and according to her students, instituting a system of warnings which effectively shut down behavior that was not sanctioned by school policy, including cell phone use, and cursing. Her conduct on June 6, 2013, and during other isolated incidents did not reflect a plan or intent to ignore her supervisors or the District.

Analysis of the Morrison Factors

27. 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 this case, since it was not established that respondent's conduct supported any of the charges, examination of the *Morrison* factors is unnecessary.

28. Nonetheless, it is doubtful that the *Morrison* factors would support cause for discipline if applied to any of the Causes, including the dismissed Cause for unprofessional conduct. For example, there was little showing that respondent's conduct adversely affected students or the District; if there was any adversity, it was minimal; the events in question happened during a total of nine minutes of one atypical school day, the day before culmination, where due to circumstances created by Moore's administrator, Ms. Perez, respondent spent under one hour in a new classroom to unpack boxes and was distracted. The conduct occurred in 2013, over two years ago, and it is highly unlikely that respondent would repeat such conduct in the future.

29. The overwhelming weight of the evidence demonstrated that respondent was a hard-working, dedicated professional who followed school policies and procedures, implemented disciplinary protocols in her classroom, and created a safe and productive educational environment for her students. Nine minutes of student misbehavior during an

atypical school day, one day before culmination, where respondent was distracted by unpacking boxes, does not support dismissal. Respondent's failure to intervene or adequately supervise a few students during a nine minute period of time on an atypical day was incidental, largely irrelevant to her overall teaching performance, and not predictive of her future ability to teach.

Disposition

30. "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.)

31. In this case, the District failed to establish that cause exists to dismiss respondent's employment.

ORDER

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


PATRICIA FUJII CARBERRY

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GORDON BROWN

December 2, 2015

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EILEEN COHN

Administrative Law Judge
Office of Administrative Hearings

minimal; the events in question happened during a total of nine minutes of one atypical school day, the day before culmination, where due to circumstances created by Moore's administrator, Ms. Perez, respondent spent under one hour in a new classroom to unpack boxes and was distracted. The conduct occurred in 2013, over two years ago, and it is highly unlikely that respondent would repeat such conduct in the future.

29. The overwhelming weight of the evidence demonstrated that respondent was a hard-working, dedicated professional who followed school policies and procedures, implemented disciplinary protocols in her classroom, and created a safe and productive educational environment for her students. Nine minutes of student misbehavior during an atypical school day, one day before culmination, where respondent was distracted by unpacking boxes, does not support dismissal. Respondent's failure to intervene or adequately supervise a few students during a nine minute period of time on an atypical day was incidental, largely irrelevant to her overall teaching performance, and not predictive of her future ability to teach.

Disposition

30. "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.)

31. In this case, the District failed to establish that cause exists to dismiss respondent's employment.

ORDER

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


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December 2, 2015