

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SAN JOSE UNIFIED SCHOOL DISTRICT
COUNTY OF SANTA CLARA
STATE OF CALIFORNIA

In the Matter of:

GARRETT GORDON,
a certificated teacher,

Respondent.

OAH No. 2015041161

DECISION

Administrative Law Judge David L. Benjamin served as the chairperson of the Commission on Professional Competence. Jody Tims and Harry Pabley served as members of the commission. The matter was heard on October 5-9, 12-13, and November 2, 2015, in San Jose, California.

Ingrid A. Meyers, Attorney at Law, Dennis Wolliver Kelley, represented complainant Dr. James Lovelace, Assistant Superintendent, Human Resources, San Jose Unified School District.

Christopher E. Schumb, Attorney at Law, represented respondent Garrett Gordon, who was present.

The record closed and the matter was submitted on November 2, 2015.

FACTUAL FINDINGS

Jurisdiction

1. Respondent Garrett Gordon is a permanent certificated employee of the San Jose Unified School District (district).

2. On March 26, 2015, complainant James Lovelace, Ed.D., the district's Assistant Superintendent of Human Resources, filed with the district's governing board a "Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension." In the Statement of Charges, complainant recommended to the board that

respondent be dismissed from employment. The board approved complainant's recommendation and on the next day, March 27, the Statement of Charges and a Notice of Intent to Dismiss was served on respondent. Respondent timely filed a notice of defense and a request for hearing, and this hearing followed.

3. Broadly speaking, the Statement of Charges alleges that respondent's performance as a teacher is unsatisfactory and that he engaged in unprofessional conduct in various instances, most notably by exhibiting indifference toward a student who was having a seizure in his classroom. Respondent denies the charges. He asserts that he welcomed criticism of his teaching and that, if his performance was deficient in any respect, he was not given a meaningful opportunity to correct it. Respondent denies that he was indifferent toward the student who had a seizure in his class.

Respondent

4. Respondent graduated from the University of California, Santa Cruz, in 1985 with a bachelor's degree in Spanish literature and a minor in English. He has a BCLAD, a multiple subject credential in math, English and business, and a single subject credential in Spanish. He studied special education at San Jose State University, and holds a Learning Handicapped (LH) credential.

5. After graduating from college, respondent taught children of migrant farm workers in Watsonville for several years. He then worked for the Salinas High School District, for the San Jose Unified School District in an intervention class, and the Alum Rock School District, each for about one year. He returned to the district in the mid-1990's. In or around 2000, respondent was assigned to Bret Harte Middle School (BHMS), where he remained until March 2013.

2011-2012 school year

6. In the 2011-2012 school year, respondent was assigned to BHMS and taught two periods of math and three periods of Spanish. His principal for this year, and for the years he remained at BHMS, was Cynthia Maijala.

7. One of Maijala's responsibilities is to conduct classroom observations of her teachers, and to evaluate tenured teachers at least every other year. She observed respondent on December 12, 2011. It appears that respondent's teaching was under scrutiny even before that date, as respondent already had two math coaches assigned to him (Laura Fujikawa and Helen Arrington), and he had been the subject of parent complaints about his teaching.

8. In the course of her December 12, 2011 observation Maijala completed a district form titled "Classroom Observation Guide/Final Assessment Form Phase I," which asks the evaluator to rate the teacher in 38 different categories, divided into five areas: A – Planning and Preparation; B – Learning Environment; C – Instruction; D – Assessment; and

E – Professional Responsibilities. Maijala gave respondent six “ineffective” ratings in the following areas:

- C8: Uses instructional time effectively
- D1: Collects and uses multiple sources of information and data to regularly assess student learning and to modify and guide instruction as needed.
- D4: Assesses the effectiveness of the lesson and the extent to which the lesson reaches the instructional goal.
- E4: Keeps records and reports that are up-to-date and accurate, and is punctual in submitting all material.
- E5: Collaborates with colleagues to continually improve professional practices related to teaching and learning.
- E10: Uses self-selected technologies that assist in areas such as reporting grades, preparing assignments and assessments, using data, and communicating with others.

Maijala prepared an improvement plan dated January 12, 2012, which she gave to respondent. Among other things, the improvement plan directed respondent to: complete training in Explicit Direct Instruction, or EDI; check for student understanding during his lessons; assign grouping partners; input assignments every day into the grading system; enter tests and quizzes no later than two days after the assessment; review learning objectives with the class; use verbal questioning to ensure mastery; use a seating chart so that a range of students are called on; and update student homework assignments daily.

9. Maijala returned to respondent’s classroom on January 26, 2012, to observe him a second time. She found that his teaching remained ineffective in the same areas and in one additional area: D3, “checks for student understanding by listening, observing, and questioning during instruction and modifies instruction accordingly.” Respondent had not yet signed up for EDI training, and he continued to have difficulty uploading comments and grades into the district’s electronic grading system, called “Infinite Campus.” Respondent could not master Infinite Campus and needed last-minute assistance from other staff members to get his grades in at the end of the fall semester.

10. Respondent was late to Back to School Night at the beginning of the school year on August 31, 2011, and then failed to appear for Open House at BHMS on May 9, 2012. At hearing, respondent testified that he was late to Back to School Night because the time for the event had changed, but he acknowledged it was his responsibility to be on time. Respondent states that he was “unaware of Open House” because his laptop had crashed and he did not have access to his school calendar. Respondent’s testimony on this point was not credible.

11. On May 21, 2011, Maijala met with respondent to give him her final performance assessment for the 2011-2012 school year. On a “Certificated Employee Information Sheet,” Maijala wrote:

Although there have been improvements in the area of professional responsibility and instruction, I am recommending that you be evaluated next year. Being late to Back to School Night and neglecting to attend Open House this year and last year are problematic and in violation of contract.

The Information Sheet asks the evaluator to rate the teacher's "Overall Performance" as Effective or Ineffective, or as "Recommended for Phase II Assessment based on formal observation," or "Recommended for non-reemployment." Maijala's final rating of respondent was "Effective Overall Performance," the highest available rating on the form.

12. On May 31, 2012, Maijala sent an email to respondent in which she informed him that "I have set aside tomorrow at 2:30 to meet with you about your teaching assignment for next year. Ms. Nerhood [assistant principal] and I will meet with you in my office at that time." Respondent did not appear for the meeting.

The Statement of Charges alleges that "[a]lthough Ms. Maijala confirmed the date and time of the meeting with Respondent prior to the meeting, he still failed to show up. Such an omission constitutes an act of insubordination and defiance." This is not a fair statement of the facts concerning respondent's failure to attend the meeting, as it does not mention respondent's communication to Maijala before the meeting. On May 31, respondent sent Maijala an email in response to hers, in which he wrote:

I have already contacted my off-site union reps . . . regarding this matter and other concerns surrounding our most recent office meeting. It is doubtful my reps would be able to honor my request to attend an afternoon meeting tomorrow on such notice. Moreover, first, the union reps need time to discuss and respond to the problems with me that I have brought to their attention, which has not yet occurred. Given these circumstances and my wish to protect my rights in regards to these issues I do not feel obliged to meet with you tomorrow.

The evidence does not establish that respondent's desire for union representation excused him from attending a meeting with his principal. At the same time, the evidence does not establish, as the Statement of Charges seems to imply, that respondent failed to respond to Maijala's email or that he failed to attend the meeting without explanation.

13. The relationship between Principal Maijala and respondent, which had been professional at one time, deteriorated in the 2011-2012 school year. Respondent believes that Maijala discriminated against him because of his race (respondent is African American); he filed discrimination complaints against her when she was his principal. Respondent feels that Maijala intimidated him and states that he tried to avoid her. Maijala denies that respondent's race has anything to do with her evaluations of his performance or her feelings towards him. Maijala states that it was respondent who attempted to intimidate her, and that

his words and manner conveyed a veiled threat of violence, to the point that she walked out of one meeting with him and thereafter refused to meet with him alone.

14. The Statement of Charges alleges that “[b]ecause of [respondent’s] inability to work with his [math] coach and refusal to respond to any other coaching assistance, the coaching sessions ceased much earlier than originally scheduled. . . . Respondent’s refusal to accept offers of assistance is disappointing to the District and further evidences his difficulty in engaging in professional collaborations with his colleagues.” The evidence does not support these allegations. Respondent did not cancel his coaching sessions with Fujikawa; it was Fujikawa who decided to end that coaching relationship. Moreover, respondent testified that Arrington was “wonderful,” that he worked with her on checking for understanding, on stating the purpose of each lesson, on using white boards, and on choosing non-volunteers among the students to check for understanding. Maijala acknowledged that Arrington never complained about any problems working with respondent, and that Arrington was complimentary of his performance.

15. The collective bargaining agreement between the district and its teachers’ union establishes a “Peer Assistance and Review” (PAR) process for teachers who need assistance in their teaching strategies and methods. Maijala did not refer respondent to PAR.

2012-2013 school year

16. For the 2012-2013 school year, Maijala assigned respondent to five sections of sixth grade math, instead of two sections of Spanish and three of math. Maijala felt that, since respondent was operating under an improvement plan, it would be easier for him to prepare for one subject rather than two. Respondent was unhappy with the change in his schedule.

17. By November 2012, Maijala was concerned that respondent was not keeping pace with the math curriculum and his partner math teacher. Maijala directed respondent to submit his lesson plans to her, beginning November 19. Respondent complied with this directive initially, and Maijala found that the lesson plans acceptable. At some point, however, respondent began to provide lesson plans only sporadically, and then stopped sending them to Maijala at all.

18. Maijala observed respondent in his classroom on November 27, 2012. On the Classroom Observation Guide, Maijala again gave respondent “ineffective” ratings in the areas identified above as C8, D1, D4, and E10. She also found him ineffective in five new areas:

- A2: Organizes curriculum to support student acquisition and understanding of subject matter.
- C1: Establishes high academic expectations for all students and endeavors to make all students successful.

- C3: Uses standards to design and implement short- and long-term curriculum that builds on students' prior knowledge.
- E1: Demonstrates professional conduct, and complies with contractual agreements.
- E2: Maintains Board of Education Policies and follows Administrative Regulations.

In two areas that Maijala had previously found respondent to be ineffective, she found him on this evaluation to be "progressing": E4 (accurate and up-to-date records) and E10 (use of technologies for reporting grades, preparing assignments and assessments, etc.).

19. Maijala placed respondent on another improvement plan signed on December 14, 2012. Among other things, the plan directed respondent to obtain and analyze "cluster data" from the California Standards Tests, and to use that data to make any appropriate changes in his curriculum; to utilize EDI; to insure that homework review is completed within the first 10 minutes of class; to make use of formal and informal assessments tools, such as pop quizzes and homework, to assess learning and modify instruction; and to "conduct himself professionally when engaged with administration. Should [respondent] take issue with anything asked of him by administration, he will put this into writing rather than engage in public or request that the issue be discussed in private with union representation."

20. The relationship between respondent and Maijala continued to deteriorate over the school year. The Statement of Charges alleges that respondent met with Maijala in December 2012 and told her that she was "full of bullshit" and used the word "bullshit" more than seven times. The evidence does not support this allegation, as Maijala testified that she does not remember particular words that respondent used when she met with him. Maijala, however, found respondent's body language and the volume of his voice to be angry and hostile.

21. Respondent was late to class and failed to timely inform the district on December 18, 2012.

22. In the fall and winter of 2012-2013, the district received numerous complaints from parents about respondent's teaching.

23. In January 2013, respondent failed again to timely post his grades in Infinite Campus. He was given a one-day extension, and failed to meet it. As a result, none of the grades for students at BHMS could be timely uploaded and posted. Respondent states that he is "technologically challenged"; he also blames his failure to timely post his grades upon his partner math teacher, stating that she was late getting her grades to him. Whatever the cause, the timely posting of grades on Infinite Campus is an important obligation that respondent did not master, at least through the 2012-2013 school year. As a consequence, fellow teachers and administrators had to assist respondent in performing this task and all students at BHMS – not just respondent's students – had to wait to see their grades until respondent completed his task.

24. Respondent requested an alternative evaluator to Maijala. Dane Caldwell-Holden, the principal of the district's alternative schools, was assigned as the alternative evaluator.

25. Caldwell-Holden observed respondent in the classroom on January 15, 2013, and found him ineffective in 11 areas – seven of which duplicated Maijala's findings in November 2012 (A2, C1, C3, C8, D4, E1, and E5), plus the following:

- A4: Demonstrates a general knowledge and understanding of student developmental characteristics and learning styles and uses them to motivate students to learn.
- C5: Selects and uses activities that encourage students to make connections, pose questions, and solve problems.
- D3: Checks for understanding by listening, observing, and questioning during instruction and modifies instruction accordingly.

In November 2012, Maijala thought respondent was progressing in the area of up-to-date records (E4), but Caldwell-Holden found him to be ineffective in that area. Like Maijala, Caldwell-Holden thought respondent was progressing in his use of self-selected technologies to report grades, prepare assignments and assessments, and to perform other tasks; he noted that he observed respondent "asking for a significant refresher surrounding gradebook, setting up and inputting classes and grades." In response to area E6 (taking responsibility for professional growth), Caldwell-Holden found respondent "effective" and noted that he was actively working with a coach and that his lesson plans reflected an effort to use EDI.

26. Caldwell-Holden worked with respondent to establish an improvement plan, dated January 29, 2013, which directed respondent to take the following steps to improve his performance:

- (a) Utilize non-volunteers, white boards and other instructional techniques to routinely check for understanding on the posted learning objective;
- (b) Re-teach as necessary;
- (c) Ensure that quiz and test dates are prominently displayed on the board 2-3 days prior to the date;
- (d) Make sure that standards displayed align with daily objective and course content in general;
- (e) Use a variety of instructional strategies that encourage students to ask questions and offers multiple opportunities for students to attempt to solve problems and actively participate in class rather than passively read along;
- (f) Collect homework and complete warm ups during the first fifteen minutes of class;
- (g) Make regular use of formal and informal assessment tools (pop quizzes, homework, tests, etc.) to assess learning and to modify instruction; and

- (h) Fax over to the evaluator a daily lesson plan from any day of the week each week that demonstrates differentiation.

27. On February 27, 2013, the district issued to respondent a “Notice of Unsatisfactory Performance and Unprofessional Conduct” based on deficiencies it perceived in his teaching, and his behavior toward his colleagues, administrators, students and parents. (The document is referred to as a “NUP/NUC.”) The deficiencies asserted by the district included all of the matters set forth above, and others. By law, a district cannot act on charges of unsatisfactory performance unless the employee has been given 90 days to correct his faults and overcome the grounds for the charges, and cannot act on charges of unprofessional conduct unless the employee has been given 45 days to correct his faults. (Ed. Code, § 44938, subds. (a) & (b).) The NUP/NUC included the following directives to respondent:

By April 1, 2013, attend at least one District-approved workshop that focuses on classroom management, effective instructional strategies, and implementing student discipline.

Be trained in the District’s computer systems for grade uploading, and meet all requisite grading deadlines.

Attend all required events as outlined in the collective bargaining agreement between your union and the District in a timely and appropriate fashion. You are responsible for finding out the dates and times of each event; ignorance of such information is not an excuse for non-attendance.

Follow all District directives whenever you receive one and immediately seek clarification should you be unclear with regard to the contents of a directive.

Comply with all past and future directives from District and/or site administration.

28. On February 28, respondent failed to show up for a basketball game he had agreed to supervise. He did not submit his weekly lesson plans to Maijala. And, in an informal observation of his classroom on March 8, Maijala found that respondent was not clear on homework and testing dates, and did not sufficiently check for understanding.

29. Caldwell-Holden conducted an observation of respondent’s classroom from about 8:00 to 9:00 a.m. on March 14, 2013. Respondent was late to class, disorganized and seemed to be unprepared.

30. On that afternoon, respondent was placed on administrative leave with pay. He was escorted out of his classroom, walked to his car, and directed to leave the campus.

Respondent remained on administrative leave for the remainder of the 2012-2013 school year.

The Statement of Charges is silent as to the circumstances that led to respondent being placed on paid leave. Respondent is not charged with any misconduct in connection with being placed on administrative leave.

31. On March 15, the day after respondent was sent home, Maijala wrote to respondent and told him that, in his absence, she had arranged for calibration of pacing with his partner math teacher. She went on to write that “[p]art of your Improvement Plan is to collaborate with colleagues. By not participating in the lesson writing with your department you are failing to fulfill your responsibilities in the process of instruction improvement.” At this time, however, respondent was on leave and had been directed not to come onto district property.

32. Also on March 15, Maijala directed respondent to provide weekly lesson plans and to monitor student engagement and actively participate in instruction. Again, respondent had been placed on leave the day before and therefore could not comply with these directives.

33. Before being placed on leave on March 14, 2013, respondent was not referred to PAR.

34. On March 29, 2013, respondent submitted to the district a request for a “voluntary transfer” to a “position as a Special Education Teacher at the high school level or as a Teacher of Spanish at a middle school other than Bret Harte or high school within SJUSD and the scope of two of my credentials; Single-Subject in Foreign Language (Spanish) and Special Education-Learning Handicapped.” No immediate action was taken on respondent’s request.

2013-2014 school year

35. The district maintained respondent on paid administrative leave for the entire 2013-2014 school year. On June 27, 2013, Meagan Azevedo, the district’s Manager of Certificated Human Resources, wrote to respondent and informed him that the district’s decision to keep him on paid leave was based on his “continued unsatisfactory performance” since being issued the NUP/NUC on February 27, 2013. Her letter continued, “Indeed, your workplace performance continues to remain so poor that the District has decided to pursue charges for your dismissal once the moratorium per Education Code section 44936 lifts on September 15, 2013.” (Under section 44936, a notice of dismissal cannot be given between May 15 and September 15 of any year.)

36. The district did not bring dismissal proceedings after September 15, 2013. During the time he was on leave, respondent was prohibited from coming onto district property.

2014-2015 school year

37. On July 2, 2014,¹ Assistant Superintendent Lovelace wrote to respondent and informed him that he was being removed from paid administrative leave status and assigned to the Human Resources Department for the 2014-2015 school year. The letter went on to inform respondent that beginning August 13, 2014, he would serve as a “roving substitute teacher.”

38. Respondent grieved his assignment as a substitute. In a letter to Lovelace on July 20, 2014, respondent wrote:

I have served the District as a professional full-time educator whose job it had been to develop curriculum and implement it. An important part of that job is getting to know the students, assessing their performance and customizing my instruction to meet their needs. This is what I love to do and would be deprived of it if I was made a “roving” substitute. This will not only be a waste of my talents and credentials, but will hurt my reputation as a professional.

Respondent asked for an assignment teaching ESL or Spanish.

39. Respondent returned to work on August 13 as directed, and was assigned to Pioneer High School where he was used as a “push-in” to assist special education students, on an individual basis, in social studies and English. Respondent feels that he had a good relationship with the principal and that he had no problems in the assignment. There is no evidence to the contrary.

40. In its response to respondent’s grievance, the district agreed that respondent’s assignment to the substitute pool did not comply with the collective bargaining agreement. On Thursday, September 4, 2014, Dr. Lovelace wrote to respondent and informed him that effective Monday, September 8 at 7:30 a.m., he was assigned to the position of Post-Secondary SDC Teacher at Cory School. The abbreviation SDC means “Special Day Class.” The Post Secondary SDC program at Cory School is referred to as the “ACE” Program, which stands for Advanced Career Education.

41. The ACE Program is a community-based program that serves students 18 to 22 years of age with cognitive disabilities. ACE students are enrolled in an alternative graduation plan focused on a life skills curriculum. The stated goal of the program is to help students “acquire the knowledge and skills to help transition successfully into the real world through individualized planning, student participation, interagency collaboration and family involvement.” Students in ACE spend part of the week in the classroom, and part of the

¹ The letter is misdated 2013.

week in the community, visiting employers or working. Areas of instruction include functional academics; independent living skills; social skills; vocational skills; self-advocacy; mobility; recreation and leisure; and community access and connections. Each of the teachers in the ACE Program has about 12 students, and each of the teachers has at least one instructional aide (IA). The ACE Program is what the district calls a “noncategorical” program, meaning that students are assigned to classrooms without regard to the nature or severity of their disability. The ACE Program includes autistic and severely disabled students.

42. Respondent reported for work to the ACE program on September 8, as directed. Before he arrived at work that day, the district did not provide him with any training on the ACE Program or any information about the program – no curricula, no lesson plans, and no Individualized Educational Plans (IEP’s) for his student. The district did not provide him with any training for his new assignment. Respondent had worked as a resource specialist before, but he had never worked with the post-secondary population and had never worked in a community-based program like ACE. Respondent credibly testified that he had no idea what he was supposed to be doing or what he was supposed to teach. On his first day at ACE, Mary Ann Sy came to respondent’s classroom. Sy is the “workability coordinator” for the ACE Program. She gave respondent about a dozen medium-sized binders of about 200 pages each concerning the ACE Program. Sy discussed the ACE Program with respondent, but she had no formal role in transitioning respondent to his new classroom.

43. Over the next few days, confronted with a new assignment, a new population, new procedures, immediate demands for new IEP’s, and new case management software, respondent felt that, in his words, he was going “stir crazy.” He concluded that he was in over his head and that he needed individualized training for him to succeed in the assignment. Of immediate concern to respondent was the need to use a computer program called “Web IEP.” Teachers in the ACE Program are expected to use Web IEP to manage the IEP process, to schedule IEP meetings, and to prepare and complete IEP’s electronically. Respondent had no previous experience with Web IEP. He had not prepared IEP’s since the early 1990’s, when they were done by hand.

44. Respondent also came to the conclusion, after meeting with his class and attending a staff meeting with the other ACE teachers, that he was not properly credentialed to teach his class. In a letter to Lovelace dated September 12, 2013, respondent stated that his position at Cory “has me working outside the realm of my credential. Since starting at Cory I have been informed by the administration to not divulge my credentials to parents or in other words – to lie. [¶] The District has deliberately assigned me to this position for which I am unqualified and untrained for purposes only known to it.”

45. The district consulted with the Santa Clara County Office of Education on respondent’s claim that he was not properly credentialed to teach his class. The COE advised the district that an LH credential authorizes the holder to teach

handicapped children in a special class in which the primary disability is “specific learning disability,” “other health impairment,” or “mentally retarded (mild)” . . . in grades twelve and below . . . and in classes organized primarily for adults.

The COE told the district that “Post-secondary SDC will work.”

Jennifer Willis, Manager of Special Education for the district, forwarded the COE’s response to respondent on September 17 and informed him forcefully that he was properly credentialed for his assignment:

... [Y]our valid California credential documents that you have demonstrated satisfactory study in an authorized preparation program to complete the tasks associated with your assignment.
... [¶] ... [¶] I expect this email to have formally reminded you of your certification and training for this assignment. I am directing you to cease all public and written comments in which you state to staff, students, or community members that you are misassigned in your present position.

Lovelace reinforced Willis’s comments in an email to respondent on October 8:

I am deeply concerned about your on-going, written, documented refusal to accept responsibility for your students and your teaching assignment. . . . [Y]ou have been directed to stop misinforming parents of your erroneous misinterpretation of your certification as you purposefully attempt to cause worry, concern and mistrust among the community of the ACE program in order to manipulate the District into changing your teaching assignment.

46. Lovelace’s criticism is carried over into the Statement of Charges, which alleges that “[w]hile properly credentialed to teach in the assignment, Respondent claimed not to be credentialed for the assignment and expressed displeasure with the assignment to others.” In so doing, the Statement of Charges alleges, respondent exhibited unsatisfactory performance and unprofessional conduct.

47. In fact, respondent was not properly credentialed to teach the Post-Secondary SDC class to which he was assigned. Respondent’s LH credential did not – does not – authorize him to teach students with autism, and there were three students with autism in his class. On or about October 9, 2014, the district moved the three students to a different class, an event that was emotionally distressing to the students. At hearing, Willis and Elizabeth Doss, the district’s Director of Special Education, continued to insist that respondent was properly credentialed to teach his class at the ACE program. Confronted with evidence that

the district had moved autistic students out of respondent's class in October 2014, they ultimately conceded that respondent had been misassigned, just as respondent had contended.

48. In October 2014, the district provided individualized training to respondent on the Web IEP program. The district also reprimanded him for failing to timely schedule IEP meetings – a process that required familiarity with the Web IEP program.

49. The Statement of Charges alleges that respondent was absent from work without excuse on October 23, 2014. Respondent credibly testified that he called in to the substitute line that day. Substitutes do not always accept assignments to the ACE Program.

50. On October 30 or 31, 2014, respondent sought medical treatment from his primary care physician for a condition unrelated to his heart. Upon taking his vital signs, however, respondent's physician referred him to a cardiologist on an urgent basis. Respondent was kept off work by his physician until March 2, 2015.

51. Respondent was not evaluated during the short time he worked as a push-in substitute, or during the time that he taught in the ACE Program. The closest thing to a classroom observation occurred on various occasions when Willis looked into respondent's classroom. The instruction Willis observed on those occasions appeared to her to be appropriate.

A.C.'S SEIZURE

52. Respondent returned to work at the ACE Program on March 2.

53. On respondent's second day back, March 3, part of his class was off campus at a job site. He received a phone call from Sy, who informed him that one of his students, A.C., had had a seizure at the job site and that she would be coming back to class. Sy told respondent to call A.C.'s parents to tell them to come and pick her up. Sy called again and told respondent to "get out the care plan" and respondent asked, "What's a care plan?" Sy expressed surprise that respondent did not have A.C.'s care plan, and told him to call the nurse, Janet Darrow, to get it. Respondent called Darrow, who told him that she had "sent those out," but that she would send the care plan again. A.C.'s care plan stated, in effect, that the district should call 9-1-1 only if a seizure lasts longer than five minutes.

When A.C. arrived back in the classroom with one of the aides, respondent was at his desk, on the phone speaking Spanish to A.C.'s mother. Respondent's IA, Lynn Sandoval, was also in the room. A.C. sat by respondent's desk and told him that she wanted to go to the bathroom. Respondent tried to talk her out of it, and asked Sandoval not to let her go to the bathroom by herself. A.C. stood up, reached for the bathroom key and fell to the ground, shaking. Sandoval called out, "Get Juvy." Juvy Motas is a special education instructional aide, a credentialed nurse in the Philippines, and a certified nursing assistant in California; Motas was next door to respondent's classroom. She came immediately, put A.C. onto her

side, made sure her airway was clear, called for cushions to put under A.C.’s head, and told someone to time the seizure.

Respondent was at his desk, on the phone to Darrow, and checking his computer to see if he had received the care plan. At some point he either received it, or Darrow told him what it said, as Sandoval remembers respondent looking at his computer and saying “Call 9-1-1 if it is five minutes.” The seizure lasted less than a minute.

Respondent testified that the A.C.’s seizure was shocking, and that he had never seen anything like it before. He thinks it was shocking to everyone, even Motas, was trained to address it and who did a competent job.

54. Doss investigated the incident and concluded that respondent was at fault in several respects: for not reviewing A.C.’s care plan when it was emailed to him on November 14, 2014; for not providing physical assistance to A.C. when she had the seizure; and for not following protocol for a seizure. Doss feels that respondent’s conduct was “outrageous.” Willis is “extremely angry” when she thinks about respondent’s conduct, as she states that A.C. could have died.

55. The next day, respondent was placed on paid administrative leave. He has never returned to work for the district. The district issued the Statement of Charges three weeks later.

56. The Statement of Charges alleges that respondent’s failure to review A.C.’s care plan when it was sent to him, his failure to provide assistance to A.C., and his failure to follow protocol for a seizure is “incomprehensible, inexcusable, unprofessional, and evidences his complete disregard for his responsibility as a teacher and for the safety of students.”

57. The evidence does not support these allegations.

Respondent did not have A.C.’s care plan before he called School Nurse Darrow on March 3 and asked her for it. It is true that Darrow emailed the care plan to respondent on November 14, 2014, but it was emailed to respondent’s district email address and respondent was home and off work for medical reasons. Respondent did not check his work email while he was off work, and the district acknowledged at hearing that he had no obligation to do so. While respondent may have been under a duty to review those emails when he returned to work, A.C.’s seizure occurred on respondent’s second day back after being off work for four months. At hearing, Sy testified that she personally handed the care plan to respondent when she distributed the care plans in November; upon being reminded that respondent was off work in November, however, Sy retracted her claim.

The district asserts that applicant was trained on seizure protocol when he was directed to go to CPR training in September 2014, but that he was not interested in the

training. The evidence, however, failed to establish that seizure protocol was included in the CPR training.

It is true that respondent did not provide any physical assistance to A.C. when she had the seizure. His conduct under these circumstances, however, did not demonstrate indifference to her welfare. The best possible person – Motas, a trained medical professional – was called, responded immediately, and took control of the situation. There was nothing more that respondent could have done. Respondent was on the phone, with Darrow and with A.C.’s parents, and it is apparent that he was doing his best to obtain and relay A.C.’s care plan to Motas. Finally, respondent’s claim that he was in shock is credible: it would be a disturbing experience for anyone who had not experienced a similar event before, and who did not know what to do. Respondent was not indifferent to A.C.’s welfare.

Significance of respondent’s reassignments in 2014-2015

58. Respondent’s improvement plans and the February 2013 NUP/NUC directed respondent to take various steps intended to improve his effectiveness as a middle school classroom teacher in a general education program. Working as a push-in substitute, and teaching adult special education, are very different assignments, in which education is based on the individual needs of each student. Changing respondent’s assignment in September 2014 made it difficult for him to follow through on the improvement plans and the directives in the NUP/NUC, and created a barrier to remediation.

59. The evidence justifies a further inference: respondent’s assignment to the ACE Program was not intended to give him the opportunity to remediate his deficiencies, but intended to put him in a situation where he would fail and thereby facilitate his dismissal. Had the district wanted to give respondent the opportunity to remediate, it would have placed him in a setting that provided continuity from his teaching assignment in 2012-2013. Instead, it gave respondent a very different and very demanding assignment, one in which he had no prior training, no prior experience, and one for which he was not properly credentialed. In so doing, the district also did a disservice to its adult special education students, who need the district’s best teachers to receive the free and appropriate public education to which they are entitled. Respondent was not given a fair opportunity to remediate his deficiencies.

LEGAL CONCLUSIONS

1. The standard of proof applied in making the factual findings set forth above is preponderance of the evidence. (*San Diego Unified School District v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1150.)

Causes for dismissal asserted in the Statement of Charges

2. Education Code section 44932 sets forth eleven exclusive causes upon which a permanent certificated employee can be dismissed. The Statement of Charges identifies four causes upon which the district seeks to dismiss respondent: “unprofessional conduct” (subd. (a)(1)), “unsatisfactory performance” (subd. (a)(4)), “[e]vident unfitness for service” (subd. (a)(5)), and “[p]ersistent 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 . . . governing board of the school district . . .” (subd. (a)(7)).

Unsatisfactory performance/unprofessional conduct

3. The classroom observations of Maijala and Caldwell-Holden reveal that respondent’s classroom teaching was ineffective in many respects, and the evidence reveals many instances in which respondent’s conduct was unprofessional.

A teacher, however, cannot be terminated for unsatisfactory performance or unprofessional conduct unless he is first given the opportunity to remediate his deficiencies. (Ed. Code, § 44938, subd. (a) & (b).) Respondent was never given a fair opportunity to do that. After the NUP/NUC was issued in February 2013, respondent was ultimately given two assignments unrelated to the general education classroom setting in which his deficiencies had been identified. Respondent’s conduct prior to February 2013 does not establish that he would not have corrected his deficiencies, or that he could not have done so. Despite deficiencies that she noted, Maijala found respondent’s overall performance “effective” in 2012, and subsequent evaluations note progress and motivation to change in some areas.

It seems that respondent’s perceived indifference to A.C.’s seizure was a primary factor in bringing the Statement of Charges. The district announced its intent to dismiss respondent for unsatisfactory performance and unprofessional conduct in July 2013, but never did; it allowed him to return to work, in a sensitive and demanding position, and took no action to dismiss him until immediately after A.C.’s seizure. But, contrary to the district’s impressions, the evidence failed to establish that respondent had ever had seizure training; that he had ever received A.C.’s care plan before the day of her seizure, or that he was indifferent to her welfare.

Cause for dismissal for unsatisfactory performance unprofessional conduct was not established.

Evident unfitness for service

4. The term “evident unfitness for service” means

“clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” Unlike “unprofessional conduct,” “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.

(*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.)

5. As noted above, while respondent remained on an improvement plan until dismissal proceedings were brought, he accepted coaching and criticism from several sources and was able to improve his performance in some areas, though certainly not all. These facts are inconsistent with the contention that respondent's inadequacies are due to a fixed character trait. Although district alleges that respondent is unfit for service, the Statement of Charges does not identify the temperamental defect or character trait that the district believes respondent suffers from. The evidence does not support the conclusion that respondent's deficiencies are due to temperamental defects or inadequacies. Cause for dismissal for evident unfitness for service was not established.

Persistent violation of school rules

6. The district asserts that respondent should be dismissed for persistent violation of state and district rules, in that he failed to use appropriate instructional materials to implement the district's curriculum, misused instructional time, failed to take steps to improve his performance as an educator, and failed to provide proper "moral instruction and role modeling to students." These are the same factual allegations offered to support the charge of unsatisfactory performance and unprofessional conduct. Under Education Code section 44938, respondent is entitled to a fair opportunity to remediate his deficiencies. He cannot be deprived of that opportunity by dismissing him for the same conduct, alleged under a different legal theory. Cause for dismissal based on persistent violation of state and local rules was not established.

Discipline

7. Cause for dismissing respondent from employment with the San Jose Unified School District was not established. As the district only seeks respondent's dismissal, the commission has no authority to impose any lesser discipline. (Ed. Code, § 44944, subd. (c)(1)(A) & (c)(3).)

ORDER

The Statement of Charges against respondent Garrett Gordon is dismissed.

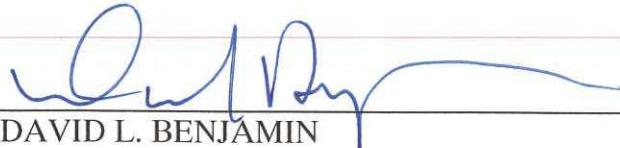
DATED: 1/22/16


HARRY PABLEY
Commission Member

DATED: 2/1/16


JODY TIMS
Commission Member

DATED: 2/5/16


DAVID L. BENJAMIN
Chair, Commission on Professional Competence
Administrative Law Judge
Office of Administrative Hearings