

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

In the Matter of the Statement of Charges
Against:

OAH No. 2017020208

CHRIS MICHELETTI,

A Permanent Certificated Employee,

Respondent.

DECISION

A Commission on Professional Competence convened to hear this matter on June 12-15, 2017, in San Jose, California. Commission members are Beth Kanaly, Coreen Aldapa, and Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, who served as the Chair of the Commission.

Ingrid A. Meyers, Attorney at Law, Dannis Woliver Kelley, represented complainant J. Dominic Bejarano, Assistant Superintendent, San Jose Unified School District.

Joseph A. Cisneros, Attorney at Law, Biegel Law Firm, represented respondent Chris Micheletti, who was present throughout the hearing.

The record closed and the matter was submitted for decision on June 15, 2017.¹

¹ On April 26, 2017, a protective order (which is part of the administrative record) was issued, per stipulation of the parties, designating all documents identifying students and/or their parents as confidential and outlining the circumstances under which the confidential materials may be disclosed.

FACTUAL FINDINGS

Jurisdiction and Allegations

1. Respondent Chris Micheletti has been a certificated employee of the San Jose Unified School District (District) since August 29, 2014, where he worked as a seventh grade co-ed physical education (PE) teacher at Herbert Hoover Middle School (Hoover). Respondent taught five class periods daily with up to 35 students in each class.

2. On December 9, 2016, J. Dominic Bejarano, Assistant Superintendent, Administration Services, on behalf of the District, served respondent with a Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension. Respondent filed a timely Notice of Defense and Request for Hearing, and this hearing followed.

3. The Statement of Charges seeks respondent's dismissal based upon alleged immoral conduct, dishonesty, evident unfitness for service, and 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 and/or by the governing board of the District. The Statement of Charges alleges that during the 2015-2016 and 2016-2017 school years, female students reported that respondent looked at them inappropriately, touched their bodies while pretending that it was an accident, and treated them differently from the male students. The Statement of Charges also alleges that respondent had erections while speaking to female students. In addition, the Statement of Charges alleges that respondent lied in his application for employment with the District and he was dishonest with District administrators on multiple occasions when asked about the location of his District-issued laptop when he was placed on administrative leave.²

4. Credibility determinations are at the heart of this case. Respondent denied the allegations made against him regarding his interactions with students. The claims made by the female students against respondent were established by the consistent and persuasive testimony of multiple female students, and a male student. In light of the solid, credible and persuasive evidence establishing that he treated female students differently from male students and that he had erections in front of female students, respondent's denial of any wrongdoing lacked credibility and candor. Accordingly, as set forth below, the conduct alleged and proven at the hearing established cause for respondent's dismissal as sought in the Statement of Charges.

² At hearing, the District withdrew the allegations in the Statement of Charges that the District discovered nude photographs on respondent's District-issued laptop and that respondent attempted to delete nude photographs from the laptop.

5. At all times relevant to the Statement of Charges, the following District policies or guidelines, which respondent received and was aware of, were in effect:

a. Code of Ethics: Pursuant to District Board Policy 4119.21, subdivision (a), the Board expects employees “to maintain the highest ethical standards, to follow district policies and regulations, and to abide by state and national laws. Employees conduct should enhance the integrity of the district and the goals of the education program.”

b. Duties of Personnel: Pursuant to District Board Policy 4119.3, the Board expects that “[a]ll employees shall fulfill the duties and responsibilities set forth in their job descriptions and shall comply with Board policies, administrative regulations, applicable employee agreements, and local, state and federal laws.”

c. Discrimination and Harassment: Pursuant to District Board Policies 0410, 5137, 5145.3, discrimination and harassment of students is prohibited, and the focus should be on creating “an orderly, caring and nondiscriminatory learning environment in which all students can feel comfortable and take pride in their school and their achievements.” The Board also “encourages staff to teach students the meaning of equality, human dignity, and mutual respect. . . .”

d. Sexual Harassment: Pursuant to District Board Policy 5145.7, harassment and discrimination in the school environment is specifically prohibited. “Sexual harassment includes, but is not limited to, unwelcome leering, sexual flirtations or propositions; unwelcome sexual slurs and leering; massaging, grabbing, fondling, stroking, or brushing the body; and sexual pictures, obscene gestures or computer-generated images of a sexual nature.”

Background

2014-2015 School Year

6. On May 7, 2015, Hoover principal Donald V. McCloskey received a complaint from a student (M.L.)³ that respondent had erections while teaching his PE class. This student named other students who also observed respondent have erections during class. Respondent was placed on paid administrative leave.

7. On May 8, 2015, respondent sent an email to McCloskey, stating:

Wow, why was this exactly? Is this related to the recent swimming issue from a few girls in 5th period, whose complaints are completely unfounded, which we discussed and basically was resolved a day later with each of the girls swimming having fun in the pool the very next day??? FYI that

³ The names of the minor students are confidential to protect their privacy.

was very embarrassing today and rather uncalled for having to be escorted [off] the premises like that. He even said in front of others both students and colleagues that I'm being put on paid leave and need to gather my belongings. This should have been done before 1st period or after 6th, that was ridiculous. What is this about exactly Don? I still have no idea why. Do I need to contact my attorney?

8. Officer R. Cardenas is a police officer with the San Jose Police Department (SJPD) and he has worked in the District for the past five years. Officer Cardenas was assigned to conduct the investigation into the allegations against respondent. He interviewed three students. The students told Officer Cardenas that respondent looked at female students while having an erection which he did not attempt to hide and this made the female students feel uncomfortable. A female student told Officer Cardenas that respondent made her feel uncomfortable when she wore her bathing suit during swimming class and she did not want to be in his class. A male student (S.M.) told Officer Cardenas that he observed respondent have erections four to five times per week and saw him staring at female students when they bent over to stretch. S.M. told Officer Cardenas that he did not have any problems with respondent, but he felt uncomfortable when these things happened. Officer Cardenas asked each student if he or she had personal issues with respondent. They each responded that they were not failing respondent's class and that they were not "out to get" respondent. Officer Cardenas found the students to be credible. Officer Cardenas did not interview respondent.

9. Officer Cardenas prepared a report and turned it over to the SJPD sexual assault investigation unit. The matter was not sent to the district attorney for prosecution because it was determined that respondent having erections in front of his female students was not a criminal offense.

10. On August 3, 2015, respondent was taken off paid administrative leave and he returned to his teaching assignment at Hoover for the 2015-2016 school year. The District did not reprimand respondent for any conduct. There were no complaints filed against respondent during the 2015-2016 school year. He passed his two-year probationary period.

11. The candid and credible testimony of witnesses McCloskey, Cardenas, S.M. and supporting documentary evidence, established the facts set forth in Factual Findings 6 through 10. It was established that respondent had erections while teaching his PE class during the 2014-2015 school year, as alleged in the Statement of Charges in paragraph 11.B.⁴

2016-2017 School Year

12. In the 2016-2017 school year, several seventh grade female students were in a support group for social/emotional issues with Karen Kochenburg, a student support

⁴ At hearing, the District noted an error in the Statement of Charges that there were two paragraphs numbered 11, and changed them to paragraphs 11A and 11B.

counselor, who has worked at Hoover for over nine years. During a group session, female students in respondent's 4th period PE class mentioned that respondent had erections during class. One student stated that she did not want to go to respondent's class because of his conduct. Kochenburg told the students to talk to the principal and their parents. Kochenburg also gave the students information about how to start a petition.

13. Female students (A.P., E.V., M.G., H.M.) created and circulated a petition and obtained approximately 100 signatures of female and male students. Not all of the signers were in respondent's PE class, but they signed the petition to support the female students who were in his class. The petition stated, in relevant part, that:

We the female students of Hoover have felt violated by Mr. Micheletti. He has looked at bodys (sic) inappropriately and has touched girls bodies pretending to be on accident. We have all noticed that he treats us girls differently than boys. We believe Mr. Micheletti has gotten away with a lot and had had no consequences. We believe Mr. Micheletti should face some consequences for his actions. He also has gotten erections while talking to female students.

14. In November 2016, the students gave the petition to principal McCloskey, who initiated an investigation. First, he conducted a group meeting with the female students who created the petition. They told McCloskey that respondent treated the female students differently, that he had erections while teaching the class and that he looked inappropriately at the female students. Next, McCloskey interviewed A.P., E.V., and H.M. separately and asked each of them the same questions. Again, they confirmed respondent's conduct in class. Each indicated that respondent had not touched them inappropriately. McCloskey also spoke to Kochenburg.

15. During his interviews, McCloskey found A.P. to be credible. She had never made any other claims against respondent. She also had no discipline referrals. McCloskey found E.V. to be credible and she was not a problem student. McCloskey also found H.M. to be credible, although she had been in trouble before and had a lot of issues. However, H.M. had never made prior complaints against any adult at the school. Overall, McCloskey had no reason to believe that they were making up the allegations. McCloskey believed the female students and that the incidents had occurred.

16. McCloskey also randomly interviewed every ninth student that signed the petition. These students happened not to be in respondent's PE class, but had signed the petition in support of the female students. McCloskey notified Assistant Superintendent Bejarano about the petition. Bejarano interviewed three additional students who corroborated what was stated in the petition, except the allegation that respondent had inappropriately touched female students.

17. The candid and credible testimony of witnesses McCloskey, Kochenburg, Bejarano, A.P., H.M., E.V., and supporting documentary evidence established the facts set forth in Factual Findings 12 through 16. It was established that respondent looked at female students inappropriately, treated female students differently, and had erections while teaching his PE class during the 2016-2017 school year, as alleged in the Statement of Charges, paragraphs 12 through 16.

18. The evidence was insufficient to establish that respondent touched female students' bodies while pretending it was an accident, as alleged in the Statement of Charges.

Dishonesty Regarding Location of Respondent's District-Issued Laptop

19. On November 7, 2016, respondent attended a meeting with Bejarano and was placed on administrative leave. Bejarano asked respondent to turn in his District-issued laptop. Respondent said that the laptop was in the PE office. Back at Hoover, when McCloskey went to retrieve the laptop, it was not in the PE office.

20. On November 15, 2016, Bejarano and Assistant Superintendent Stephen McMahon met with respondent and his union representative, Debbie Baker, to discuss the allegations. Respondent denied the allegations. He was informed that he would be dismissed. Respondent stated that he did not know where his laptop was, but that it might be in his vehicle. When respondent went to retrieve the laptop, it was not in his vehicle.

21. On November 16, 2016, District Chief of Police Jesse Toscano went to respondent's residence to retrieve the laptop. Initially, respondent told Toscano that he did not have the laptop. When Toscano told respondent that he was a peace officer and the District's technology department had "pinged" the laptop at his residence, respondent stated that he would get the laptop from his home office. Respondent asked Toscano to wait while he transferred personal data from the laptop onto a hard drive. Toscano allowed him to do so. Toscano turned the laptop over to District Technology Director Emalle McGuinness. Toscano prepared a statement regarding his interactions with respondent.

22. The candid and credible testimony of witnesses Bejarano, McCloskey, Toscano, McGuinness, and supporting documentary evidence, established the facts set forth in Factual Findings 19 through 21.

Dishonesty on Respondent's Employment Application

23. Bejarano oversees the District's human resources department. However, he did not participate in the initial hiring of respondent. During his interviews of the students regarding the petition, a male student told Bejarano that he had heard a rumor about respondent when he worked at another school. In response, Bejarano reviewed respondent's personnel file.

24. Bejarano determined that on July 30, 2014, respondent submitted a District Certificated Employment Application (application) to the District. The application had a question, "Have you ever resigned from any teaching/administrative position." Respondent marked the box, "No." For the question, "have you ever been dismissed, or asked to resign, from any teaching/administrative position" respondent marked the box, "No." For the question, "have you ever been non-reelected," respondent marked the box, "No." By signing the application, respondent certified that all statements made in the application were true and correct. The application specifically stated that "any omission or falsely answered statement made by me on this application, or any supplement to it will be sufficient grounds for failure to employ or for my discharge should I become employed with the district/County Office."

25. According to respondent's resume, he taught science at Brier Elementary in 2011-2012. He was a PE teacher at Shirakawa Elementary in 2009-2010, and St. Christopher School in 2008-2009. He worked as a substitute teacher between 2004-2007 for the District, the Oak Grove School District and the Diocese of San Jose. He was also a youth soccer coach/trainer from 2000 to 2010.

26. Bejarano compared respondent's resume with his application and found discrepancies. Bejarano found that respondent had resigned (or was released from his employment contract) at Fremont Unified in February 2012. On his application, respondent indicated that he had worked 12 months for the Fremont Unified School District from 2011 to 2012, as a science teacher. But, according to the employment verification submitted by the employer, respondent did not work a total of 12 months and Fremont Unified indicated that they would not employ respondent again. Also, there was a discrepancy for the dates of his employment with the Diocese of San Jose, where on his application he wrote that he worked 12 months from 2009 to 2010. However, the employment verification from the Diocese of San Jose indicated that respondent did not work a full year. Also, his application indicated that he worked for the Orchard School District for 24 months from 2012 to 2014. However, the employment verification only confirmed that he worked during the 2013-2014 school year. Bejarano concluded that respondent was dishonest on his application.

27. The candid and credible testimony of witness Bejarano, and supporting documentary evidence, established the facts set forth in Factual Findings 23 through 26.

Additional Evidence

28. McCloskey has been the principal at Hoover for four years and an employee with the District for 24 years. He saw respondent daily wear either sweat pants or above the knee athletic shorts. McCloskey evaluated respondent as part of the first two years of full evaluation cycles in 2014-2015 and 2015-2016. McCloskey found that respondent did not meet performance standards because he thought respondent could improve his relationship or interaction with students. McCloskey also felt that respondent had a harsh tone, and as reported by other staff and students, respondent could lose his temper. Also, respondent "rubbed people the wrong way" because he protected his PE class and he did not see the broader aspects of school. For example, if a student was pulled out of his class for speech

therapy or to see a counselor, respondent became annoyed because he did not believe that a student should miss his class. McCloskey was aware that Kochenburg had a dispute with respondent regarding scheduling counseling sessions during PE class time. During this time period, McCloskey heard comments from male and female students that respondent was being unfair. The female students felt that they were being picked on in class. McCloskey did observe respondent treat female students differently where he would have them run separately or play different games than the male students. He discussed this with respondent as there was no reason to separate the female students from the male students. McCloskey expected improvement from respondent. Although he completed the performance reviews, McCloskey had no input on making respondent a permanent teacher.

29. McCloskey had no input in respondent's return to the classroom for the 2015-2016 school year. He had concerns about respondent's return and whether rumors would spread causing difficulty with his success with students. If the allegations against respondent were untrue, McCloskey did not want respondent labeled incorrectly. McCloskey did not hear any rumors about respondent during the 2015-2016 school year. McCloskey states that prior to receiving the petition in November 2016, no student approached him with complaints about respondent.

30. McCloskey states that teachers have a responsibility to prepare students for high school. In doing so, middle school teachers must show students how to contribute to society. McCloskey expects teachers to be respectful to students.

31. McCloskey is concerned with respondent returning to Hoover if his dismissal is not upheld because this recurring conduct occurred in two separate school years involving different students. McCloskey feels that he needs to protect his students and if respondent returns to Hoover, it would not be in the students' best interest.

32. Bejarano testified that he can no longer trust respondent around students based on his being dishonest about the location of his laptop on two occasions, the recurring accusations involving inappropriate conduct with female students, and information obtained from respondent's former employers that differed from what he provided to the District prior to his employment.

Respondent's Evidence

33. Respondent received three single subject teaching credentials in history/social science, PE, and general science from National Hispanic University in 2007. He graduated from San Diego State University with a degree in anthropology in 2004.

34. Respondent denies all of the students' allegations. Respondent states that he wore regular PE attire and sunglasses because of the glare of the sun off the pool and the black top outside. Respondent described the two-week swimming class. According to respondent, he monitored the students and walked around the edge of the pool providing instruction on technique and making sure there was no negative behavior by the students.

Respondent states that he was not checking out the bodies of female students while they were swimming. Respondent also described running laps as part of the curriculum. Respondent would stand where he could see the students while they ran and write down their lap times. He states that he did not have an erection while students ran and he never looked at female students in a sexual manner while they ran or exercised. Respondent states that he is not attracted to females under the age of 18.

35. Respondent opined about the students who testified at hearing.

a. Respondent described S.M. as a good student who participated in class and received good grades. Respondent believes that S.M. was the boyfriend of the student that made the allegation against him in the 2014-2015 school year.

b. Respondent described E.V. as a quiet, shy, and good student. He did not have any issues with her. Respondent states that he was not mean to her and he never looked at her in a sexual way.

c. Respondent described H.M. as nice, but different and she kept to herself; she refused to participate in class sometimes. He said that he had no personal issues with her. Respondent states that he never spent five minutes staring at H.M. or other female students.

d. Respondent described A.P. as introverted, quiet, shy, and polite. He states that he had no issues with her. He did not believe that she liked PE. Respondent states that “I don’t think that I ever made the comment ‘shake that money maker,’” which A.P. said he did. Respondent stated that he never looked at A.P. inappropriately.

36. Respondent stated that he first became aware of the rumor in Spring 2015 because it was on social media. He found this very embarrassing. Respondent acknowledged that it is unusual for a PE teacher to have an erection around female students.

37. Regarding the allegation that he was dishonest about the location of his District-issued laptop, respondent stated that when he was called to the District office and placed on paid administrative leave that they did not give him a reason. He stated that he asked for a reason three times. He believed that the District handled the matter in an extremely unprofessional manner. Respondent stated that he was emotionally distraught and that he did “nothing wrong or illegal whatsoever.” So, he was not focused and said that his laptop “might” be in the PE office. Two weeks later, respondent was told that they had completed their investigation (although they never questioned respondent), and they still did not give him a specific reason for why there were dismissing him. They told him that his laptop was not in the PE office, as he said. Respondent said that “maybe” he left it in his car; although, it was not there.

Respondent stated that when Officer Toscano came to his home to retrieve the laptop, he told Officer Toscano that he was “not sure” where it was. Then, Officer Toscano said it was “pinged” at his residence. Respondent stated that it was at that point that he “realized that the laptop must be in [his] home office through the process of elimination.” Respondent asked to transfer personal files to a hard drive, did so, and gave the laptop to Officer Toscano.

38. Regarding the allegation that respondent treated female students different than male students, he stated that he never discriminated against females students. Respondent stated that he “may have been nicer to the girls.” He stated that he always gave the students a choice to do co-ed or mixed games. Sometimes the students decided to play separately when playing an aggressive game; some girls would say that they did not want to play with the boys. Respondent said, “I was softer on the girls, if anything, I have a tendency to run boys harder than the girls.” Respondent stated that he did not make the female students run more than the males and only when a student misbehaved was the consequence to run more laps.

39. Respondent addressed the allegation that he lied on his application. Respondent stated that he had his interview at same time that he completed the application and he had to complete it in a rush. He admitted that he made mistakes on the application. He attributed this to not having his resume with him at the interview. He stated that he should have put less than 12 months for his experience with Fremont. He stated that he was teaching six science classes without preparation time and ended up working until midnight; it was rigorous and demanding, with no support from the principal. He was given the option to resign in February 2012, after he was told that Fremont would be non-reelecting him. Respondent stated that during the interview, he informed the panel of this information. This was not corroborated at hearing.

Respondent’s Witnesses at Hearing

40. Aaron Lilly is a PE teacher at Hoover, who was hired a year before respondent. Lilly states that he never saw respondent have an erection. Lilly never saw respondent treat female students harder than the males and he never saw respondent look at female students inappropriately. Lilly admits that he was not with respondent all the time. Lilly was not aware of any of the rumors about respondent. Lilly states that as a male PE teacher himself, it is unusual to have erections around female students. Also, he believes that it is not appropriate to have an erection in class and it is not appropriate to treat students differently.

41. Kristy Cross is a consulting teacher and probationary supervisor and evaluator of new teachers. Cross monitors a teacher’s progress and effectiveness in the classroom before that teacher can become a permanent employee. Cross was respondent’s evaluator during the 2015-2016 school year and observed him with the students. Cross never saw respondent get an erection, did not observe him treat males differently from females, and did not observe him look inappropriately at female students. Cross admitted that respondent had

a reason to be on his best behavior though when she was present. Cross found that respondent met the performance standards.

42. Mario Galicia has been a PE teacher at Hoover for over 20 years. Galicia never saw respondent have an erection, never saw him treat female students differently, never saw him stare at female students; and never saw him behave inappropriately with female students. Galicia believes that it is inappropriate for a male PE teacher to get an erection in class, to treat students differently, and to look inappropriately at female students. Galicia was not in a position to directly observe respondent teach his class from Galicia's location; he taught 6th grade PE. Galicia is concerned about the petition filed against respondent because students could start a petition on anyone. However, Galicia acknowledges that the female students should have filed a petition if the allegations were true.

43. Respondent has no prior history of disciplinary action taken by the District. Also, the District did not reprimand him in 2015, so according to respondent, the District must have believed that he was a valuable employee despite the rumors.

44. Respondent has a recommendation letter written by McCloskey when he was the principal at Bret Harte Middle School. McCloskey did not recall writing the recommendation letter, but he states that it is possible that he wrote it if respondent worked as a student teacher as part of a credentialing program.

Respondent's Contentions

45. Respondent states that the District's case is filled with rumor and innuendos. He points to inconsistencies in the testimony of the students. Respondent believes that Kochenburg encouraged the students to create the petition because of the animosity between respondent and Kochenburg. He contends that McCloskey is a biased district employee and conducted a flawed investigation because he started the investigation with a group interview; he asked leading questions that suggested the answers; and he did not interview other students that respondent had taught. Respondent's contentions have been considered and are found to be without merit, as established above and in the credibility findings below.

Credibility Findings

46. The students' statements throughout the District's investigations and their testimony have been overall consistent that respondent had erections during PE class. It is important to emphasize that the students generally did not harbor any ill will against respondent which could be perceived to bias or taint their statements or testimony. The students' testimony generally was candid, frank, and honest, and their demeanors evidenced sincerity and truthfulness. Of course some of the students' testimony was slightly inconsistent with prior statements. However, this is not unexpected of middle school students and due to the length of time that has passed since the incidents occurred. In

totality, the students' testimony was credible and consistent with the facts that were discovered during the District's investigation.

47. S.M. credibly testified that he had no issues with respondent personally. Respondent corroborated that S.M. had no behavior issues in the classroom. S.M. credibly testified that he personally saw respondent have erections in class and respondent would use his hands or arm to cover his erection. S.M. stated that he "felt awkward," but he did not report it to anyone because S.M. is not the type of person to tell other people.

48. E.V. credibly testified that she was aware of the prior allegations against respondent when she was in the 6th grade. He would look at the female students running and stand with his hands on his hips with an erection that "popped out of his shorts" and not attempt to cover it up. She described another time when they were doing squats, and he stood behind them and had an erection. E.V. said that she would try and stand in a way that he could not see her. E.V. states that she felt weird when respondent had an erection, "Like why in the class." She stated that respondent would look at female students "butts and boobs" which made her feel uncomfortable. Although he wore sunglasses, she could still see his eyes. She stated that no one told them to write the petition and they needed to do something as they felt violated because it was not right for respondent to have erections during class. E.V. stated that she has no reason to make this up.

49. H.M. credibly testified that she observed respondent have an erection two times in the class through his sweat pants as he stood near the edge of the pool. She would ask to go to the office or see the counselor and make an excuse to get out of class because she felt uncomfortable. H.M. stated that she observed respondent look at girls inappropriately during the swimming class as he looked at their bodies for a long time. H.M. also testified that respondent would grab female students around the waist when doing the pushups. She stated that she did not report respondent to the principal because she felt that nothing would be done. She stated that she has no reason to make this up. As corroborated by respondent, she had no issues with respondent.

50. A.P. was only in respondent's PE class for part of the year before she switched to a dance class. Prior to being in his class, she had heard rumors that respondent was a "perv," but she did not believe the rumors. A.P. observed respondent have an erection while wearing sweat pants with his hands in his pockets as he stood near the pool. On one or two occasions, A.P. saw respondent looking at female student's "breasts and butts" during swimming class which made her feel uncomfortable. She also heard him on one occasion make a remark, "shake that money maker," as they were running which made her feel uncomfortable. She states that she has no reason to make this up.

51. Respondent consistently denied the allegations in the Statement of Charges. He categorically denies that he ever had an erection during class. Respondent's categorical denial of all charges, in light of the credible testimony and statements of multiple students from his PE class, is simply not believable. The evidence clearly established that respondent

looked at female students inappropriately, he treated female students differently from the male students, and he had erections in front of female students.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proof in this matter and the standard of proof in a teacher dismissal proceeding is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.) Proof by a preponderance of the evidence requires a showing that it is more likely than not to be true. In other words, the evidence is more convincing than that which is offered in opposition. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. A permanent employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subds. (c)(1)-(3).) The Commission's decision is deemed to be the final decision of the District's governing board. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 331.) "The Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*Id.* at pp. 343-344.) Thus, even where cause for dismissal has been established, a 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.)

3. The causes alleged in this matter are immoral conduct, dishonesty, evident unfitness for service, and persistent violation of the school laws of the state. As set forth below, dismissal is appropriate in the instant case on each of the grounds alleged. Each ground provides a separate and independent basis for dismissal.

Determination of Charges

I. Immoral Conduct

4. Cause exists to dismiss respondent for immoral conduct pursuant to Education Code⁵ section 44932, subdivision (a)(1), by reason of Factual Findings 3 through 32, and 46-51.

⁵ All further statutory references are to the Education Code unless noted otherwise.

5. “Immoral conduct,” pursuant to sections 44932, subdivision (a)(1), and 44939, has been defined to mean conduct that is 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. It is sometimes used as synonymous with “dishonesty” or a high degree of unfairness. (*Bd. of Education of the San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Immoral conduct can be construed according to common usage. “The term ‘immoral’ has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes 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.” (*Palo Verde Unified School Dist. of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

6. The Commission 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, here the Commission, 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.) And, the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (*Kearl v. Bd. of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

7. A preponderance of the evidence established that respondent’s conduct as alleged in paragraphs 4 through 17 of the Statement of Charges constituted immoral conduct. Respondent lied on his employment application. Respondent had erections in front of female students during PE class and looked at female students inappropriately. Statements and testimony by his former students were particularly persuasive regarding these allegations. Respondent’s categorical denial of these incidents was not supported by the evidence. Had respondent admitted this conduct and offered justification for his actions, i.e., that he suffered from a medical condition, respondent actions, although in violation of the District’s policies, may have been explainable or understood. However, his steadfast denial of the incidents, coupled with his dishonesty about his application and the location of his laptop, suggest a nefarious intent by respondent.

8. Of significance and particularly disturbing is that evidence establishing that respondent committed his misconduct with only the female students in his class. On these facts, the preponderance of the evidence established that respondent engaged in immoral conduct with female students in his seventh grade class during the 2014-2015 and 2016-2017 school years.

II. Dishonesty

9. Cause exists to dismiss respondent for dishonesty pursuant to section 44932, subdivision (a)(4), by reason of Factual Findings 19 through 32, and 46-51.

10. In the context of employee discipline, California courts have concluded that the term “dishonesty” connotes a “disposition to deceive,” an “absence of integrity; a disposition to cheat, deceive, or defraud.” (*Gee v. State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718-719, quoting from *Midway School Dist. v. Griffith* (1946) 29 Cal.2d 13, 18 and *Hogg v. Real Estate Commissioner* (1942) 54 Cal.App.2d 712, 717.)

11. A preponderance of the evidence established that respondent committed acts of dishonesty pursuant to section 44932, subdivision (a)(4), as alleged in paragraphs 4 through 20 of the Statement of Charges. In addition, respondent’s dishonesty to the district regarding his misconduct was aggravated by his dishonest testimony at hearing.

III. Evident Unfitness For Service

12. Cause exists to dismiss respondent for evident unfitness for service pursuant to section 44932, subdivision (a)(6), by reason of Factual Findings 3 through 32, and 46-51.

13. Section 44932, subdivision (a)(6), provides that the District may suspend or dismiss a permanent employee for “evident unfitness for service.” “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445.) Evident unfitness for services requires that unfitness be attributable to a defect in temperament which “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Ibid.*)

14. Here, respondent engaged in multiple acts of misconduct, as alleged in paragraphs 4 through 23 of the Statement of Charges. The evidence at hearing established that respondent is evidently unfit for service. Respondent lied on his employment application and about the location of his laptop. Respondent had erections in front of female students during PE class; he looked at female students inappropriately; and he treated the female students differently than the male students. Again, his dishonesty at hearing about his misconduct substantiates that he is unfit for service as a certificated employee.

15. Based on these multiple incidents of misconduct, the District has established that respondent suffers from a temperamental defect and inadequacy that connotes a fixed character trait that is presumed not remedial. Accordingly, the District established by a preponderance of the evidence that respondent is evidently unfit for service.

IV. Application of The *Morrison* Factors

16. To terminate a teacher on grounds of immoral conduct, dishonesty, or evident unfitness for service, it must also be established that the conduct renders the teacher unfit to teach. (*Morrison v. State Bd. of Education* (1969) 1 Cal.3d 214, 229-230.) The *Morrison* analysis does not apply to causes for dismissal for unsatisfactory performance or persistent violation of school rules, laws or policies because such causes of action, by definition, have a direct nexus to teaching. (*Id.*, at pp. 227-230.) “[A]n individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.” (*Id.*, at p. 235.) Thus, a determination of unfitness requires an analysis based on criteria set forth in *Morrison*.

17. In *Morrison*, the Supreme Court held that the determination of whether a person is fit to teach must be based on an objective and analytical approach, consisting of a review of the teacher’s conduct and an assessment of a variety of specific factors. “In determining whether the teacher’s conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.” (*Morrison v. State Bd. of Education*, *supra*, 1 Cal.3d at pp. 227-230.) In reaching a conclusion that grounds exist to dismiss a certificated employee on the basis of evident unfitness for service, not all *Morrison* factors need be examined, only the pertinent ones. (*Governing Bd. of ABC School Dist. v. Haar* (1994) 28 Cal.App.4th 369, 384.) Moreover the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence*, *supra*, 2 Cal.App.4th at p. 1457.)

18. In this case, application of the *Morrison* factors demonstrate that respondent engaged in conduct that is related to teaching and renders him unfit to teach as follows:

(a) The likelihood that the conduct adversely affected students or fellow teachers: Respondent’s conduct adversely students who no longer wanted to be in respondent’s PE class. Several students expressed that they were made uncomfortable by respondent’s conduct. Ultimately, respondent’s conduct made the affected students feel that their only recourse was to circulate a petition so that the conduct would cease.

(b) The degree of such adversity anticipated: Some female students did not want to attend respondent's PE class because of his inappropriate conduct. Again, students believed that their only recourse was to circulate a petition about respondent's inappropriate conduct. Also, the school administrators no longer trust respondent.

(c) The proximity or remoteness in time of the conduct: Respondent's conduct occurred in the 2014-2015 and 2016-2017 school years. Thus, it is not remote in time within the meaning of *Morrison*.

(d) The type of teaching credential held by the party involved: Respondent has single subject teaching credentials in PE, history/social science, and general science which places him in elementary or middle school classrooms with young students that would be at risk for the inappropriate behaviors that have been established in this case. In addition, his PE credential gives him access to females in bathing suits and gym clothes, who are at varying stages of maturity.

(e) The extenuating or aggravating circumstances, if any, surrounding the conduct: Respondent's categorical denial of all allegations is of particular concern. Respondent also engaged in conduct in which he had erections in front of vulnerable and impressionable pre-teen female students. In aggravation of his misconduct, respondent's testimony at hearing lacked credibility and candor.

(f) The praiseworthiness or blameworthiness of the motives resulting in the conduct: Respondent attempted to establish a motive for the students' allegations by stating that the counselor instructed them to create the petition in 2016. However, this motive was not substantiated. Also, it does not address his immoral conduct in 2015. Respondent's conduct is blameworthy.

(g) The likelihood of the recurrence of the questioned conduct: It is highly likely that respondent would again engage in inappropriate activity in the future. Respondent accepted very little responsibility for his conduct, categorically denying the charges.

(h) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers: This factor is not at issue. There is no constitutional right that would be adversely affected by the District imposing discipline for respondent's misconduct.

19. All factual findings and legal conclusions have been considered in reaching the determination that respondent is unfit to teach under the *Morrison* factors, and that dismissal of respondent from his position as a certificated teacher with the District is warranted pursuant to section 44932, for immoral conduct, evident unfitness for service and dishonesty.

V. Persistent Violation Or Refusal To Obey School Laws Or Regulations

20. Cause exists to dismiss respondent for persistent violation of or refusal to obey school laws or regulations pursuant to section 44932, subdivision (a)(8), by reason of Factual Findings 3 through 32 and 46-51.

21. Persistent violation of or a refusal to obey school laws or regulations under section 44932, subdivision (a)(8), requires that the violation be either “persistent” or “motivated by an attitude of continuous insubordination.” (*Governing Bd. of 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.) Cases interpreting section 44932, subdivision (a)(8), require a “showing of intentional and continual refusal to cooperate.” (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.) Cause for discipline may be based on the violation of school rules. (*Id.*, at pp. 1180-1181.)

22. Here, respondent was aware of the school policies prohibiting engaging in inappropriate conduct with students. These policies include District Board Policy 4119.21 (a), where the Board expects employees “to maintain the highest ethical standards, to follow district policies and regulations, and to abide by state and national laws. Employees conduct should enhance the integrity of the district and the goals of the education program”; District Board Policy 4119.3, where the Board expects that “[a]ll employees shall fulfill the duties and responsibilities set forth in their job descriptions and shall comply with Board policies, administrative regulations, applicable employee agreements, and local, state and federal laws;” District Board Policies 0410, 5137, 5145.3, which prohibits the discrimination and harassment of students; and District Board Policy 5145.7, which prohibits harassment and discrimination in the school environment.

Respondent’s conduct, as established by the preponderance of evidence in this case, violated these District policies. It was established that respondent committed acts demonstrating a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the governance of the public schools by the State Board of Education or by the governing board of the District employing him pursuant to section 44932, subdivision (a)(8), by reason of, among other things, his violations of the District’s policies regarding sexual harassment. Such violations were repeated and occurred over a protracted period of time. (See *Governing Bd. of the Oakdale Union School Dist.*, *supra*, 28 Cal.App.3d 77, 82.)

Disposition

23. Respondent’s misconduct with his seventh grade female students is a serious concern for the District. Respondent’s students were adversely impacted by his conduct, ultimately requiring one student to avoid going to his PE class altogether. Although respondent had no prior history of disciplinary action prior to the charges alleged in this

proceeding, respondent's conduct clearly shows that he is unfit to continue teaching with the District. Under these circumstances respondent's dismissal from the District is the appropriate disposition in this case.

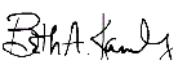
24. The Commission on Professional Competence concludes that cause exists to dismiss respondent based on immoral conduct, dishonesty, evident unfitness for service, and persistent violation of or refusal to obey school laws or regulations. The Commission reached this decision on a unanimous vote.

ORDER

Respondent Chris Micheletti is dismissed from his position as a permanent certificated employee of the San Jose Unified School District due to immoral conduct, dishonesty, evident unfitness for service, and a persistent violation of and refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district, pursuant to Legal Conclusions 4, 9, 12, and 20, jointly and individually.

DATED: September 18, 2017 _____

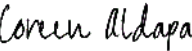
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BETH KANALY
Commission Member

DATED: September 18, 2017 _____

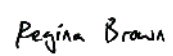
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COREEN ALDAPA
Commission Member

DATED: September 18, 2017 _____

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REGINA BROWN
Chair, Commission on Professional Competence
Administrative Law Judge