

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Dismissal of:

WILFREDO CORNEJO (EN 597426),

A Permanent Certificated Employee,

Respondent.

OAH No. 2014100389

**DECISION**

On March 2, 3, 4 and 9, 2015, the Commission on Professional Competence (Commission) heard this matter in Los Angeles, California. The Commission consisted of Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, Bonnie Macdonald, and Luciano Ortiz.

L. Carlos Villegas, Attorney at Law, Fagen Friedman & Fulfrost, LLP, represented complainant, Justo H. Avila, Chief Human Resources Officer, Los Angeles Unified School District (LAUSD or District).

Rosemary O. Ward, Attorney at Law, and Richard Schwab, Attorney at Law, Trygstad, Schwab & Trygstad, represented respondent Wilfredo Cornejo (respondent), a permanent certificated employee of the District, who was present throughout the hearing.

Oral and documentary evidence was received and the record was closed on March 9, 2015. On March 10, 2015, the Commission reconvened to deliberate regarding the decision in this case. On March 13, 2015, the record was reopened to provide notice of a March 10, 2015, ex parte communication to one of the panel members. Consequently, following notice and an opportunity for the opposing party to respond to the Notice of Ex parte Communication, the record was closed on March 23, 2015, and the matter was submitted for decision. The Commission finds as follows:

**FACTUAL FINDINGS**

*Jurisdiction and Allegations*

1. On May 2, 2014, complainant made and filed the Statement of Charges, and on October 2, 2014, respondent submitted a request for hearing to the District. On October

14, 2014, complainant made and filed the Accusation in his official capacity, and on October 24, 2014, respondent submitted a second request for hearing and notice of defense. All jurisdictional requirements were met to proceed to hearing before the Commission.<sup>1</sup>

2. The District alleges that respondent is subject to dismissal from his employment as a permanent certificated employee of the District for immoral conduct, in violation of Education Code sections 44932, subdivision (a)(1), and 44939<sup>2</sup>; evident unfitness for service, in violation of section 44932, subdivision (a)(5)<sup>3</sup>; and persistent violation or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the Governing Board of the school district, in violation of section 44932, subdivision (a)(7)<sup>4</sup>.

3. The District's Accusation and Statement of Charges alleged the following misconduct as a basis for dismissal:

(1) From about September 13, 2011 to approximately December 31, 2011, respondent on multiple occasions placed his hands in the pants pockets of seven-year-old student M [REDACTED] S. and touched M [REDACTED] A.'s "private parts."

(2) From about September 13, 2011, to June 30, 2012, respondent on multiple occasions placed his hands in the pants pockets of seven-year-old student K [REDACTED] A., and touched K [REDACTED] A.'s genitals.

(3) From about September 13, 2011, to June 2012, respondent on multiple occasions placed his hands under M [REDACTED] S.'s armpits, lifted him off the ground, and placed him in a chair in front of the computer.

(4) From about September 13, 2011, to June 2012, respondent on multiple occasions placed his hands under K [REDACTED] G.'s, armpits, lifted him off the ground, and placed him in a chair in front of the computer.

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<sup>1</sup> The District's Accusation and Statement of Charges indicate that on December 5, 2013, the District issued respondent a Notice of Unsatisfactory Service/Acts and a Notice of Suspension (15 Days) for the alleged misconduct. Although the District did not offer these documents into evidence, respondent did dispute their accuracy.

<sup>2</sup> All further statutory references shall be to the Education Code unless otherwise specified.

<sup>3</sup> Effective January 1, 2015, section 44932, subdivision (a)(5), was changed to section 44932, subdivision (a)(6).

<sup>4</sup> Effective January 1, 2015, section 44932, subdivision (a)(7), was changed to section 44932, subdivision (a)(8).

(5) From about September 13, 2011, to June 2012, respondent on multiple occasions placed his hands under M [REDACTED] S.'s armpits, lifted him off the ground, and placed him in a corner to sit down.

(6) From about September 13, 2011, to June 2012, respondent on multiple occasions placed his hands on M [REDACTED] S.'s shoulders.

(7) From August 14, 2012, to about February 18, 2013, respondent on multiple occasions massaged the shoulders of seven-year-old student J [REDACTED] S.

### *Background*

4. Respondent was hired as a kindergarten teacher by the District at Dayton Heights Elementary School in approximately 1998. In or about 2010, he was hired at 10th Street Elementary School (10th Street) where he taught second grade. Respondent was a second grade teacher at 10th Street during the 2011-2012, and 2012-2013 school years, the relevant time period in the District's Accusation and Statement of Charges. Linda K. Ariyasu (Ariyasu) was the principal at 10th Street during the 2011-2012 school year. Juan Alfayate (Alfayate) was hired as the principal at 10th Street on February 1, 2013, and held that position until September 2014.

5. On May 5, 2011, Ariyasu gave respondent an Evaluation of Instructional Personnel Evaluation (STULL Evaluation) for the 2010-2011 school year. The STULL Evaluation indicated that respondent "Meets Standard Performance" and commended respondent for "providing a rigorous academic program that challenges each student in his class to achieve his/her potential." (Exh. P.)

6. At all times relevant to the Accusation and Statement of Charges the following District policies or guidelines were in effect: the LAUSD Code of Conduct with Students (CCS) (effective July 15, 2008); the LAUSD Child Abuse and Neglect Reporting Requirements Policy Bulletin (Bul-1347.2, dated July 1, 2011); the LAUSD Employee Code of Ethics (ECE) (adopted September 1998; Revised December 2000 and February 2003); the LAUSD Sexual Harassment Policy Bulletin (Bul-3349.0, dated November 29, 2006); and the LAUSD Sexual Harassment Policy (effective June 2006) and the LAUSD Board of Education Resolution to Enforce the Respectful Treatment of All Persons (October 1988). Respondent was familiar with, and received annual training on, these policies and guidelines. On September 13, 2011, respondent attended a faculty meeting at which time these policies and guidelines were discussed, disseminated and/or made available to all teachers in attendance.

7. The CCS prohibits, among other things, engaging in any behavior, either directly or indirectly with a student or in the presence of a student that is unprofessional, unethical, illegal, immoral, or exploitative. (Exh. 13.) It also prohibits touching or having physical contact with a student that is not age-appropriate or within the scope of the employee/individual's responsibilities and/or duties. The District's child abuse and reporting policy requires District employees to report child abuse immediately. (Exh. 14.) The child

abuse policy defines “child abuse” as “physical abuse,” which means physical injury such as a bruise, welt, burn or cut, inflicted by other than accidental means, and hazing. Child abuse is also defined as “sexual abuse” which includes sexual assault. “Sexual assault” includes specified acts committed against a child including the “intentional touching of the genitals or intimate parts of the clothing covering them, or child molestation.” The District’s Sexual Harassment policy defines “sexual harassment,” in relevant part, as unwelcome sexual advances, requests for sexual favors, or other verbal, visual, or physical conduct of a sexual nature, made in the work or educational setting, which has the purpose or effect of negatively impacting the individual’s work or academic performance, or creating an intimidating, hostile, or offensive work or educational environment. (Exhs. 16 and 17.)

8. Respondent had a classroom rule or policy that prohibited his second grade students from bringing candy and toys into the classroom. If respondent noticed that a student had candy or toys, he would confiscate the items and hold them to the end of the day. In some instances he would throw the candy away. Respondent prohibited candy and toys because seven and eight-year-old second grade students are easily distracted by these items. Respondent’s rule or policy was not a school wide or District policy, but it was not established that the rule violated any 10th Street or District laws or regulations.

*M [REDACTED] S.’s Complaint and District’s Investigation*

9. M [REDACTED] S. was seven years old and a student in respondent’s second grade class at 10th Street during the 2011-2012 school year. He is now ten years-old and in the fifth grade. Alfayate testified that in February 2013, M [REDACTED] S.’s parents came to the 10th Street school office and told him that respondent had put his hand into M [REDACTED] S.’s pocket and touched his “private parts” while M [REDACTED] S. attended respondent’s second grade class. Alfayate recalled that M [REDACTED] S.’s parents stated respondent touched M [REDACTED] S. in this manner on two occasions in respondent’s classroom. M [REDACTED] S. began his third grade year at 10th Street, but prior to the end of the 2012-2013 school year, he transferred to another school. He was no longer a student at 10th Street when his parents filed their complaint in February 2013. Alfayate conducted the District’s investigation into the allegations against respondent. Alfayate did not know respondent prior to February 2013, and did not contact principal Ariyasu regarding the investigation.

10. After receiving M [REDACTED] S. parents’ complaint, Alfayate filed a child abuse report with the Los Angeles Police Department (LAPD). On or about February 13, 2013, officers from the LAPD interviewed M [REDACTED] S. and completed a “Crime Against a Child” investigation report. (Exh. 20.) The report indicated that M [REDACTED] S. stated that every time he had to use the restroom, respondent searched his pants pocket for candy. M [REDACTED] S. told officers that whenever he had to use the restroom, he had to approach respondent’s desk, and respondent would place his left hand into M [REDACTED] S.’s right front pocket and “fondle around in search of candy.” M [REDACTED] S. stated that respondent would “always rub his index finger against his penis” when he searched his pant pockets. He also told officers that respondent searched him because he did not want “kids” eating candy in class, and that respondent only searched the boys and not the girls. M [REDACTED] S. told officers that respondent never said anything during the searches, and that respondent searched him “numerous times.” Criminal

charges against respondent were ultimately not pursued. The LAPD supplemental investigation report dated March 23, 2013, indicated that the Matthew S. case was “rejected” for criminal prosecution “due to M [REDACTED] S. declining to testify.” (Exh. 24.)

11. From April to August 2013, Alfayate interviewed several students from respondent’s 2011-2012 second grade class as part of his investigation. The District offered into evidence several written statements from students who were interviewed by Alfayate. A [REDACTED] P. provided a written statement that respondent always checked M [REDACTED] S.’s pockets for “things” or “stuff” by putting his hands into M [REDACTED] S.’s pockets. (Exhs. 2 and 18.) S [REDACTED] P. provided a written statement that if students had “toys,” respondent checked their pockets by putting his hand inside their pockets. (Exh. 5.) S [REDACTED] P. did not specifically indicate that respondent put his hand inside of M [REDACTED] S.’s pockets. K [REDACTED] A. provided a written statement that respondent put his hand inside of K [REDACTED] A.’s pocket whenever respondent checked his school work, and that he thought respondent put his hand into M [REDACTED] S. and A [REDACTED] T.’s pockets. (Exh. 4.) However, Alfayate’s interview notes from K [REDACTED] A.’s April 2013 interview indicate that K [REDACTED] A. did not see respondent do anything inappropriate in the classroom and that K [REDACTED] A. did not see respondent put his hands on M [REDACTED] S. (Exh. YY.) On August 15, 2013, Alfayate interviewed K [REDACTED] A. a second time. Alfayate’s interview notes indicate that in response to the question: “Did he touch your private parts?”, K [REDACTED] A. stated that respondent “sometimes” touched his private parts when respondent searched his pockets. (Exh. 27.) When asked: “Did he touch your penis?”, K [REDACTED] A. responded “yes.” N [REDACTED] V. stated that respondent checked M [REDACTED] S.’s pockets by feeling or tapping the “front” or “top” of his pockets, not by putting his hand inside of M [REDACTED] S.’s pocket. (Exhs. 3 and 19.)<sup>5</sup>

12. On April 24, 2013, Alfayate interviewed respondent, and on April 30, 2013, respondent provided a written response to Alfayate’s interview questions. (Exh. 9.) Respondent denied that he ever touched any student inappropriately, including M [REDACTED] S., and stated that he “never searched any student’s pocket in all my years of teaching.” He denied ever being alone with any student, stating that “I am always careful to never be alone with any student.” Finally, respondent denied ever physically disciplining or punishing any student, and stated that he used progressive discipline to deal with challenging student behaviors.

13. On August 28, 2013, Alfayate again interviewed respondent. Respondent provided a written response on September 6, 2013. (Exh. 11.) Respondent stated that toys were not allowed in his classroom, and that he followed District protocol in enforcing this rule. He stated that he never touched or searched M [REDACTED] S.’s pockets for candy or toys, and that he never “pat or searched student’s pockets for anything.” He denied touching K [REDACTED] A.’s penis, and stated that he had never touched any student inappropriately.

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<sup>5</sup> Alfayate’s interview notes indicated that several students in respondent’s second grade class stated that respondent did not search M [REDACTED] S.’s pockets (A [REDACTED] N., Exh. TT; A [REDACTED] T., Exh. UU; K [REDACTED] E., Exh. VV; and R [REDACTED] R., Exh. WW), or that respondent did not put his hand into any student’s pocket (A [REDACTED] R. Exh. LL; J [REDACTED] V., Exh. MM; J [REDACTED] C., Exh. NN; and H [REDACTED] P., Exh. OO).

Respondent stated that he never massaged any student in the classroom, nor “patted or poked any student on any part of the body.” However, on rare occasions, he admitted he would “tap” students on the shoulders with two fingers to reinforce good behavior.

14. On September 16, 2013, Alfayate interviewed M [REDACTED] S., who provided a written statement. (Exh. 6.) M [REDACTED] S. stated that respondent “use to put his hands in my pocket and check for candy. I wasn’t ok for Mr. Corjneho [sic] touched my private part. It hapend [sic] more than once. It was only me and him. It was in the classroom.” (Exh. 6.)

*M [REDACTED] S. Allegation (Charge No. 1)*

15. M [REDACTED] S. testified that whenever he asked to go to the bathroom, if respondent thought he had candy in his pockets, respondent would place his hand inside of M [REDACTED] S.’s pockets to feel around for the items. He testified that respondent put his finger on his penis while inside of his pockets each time respondent searched his pockets. M [REDACTED] S. also testified that every time he asked to go to the bathroom, respondent required him to come to the “kidney” or “half circle” table in the front corner of the classroom, which respondent sometimes used as his desk. He claimed that he went to the bathroom once or twice every day and that respondent searched his pockets and touched his penis every time he went to the bathroom, which M [REDACTED] S. estimated occurred over 200 times. M [REDACTED] S. felt that respondent treated him differently by searching his pockets and he was angry and upset when respondent took his candy and toys. M [REDACTED] S. did not tell his parents or his grandmother about the alleged incidents until almost one and a half years after the incidents allegedly occurred.

16. Respondent testified that he never placed his hand inside of M [REDACTED] S.’s pocket to search for candy or toys and that he never touched the student’s genitals. Respondent had a classroom rule or policy that prohibited students from bringing candy, toys and gum into his class. He testified that if he saw a student with candy or toys, he would ask the child to put the toy away and to throw the candy away. Sometimes he would take the toy and keep it until the end of the school for the parent to retrieve. If he believed the student had a toy or candy in his pocket, respondent stated that he would point to the pocket and ask the student to remove the item from his or her pocket.

17. Respondent testified that at the beginning of the 2011-2012 school year, M [REDACTED] S. brought candy, gum and toys to his classroom at least once or twice per week, and respondent verbally admonished him for this conduct. Respondent initially testified, consistent with his written statements to Alfayate, that he never searched M [REDACTED] S. in any manner. Respondent stated that he spoke to M [REDACTED] S.’s grandmother at the beginning of the school year about the student’s conduct and told her that M [REDACTED] S. was easily distracted and was prohibited from bringing these items to class. Thereafter, the frequency that M [REDACTED] S. violated respondent’s classroom policy decreased. Respondent also testified that M [REDACTED] S. got upset whenever he took his candy and toys.

18. Respondent used a “buddy system” for student bathroom request which required a second student to accompany the requesting student to the bathroom. Both

students typically came up to respondent's desk prior to leaving the classroom so that they could go together. Respondent testified that M█████ S. used the "buddy system" whenever he went to the bathroom, except on a few occasions when he ran off before a "buddy" could be selected. Consequently, whenever M█████ S. went to the bathroom, he would be accompanied by a second student except on rare occasions. At hearing, A█████ N., S█████ S., and K█████ A., students in respondent's 2011-2012 second grade class, confirmed that respondent used a "buddy system" for his students to go to the bathroom. Respondent's teacher assistant, Anel Peralta, also testified that respondent used a "buddy system" for students to use the bathroom.

19. Respondent initially denied that he searched M█████ S., or any student, in any manner in his written statements and at hearing. However, the evidence established that respondent checked M█████ S.'s pockets for candy and toys by tapping or touching the outside of the students' pockets to feel for these items. Several students stated that they saw respondent check M█████ S.'s pockets for candy and toys in this manner although it was not established how often such searches occurred. Respondent reluctantly admitted that he "checked" to see if students had candy and toys and that he may have "accidentally" touched a students' pockets one or two times when he pointed to their pockets if he saw a bulge in the pocket. But he did not admit he checked M█████ S.'s pockets in this manner. Respondent also admitted his written responses to Alfayate indicating that he had not searched or checked student's pockets in any manner were inaccurate. He suggested that miscommunication between him and his attorney in his written response caused the inaccuracy. Nonetheless, respondent's denial that he checked M█████ S.'s pockets in any manner or that he only touched students' pockets "accidentally" when checking for candy and toys is not credible. The preponderance of the evidence showed that respondent did in fact check or search students' pockets, including M█████ S., for candy and toys by tapping and touching the outside of the pockets if he believed these items were present. However, notwithstanding respondent's lack of veracity on this point, there was insufficient evidence to conclude that he put his hand inside of M█████ S.'s pockets and touched the student's genitals at any time.

20. M█████ S. made inconsistent statements regarding the frequency that respondent committed the alleged acts, as well as the circumstances surrounding how the incidents occurred. He testified that respondent touched his penis or private parts over 200 times, but in his written statement to Alfayate on September 6, 2013, he only stated respondent committed this act "more than once." On February 13, 2013, M█████ S. told LAPD officers that respondent touched him "numerous times," also suggesting fewer than 200 occurrences. M█████ S.'s parents also told Alfayate that respondent touched M█████ S.'s private parts on only two occasions, again conflicting with M█████ S.'s testimony that respondent touched him over 200 times. M█████ S.'s September 16, 2013, written statement also indicated that only he and respondent were present at respondent's desk when respondent put his hand into M█████ S.'s pocket and touched his penis. At hearing, he denied that respondent used a "buddy system" and insisted that he always went to the bathroom by himself. However, the evidence established that respondent used the "buddy system," which required another student to accompany M█████ S. to the bathroom, which

contradicts M [REDACTED] S.'s assertion that he and respondent were alone when he approached his desk to go to the bathroom. M [REDACTED] S. frequently violated respondent's classroom policy prohibiting toys and candy and it angered him that respondent checked him for these items and sometimes took the items away. It is not inconsequential that by M [REDACTED] S.'s own admission, the alleged incidents of inappropriate touching by respondent always occurred when respondent was checking the student's pockets for candy and toys. M [REDACTED] S.'s statements and testimony regarding his allegations against respondent may have been colored or influenced by his resentment of respondent's classroom policy. The inconsistencies in his statements, and the presence of an ulterior motive, raise serious doubts about the credibility of his allegations.

21. The District also relies on A [REDACTED] N. and K [REDACTED] A.'s testimony, and written statements by A [REDACTED] P. and S [REDACTED] P. to support their assertion that respondent inappropriately touched M [REDACTED] S.'s "private parts."<sup>6</sup> However, although A [REDACTED] N. testified that she saw respondent put his hand inside of M [REDACTED] S.'s pocket, Alfayate's April 2013 interview notes indicate that A [REDACTED] N. stated that she never saw respondent put his hand into M [REDACTED] S.'s pockets or do anything inappropriate. K [REDACTED] A. testified that he saw respondent put his hand into M [REDACTED] S.'s pocket one or two times, but in his April 2013 written statement he merely states "I think he also put his hand in M [REDACTED] and A [REDACTED]" pockets, referring to M [REDACTED] S. and A [REDACTED] T., indicating he was not sure that respondent put his hands into M [REDACTED] S.'s pockets. (Exh. 4.) K [REDACTED] A.'s testimony also contradicted his statements to Alfayate at his April 2013 interview, at which time he stated that he did not see respondent put his hands on M [REDACTED] S. K [REDACTED] A. even contradicted himself at hearing by first testifying that respondent only placed his hand "near" M [REDACTED] S. and A [REDACTED] T.'s pocket to search for candy, but then inconsistently testifying that respondent put his hand into M [REDACTED] S.'s pocket "really fast" and removed it. Consequently, both A [REDACTED] N. and K [REDACTED] A.'s testimony were inconsistent with their other statements, including some statements made closer in time to the events in question. Their inconsistent statements likewise cast doubt on their credibility.

22. Conversely, several students provided written statements and testimony that respondent did not place his hands inside of M [REDACTED] S.'s pockets, stating instead that he merely touched or tapped the outside of M [REDACTED] S.'s pockets to feel for candy and toys. S [REDACTED] S. testified that respondent checked M [REDACTED] S.'s pockets for candy by making him "stand like a cross," and touching or tapping the outside of the pocket. He stated that respondent never put his hands inside of M [REDACTED] S.'s pockets, and that if M [REDACTED] S. had candy in his pockets, respondent asked him to take the candy out. K [REDACTED] G. provided a written statement that he never saw respondent put his hand into M [REDACTED] S.'s pocket, and he consistently testified that he never saw respondent touch Matthew S., K [REDACTED] A. or any other student below the waist. A [REDACTED] T. testified that respondent never touched his pockets or anywhere else on him below the waist. Although K [REDACTED] G. and A [REDACTED] T.'s recollection of

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<sup>6</sup> A [REDACTED] P. and S [REDACTED] P. did not testify at hearing. Their written statements were admitted as administrative hearsay, and can only supplement and explain other admissible evidence, but are not sufficient standing alone to support a factual finding. (Govt. Code § 11513, subd. (d).)

events was spotty, both students' testimony was generally consistent with their prior interview statements to Alfayate. Additionally, K [REDACTED] G. and A [REDACTED] T.'s mothers, M [REDACTED] L. and M [REDACTED] T. respectively, testified that their sons never complained about respondent and thought that respondent was a very good teacher. Alfayate's interview notes for many students indicated that these students had not seen respondent put his hand inside of M [REDACTED] S. or any other student's pockets.

23. It is improbable that respondent put his hand into M [REDACTED] S.'s pockets with the intent to touch his private parts in a sexual manner as alleged when all of the incidents purportedly occurred in plain view of the other students in the classroom. Additionally, other District employees frequently visited respondent's class unannounced or were present in the classroom during a significant percentage of the school day. Christina Vega (Vega) taught a third grade class at 10th Street during 2011-2012 school year and her classroom was next door to respondent's classroom. The door adjoining the two classrooms was always open and unlocked. Vega went into respondent's classroom unannounced several times per day and could observe respondent in his classroom through the door and a common window between the classrooms. She testified that she never saw respondent put his hands into any student's pocket or touch any student inappropriately. Anel Peralta (Peralta) was respondent's teacher assistant during the 2011-2012 school year. Peralta never observed respondent put his hands into any student's pocket or touch any student inappropriately, although she spent significant portions of the school day in respondent's classroom. Vega and Peralta were not in respondent's classroom every minute of the school day, but both had access to his classroom all day and would enter unannounced several times during the school day, and neither ever saw respondent touch a student inappropriately or place his hands inside of a students' pockets.

24. Caroline Kwong-Der (Kwong-Der) has taught first through third grade classes at 10th Street for approximately 18 years. During the 2012-2013 school year, Kwong-Der taught third grade at 10th Street, and her class included many students who were in respondent's second grade class for the 2011-2012 school year, including M [REDACTED] S. for one-half of the school year and K [REDACTED] A. for the entire school year. Neither M [REDACTED] S. nor K [REDACTED] A., or any other student from respondent's 2011-2012 second grade class, complained to Kwong-Der about respondent. Although Kwong-Der did not observe respondent interacting with his students in the classroom, she stated that students described respondent as a great teacher and always made positive comments about respondent. Kwong-Der described respondent as a teacher with a reputation for professionalism, and stated that he was always respectful towards students and adults at 10th Street.

25. Finally, Alfayate testified that it was inappropriate for respondent or any teacher to physically touch a student to perform searches of the student's clothing. However, he stated that it would not be inappropriate for the teacher to ask the student if there was anything in their pockets, point to the pocket, and ask the student to remove items such as candy and toys. Here, respondent physically touched or tapped the outside of M [REDACTED]'s pockets to check for candy and toys. The District's CCS policy prohibits touching or physical contact with a student that is not age-appropriate or within the scope of the teacher's responsibilities or duties. Respondent reasonably believed that candy and toys were a

distraction to his second grade students and he attempted to prevent students from bringing these items to class. Consistent with the District's CCS, tapping or touching the outside of second grade students' pockets and asking them to remove the items from their pockets appears to be an age-appropriate manner to check for such items. It was within respondent's responsibilities to effectuate a reasonable classroom policy prohibiting candy and toys. Although such a practice is ill-advised, given the risks that such physical contact with a student could be misconstrued, the evidence established that respondent harbored no inappropriate or sexual intent in touching the student. Instead the evidence showed that respondent's purpose in tapping and touching outside the student's pockets was solely to enforce his classroom policy prohibiting candy and toys in the classroom for second grade students. It is also significant to note that the District did not allege in the Statement of Charges or Accusation that respondent was subject to dismissal for enforcing a classroom policy by tapping or touching the outside of the students' pockets for candy or toys. The District alleged respondent placed his hands inside of M [REDACTED] S.'s pocket and inappropriately touched his private parts, which was not established by the evidence.

26. The District failed to establish by a preponderance of the evidence that respondent put his hands inside of M [REDACTED] S.'s pockets and touched his "private parts." Respondent prohibited students from bringing candy and toys to his classroom and checked students' pockets, including M [REDACTED] S., by tapping or touching the outside of their pockets to check for these items. As stated above, respondent's conduct was ill-advised and not a prudent practice by which to effectuate his classroom policy. However, there was insufficient evidence to establish that respondent had a sexual or inappropriate intent when he checked M [REDACTED] S. for candy and toys.

K [REDACTED] A. *Allegation (Charge No. 2)*

27. The District also asserts that on multiple occasions during the 2011-2012 school year, respondent put his hand inside of second grade student K [REDACTED] A.'s pants pockets and touched his genitals. K [REDACTED] A. testified that respondent placed his hands inside of his pants pockets and touched his penis seven or eight times while respondent checked K [REDACTED] A.'s school work at respondent's desk. According to K [REDACTED] A., respondent was seated at his desk when he committed these acts and respondent never said anything or told him why he was placing his hand into K [REDACTED] A.'s pockets. He stated that the other students in the class were doing their work and not paying attention to him and respondent, even though the incidents allegedly occurred in the front of the classroom.

28. Respondent denied touching K [REDACTED] A.'s penis, stating that he "never touched any part of him." (Exh. 11.) He testified that he never put his hand into K [REDACTED] A.'s pants or touched his genitals while checking K [REDACTED] A.'s school work at his desk. Respondent testified that he checked students' work at the overhead projector cart, which he frequently used as his desk, and the cart was in the front of the class in plain view of the rest of the students. Respondent stated that the overhead projector cart was of a height that required him to stand when reviewing a student's work. Respondent maintained that he did not check student's school work at the "kidney" or "half table" because he always used the overhead projector when reviewing student's work. This contradicts K [REDACTED] A.'s claim that

respondent sat at the “kidney” or “half table” to check his school work, which the District asserts, conceivably concealed his conduct for the other students who were present in the class.

29. As shown in Factual Findings 11 and 20 above, K█████ A. made inconsistent and contradictory statements to Alfayate and during his testimony at hearing. Significantly, no other student claimed that they saw respondent place his hand into K█████ A.’s pockets or searched K█████ A.’s pockets in any manner. K█████ A. failed to tell Alfayate that respondent touched his genitals in his April 18, 2013, interview and written statement. To the contrary, he told Alfayate that respondent had not touched him inappropriately in any manner. After the April 2013 interview, K█████ A. also did not tell his parents that respondent had inappropriately touched his genitals, even though his parents were aware he had been questioned regarding respondent in April 2013. He asserted these allegations in the August 2013 interview, over one year after the incidents allegedly occurred, only after Alfayate specifically asked him whether respondent touched his “private parts” or “penis.” (Exh. 27.) K█████ A. stated that he did not initially tell Alfayate respondent touched his penis because he was nervous and feared something bad would happen, and he did not want to say a “bad word” in front of the principal. K█████ A.’s omissions and inconsistent statements raise doubts about the truthfulness of his allegations and testimony.

30. K█████ A.’s credibility is further undermined by his denial that he was aware of respondent’s rule prohibiting candy and toys in the classroom. It was common knowledge amongst the students in respondent’s second grade class that respondent did not allow candy and toys in the classroom, and that he checked students for these items. K█████ A. was also not credible in testifying that M█████ S. never had candy or toys in his pockets in class, even though M█████ S. admitted having these items in class, and most students who testified were aware of this fact. Finally, K█████ A. and M█████ S. were good friends in respondent’s second grade class. Although K█████ A. claimed that he saw respondent put his hand into M█████ S.’s pocket, K█████ A. never told M█████ S. that respondent had done the same thing to him, or that respondent touched his penis. M█████ S. also never told K█████ A. that respondent put his hand into his pocket and touched M█████ S.’s penis. This seems peculiar given the relationship the two students had. Finally, K█████ A. testified that he did not like respondent’s class and thought that respondent was a mean teacher that yelled at the students all of the time. However, no other student, including M█████ S., claimed that respondent yelled at them or other students.

31. It is implausible that respondent placed his hands inside of K█████ A.’s pockets and touched his penis when this conduct is alleged to have occurred in plain view of other students in the classroom. Other than K█████ A.’s inconsistent statements and testimony, the District presented no other credible evidence to support this allegation. Consequently, the evidence did not establish that respondent placed his hands inside of K█████ A.’s pants pockets and touched his genitals, or that respondent touched K█████ A. in any manner.

M [REDACTED] S. Allegations (Charges 3, 5 and 6)

32. The District alleged that during the 2011-2012 school year, on multiple occasions respondent placed his hands under M [REDACTED] S.'s armpits, lifted him off of the ground and placed him on a chair in front of the computer, and on multiple other occasions lifted him in the same manner and placed him in a corner to sit down. The District also alleged that respondent "placed his hands on M [REDACTED] S.'s shoulders" on multiple occasions during the same period.

33. Respondent denied using physical discipline or corporal punishment on any student. He testified that he used progressive discipline to address student behavior problems and that he "benched" or placed students on timeout during recess if they misbehaved. Respondent's students had a scheduled time to work at the computer and they generally complied with the schedule. He denied ever dragging, pushing or carrying a student to or from the computer area. Respondent admitted that he may have tapped M [REDACTED] S. on the shoulder to reinforce good behavior, but that he never placed both of his hands on M [REDACTED] S.'s shoulders. Respondent tapped students on their shoulders to praise them or calm them down if they were upset, angry or crying.

34. The District relies primarily on A [REDACTED] N.'s testimony to support these allegations. A [REDACTED] N. testified that respondent mistreated students and that he put students in the corner in the classroom, including M [REDACTED] S. She testified that respondent picked M [REDACTED] S. up and put him in the corner. However, Alfayate's interview notes indicate that A [REDACTED] N. told him, referring to M [REDACTED] S., that respondent would "put him in the corner and sit him down." A [REDACTED] N. did not state that respondent picked M [REDACTED] S. up in any manner. Significantly, and most importantly, M [REDACTED] S. and his parents never claimed that respondent lifted or picked M [REDACTED] S. in any manner. They also did not complain that respondent placed his hands on M [REDACTED] S.'s shoulders. M [REDACTED] S. did not testify that respondent picked him up or touched his shoulders in any manner, and the District did not question him regarding these allegations. Although Alfayate interviewed several students regarding respondent's conduct towards M [REDACTED] S., no student other than A [REDACTED] N. asserted that respondent put his hands on M [REDACTED] S., or any other student in this manner. One student, N [REDACTED] V., told Alfayate that respondent tapped students on their shoulders when they did a good job or passed a test, corroborating respondent's statement that he praised students in this manner.

35. Vega, who frequently observed respondent's classroom from next door and made frequent unannounced visits to his class, never saw respondent pick a student up by the armpits, massage a student's shoulders, or touch a student inappropriately in any way. Vega stated that it was respondent's practice to send students to her classroom for "timeout" as discipline for students who misbehaved in class. Peralta, respondent's teacher assistant, never received any complaints from any student about respondent. She described respondent as very professional and stated that he did not yell at the students, but instead would "bench" the students if they misbehaved. Peralta never witnessed respondent pick any student up by his armpits or massage any students' shoulders.

36. There is insufficient evidence to support the District's allegations that respondent lifted M [REDACTED] S. up by his armpits and moved him in any manner. Although respondent tapped M [REDACTED] S.'s shoulders at times to calm him down or praise him, tapping the student on the shoulders to praise him is not inappropriate conduct.

*K [REDACTED] G. Allegation (Charge 4)*

37. The District also alleged that on multiple occasions during the 2011-2012 school year, respondent lifted K [REDACTED] G. off of the ground by his armpits and placed him in a chair in front of a computer. Respondent denied lifting or moving K [REDACTED] G. in any manner in his classroom. In a written statement dated October 9, 2014, K [REDACTED] G. corroborates respondent's testimony by stating that respondent never picked him or any other student up by their armpits. Consistent with his written statement, K [REDACTED] G. testified that respondent never picked him up in any manner, or physically touched him to move him in the classroom. Consequently, the District did not establish that respondent lifted K [REDACTED] G. up by the armpits and placed him in a chair in front of a computer.

*J [REDACTED] C. Allegation (Charge 7)*

38. The District alleged that during the 2012-2013 school year, respondent on multiple occasions massaged J [REDACTED] C.'s shoulders. Alfayate testified that J [REDACTED] C.'s parents made the complaint that respondent inappropriately massaged J [REDACTED] C.'s shoulders. Alfayate, however, had a vague recollection of this allegation. He interviewed A [REDACTED] T. and asked him whether respondent "put his hands on any students' shoulders, like to give a massage," and Alfayate's interview note indicates A [REDACTED] T. stated "yes," respondent would put his hands on a student's shoulders when the student got angry, and that respondent had placed his hands on A [REDACTED] T.'s shoulders when A [REDACTED] T. got mad. At hearing A [REDACTED] T. denied that he told Alfayate respondent touched or massaged his shoulders. He did not clearly remember his interview with Alfayate and did not clearly recall whether he told Alfayate that respondent "massaged" M [REDACTED] S.'s shoulders. But A [REDACTED] T. denied ever stating respondent massaged his shoulders. Alfayate's interview notes from interviews with several other students indicated that most of the students denied seeing respondent massage a student's shoulders.

39. The District offered no other evidence in support of its allegation that respondent massaged J [REDACTED] C.'s shoulders. There is no written statement from J [REDACTED] C., and neither he nor his parents testified at hearing. Consequently, there is insufficient evidence to support this allegation.

*Other Factors*

40. Respondent offered several character letters of reference submitted by both past and current colleagues who professed knowledge of his excellent character and professionalism. He was described as a superb teacher and instructor that genuinely cared about his students. Several references spoke of respondent's ability to create a positive and

safe classroom environment that fostered students' ability to learn, and resulted in respondent's students achieving academic success.

41. Respondent has no prior history of disciplinary action taken by the District. By all accounts, prior to the Statement of Charges and Accusation in this case, respondent had met all of the performance standards required by the District and had been commended for his proficiency as a teacher in the District.

## 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).)<sup>7</sup> 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.) A Commission has broad discretion to determine the issues before it, including whether dismissal is the appropriate sanction. (*Id.*, at p. 343.)

### *Grounds For Dismissal*

3a. Cause does not exist to dismiss respondent for immoral conduct pursuant to section 44932, subdivision (a)(1), by reason of Factual Findings 4 through 39.

3b. "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. (*Board of Education of the San Francisco Unified School District v. Weiland* (1960) 179 Cal.App.2d 808, 811.) Immoral conduct can be construed according to common usage. "The term 'immoral' has

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<sup>7</sup> Effective January 1, 2015, section 44944, subdivision (c)(1-3), was changed to section 44944, subdivision (d).

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 District of Riverside v. Hensey* (1970) 9 Cal.App.3d 967, 972.)

3c. The District did not establish that respondent committed immoral conduct by placing his hands in M [REDACTED] S. and K [REDACTED] A.'s pants pockets and touching their private parts or genitals, as alleged in Charges 1 and 2, by reason of Factual Findings 4 through 31, and Legal Conclusions 1 through 3. Respondent checked M [REDACTED] S.'s pockets for toys and candy to enforce his classroom policy which prohibited students from bringing these items into his classroom. He did this if he believed M [REDACTED] S. possessed such items by pointing to the pocket and asking M [REDACTED] S. to remove the item, and/or touching and tapping the outside of M [REDACTED] S.'s pockets to feel for the items. The evidence did not establish that respondent touched or searched K [REDACTED] A.'s pockets in any manner as alleged in the Statement of Charges and Accusation.

3d. 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. Board of Medical Quality Assurance, supra*, 189 Cal.App.3d at 1052.)

3e. Respondent initially denied that he searched M [REDACTED] S. or any other student in any manner. This assertion was false and not credible. However, respondent credibly testified, and the totality of the evidence established, that he did not put his hands inside of M [REDACTED] S. or K [REDACTED] S.'s pockets and touch the students' private parts or genitals. Even though respondent was less than truthful regarding his conduct in checking M [REDACTED] S.'s pockets for candy and toys, there was insufficient evidence to conclude that respondent placed his hands into M [REDACTED] S. or K [REDACTED] A.'s pockets and touched their "private parts" or genitals. M [REDACTED] S. and K [REDACTED] A.'s statements and testimony were found to be inconsistent and lacking in credibility. A [REDACTED] N.'s testimony was also found to be inconsistent and unpersuasive.

3f. Conversely, respondent presented credible evidence that raised significant doubt as to whether he committed the conduct alleged by M [REDACTED] S. and K [REDACTED] A. Both students alleged that respondent committed these acts in plain view in the classroom while other students were present. However, several students offered credible testimony that they never saw respondent place his hands into M [REDACTED] S.'s pockets or touch him inappropriately in any manner. Moreover, Christina Vega and Anel Peralta, District employees who both

had substantial access to respondent's second grade classroom, both testified on respondent's behalf stating that they had not witnessed the alleged activity and that they did not believe respondent committed such conduct. Other than K [REDACTED] A.'s own statements and testimony, no other student or witness corroborated his allegation that respondent placed his hand inside of K [REDACTED] A.'s pants pockets. Both M [REDACTED] S. and K [REDACTED] A. expressed their dislike for respondent's class, and M [REDACTED] S. specifically stated that he was angered by respondent's classroom policy prohibiting toys and candy. Finally, both M [REDACTED] S. and K [REDACTED] A. delayed reporting their allegations of respondent's misconduct until almost one and half years after the incidents allegedly occurred. This lapse in time, and their inconsistent versions of the facts supporting their allegations raise serious questions about the veracity of the allegations.

3g. Finally, the evidence established that respondent had a classroom policy that prohibited second students from bringing toys and candy into the classroom because he reasonably believed these items distracted students of this age. M [REDACTED] S. frequently violated this classroom policy and respondent ill-advisedly checked the outside of his pockets for these items. Although respondent's conduct was ill-advised and risked being misinterpreted by students and parents, respondent's touching of second grade students in this manner was age-appropriate and did not violate the District's CCS policy. The District did not establish by a preponderance of the evidence that respondent put his hands inside of M [REDACTED] S. or K [REDACTED] A.'s pockets and touched their genitals or that respondent harbored any sexual or inappropriate intent in enforcing and implementing his classroom rule or policy. Respondent's tapping or touching M [REDACTED] S.'s pockets to check for candy and toys did not constitute immoral conduct. (*Board of Education of the San Francisco Unified School District v. Weiland*, *supra*, 179 Cal.App.2d 808, at p. 811; (*Palo Verde Unified School District of Riverside v. Hensey*, *supra*, 9 Cal.App.3d 967, at p. 972.)

3h. The District also did not establish that respondent committed immoral conduct by lifting M [REDACTED] S. and K [REDACTED] G. off of the ground by their armpits and placing them in a chair in front of a computer, and in M [REDACTED] S.'s case, lifting him in the same manner and placing him in a corner to sit down, as alleged in Charges 3 through 5, by reason of Factual Findings 4 through 8, 32 through 37, and Legal Conclusions 1 through 3.

3i. Finally, the District did not establish that respondent committed immoral by placing his hands on Matthew S.'s shoulders, or by massaging J [REDACTED] C.'s shoulders as alleged in Charges 6 and 7, by reason of Factual Findings 4 through 8, 32 through 39, and Legal Conclusions 1 through 3.

3j. Although respondent tapped students on the shoulders, including M [REDACTED] S., to calm the student if the student was angry or upset, or to praise a student for performing good school work, such physical contact is not considered immoral conduct. There was insufficient evidence to establish that respondent touched or massaged J [REDACTED] C.'s shoulders in any manner as alleged in Charge 7.

4a. Cause does not exist to dismiss respondent for evident unfitness for service pursuant to section 44932, subdivision (a)(5), by reason of Factual Findings 4 through 41, and Legal Conclusions 1 through 4.

4b. Section 44932, subdivision (a)(5), 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 (*Woodland*).) 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.” (*Id.* at 1444.)

4c. “Evident unfitness for service” is not synonymous with “unprofessional conduct,” and the term means clearly not fit for teaching, ordinarily by reason of temperamental defects or inadequacies; it connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet expectations of the school district. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) “Evident unfitness” includes in its definition “unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.” To terminate the teacher on grounds of immoral conduct, unprofessional conduct, or evident unfitness for service, it must also be established that the conduct renders the teacher unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230.) Thus a determination of evident unfitness requires an analysis based on criteria set forth in *Morrison*.<sup>8</sup> 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 Board v. Haar* (1994) 28 Cal.App.4th 369, 384.)

4d. The District failed to establish that respondent is unfit to teach. The evidence did not establish that respondent engaged in or committed the inappropriate conduct alleged in Charges 1 through 7. The evidence established that respondent enforced a reasonable classroom policy prohibiting second grade students from bringing candy and toys into class by checking their pockets for these items in an age-appropriate manner. It was further established that respondent did not use corporal punishment by lifting students from the ground by their armpits and moving them to areas in the classroom. Respondent did tap students’ shoulders to calm them down and praise them, but it was not established that he

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<sup>8</sup> In *Morrison*, the Supreme Court of California 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 including: (1) the likelihood of recurrence of the questioned conduct; (2) the presence of extenuating or aggravating circumstances; (3) the effect of notoriety and publicity; (4) the likelihood that the conduct adversely affected students or fellow teachers; (5) the disruption of the education process; (6) the motive underlying the conduct; and (7) the proximity or remoteness in time of the conduct.

massaged any student's shoulders in any manner. To the contrary, the evidence established that respondent was a professional and competent teacher that cared for his students and was conscientious in performing his duties. Consequently, it was not established that respondent's conduct rendered him evident unfit to teach.

5. Since the Commission determined that respondent did not commit the misconduct alleged in Charges 1 through 7, the factors set forth in *Morrison v. State Board of Education, supra*, 1 Cal.3d 214, need not be considered.

6a. Cause does not exist to dismiss respondent for persistent violation of or refusal to obey school laws or regulations pursuant to section 44932, subdivision (a)(7), by reason of Factual Findings 4 through 41, and Legal Conclusions 1 through 5.

6b. Persistent violation of or refusal to obey school laws or regulations under section 44932, subdivision (a)(7), 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.) Cause for discipline may be based on the violation of school rules. (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180-1181.)

6c. The District did not establish that respondent's conduct was a persistent violation or refusal to obey school laws or regulations. Because the Commission determined that the District did not establish that Charges 1 through 7 occurred as alleged, there is no basis upon which to conclude that respondent violated or refused to obey any law or regulations. Although respondent implemented and enforced a classroom rule or policy prohibiting second grade students from bringing toys and candy to class, the District did not establish that respondent's classroom rule violated any school laws or regulations. The Commission concluded respondent implemented this classroom rule in an age-appropriate manner and that he did not touch any student in a sexual or inappropriate manner. The District's Accusation and Statement of Charges also did not allege that respondent's classroom rule or policy of prohibiting candy and toys in class was a violation of, or a refusal to obey, a District rule or regulation. Accordingly, the District failed to show that respondent persistently violated school laws and regulations.

## ORDER

The determination of the Governing Board of the Los Angeles Unified School District seeking to dismiss respondent Wilfredo Cornejo (EN 597426) pursuant to Education Code sections 44932 and 44939 is not upheld. Accordingly, the Statement of Charges and Accusation are dismissed. Respondent shall be reinstated as a certificated employee of the District.

DATED: August 7, 2015

  
MICHAEL A. SCARLETT  
Administrative Law Judge,  
Office of Administrative Hearings,

DATED: 8/20/15

  
BONNIE MACDONALD  
Commission Member

DATED: 8/21/15

  
LUCIANO ORTIZ  
Commission Member