

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
OF THE KLAMATH-TRINITY JOINT UNIFIED SCHOOL DISTRICT
HUMBOLDT COUNTY, CALIFORNIA

In the Matter of:

JUDITH ROSE,

A Permanent Certificated Employee,

Respondent.

OAH No. 2018080221

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Klamath-Trinity Joint Unified School District (District) on October 24, 25, and 26, 2018, in Hoopa, California. The Commission included Jani Ayers, Alysha Simoni, and Timothy Aspinwall, Administrative Law Judge, Office of Administrative Hearings, presiding.

Laurie Kamerrer, Attorney at Law, represented the District.

Peder J. V. Thoreen, Attorney at Law, represented Judith Rose (respondent), who was present throughout the hearing.

This matter was submitted for decision when the Commission concluded its deliberations on October 26, 2018.

FACTUAL FINDINGS

1. Respondent is a permanent certificated employee of the District. She was regularly assigned as a Transitional Kindergarten (TK) teacher at Trinity Valley Elementary School. She is presently suspended from the District without compensation.

2. On May 16, 2018, Elizabeth Franklin, Principal, Trinity Valley Elementary School, signed a letter addressed to respondent enclosing a Draft Notice of Intent to Immediately Suspend and Dismiss; and Statement of Charges (Statement of Charges). On

June 5, 2018, the District Board of Trustees considered and approved the Statement of Charges. On June 6, 2018, Jon Ray, Superintendent, signed a letter addressed to respondent notifying her that she had been placed on immediate suspension without pay, effective June 6, 2018, and enclosing the Statement of Charges. On June 13, 2018, respondent filed a Demand for Hearing on the Statement of Charges. All prehearing jurisdiction requirements were met.

3. The District contends that respondent engaged in immoral conduct, committed persistent and willful violations of the school laws or regulations governing her employment, and that she is evidently unfit for service. The District seeks respondent's dismissal from her position as a permanent certificated employee of the District.

Background

4. Respondent has been employed by the District as a TK teacher since 2013. Prior to her appointment as a TK teacher, she worked for the District as an elementary school substitute teacher for approximately four years. Before she began working for the District, respondent worked in various capacities including the operation of a family day care home and substitute teaching in Humboldt County. Respondent earned a bachelor's degree in liberal studies from California State University, Humboldt, and received a Multiple Subject Teaching Credential in June 1977. She received a Cross-Cultural, Language and Academic Development Certificate in September 2007.

5. During the 2017-2018 school year, respondent was assigned to work as a TK teacher at Trinity Valley Elementary School. There were between 11 and 14 students in respondent's class during that year.

Allegations of Misconduct

6. The District alleged numerous incidents of immoral conduct, evident unfitness for service, persistent violations of or refusal to obey school laws or regulations, and violations of specified laws and regulations during the period of December 2017 through April 2018. The evidence regarding the incidents is individually summarized and discussed below.

DECEMBER 8, 2017 INCIDENT

7. The District alleged that on December 8, 2017, respondent took S.L., a four-year-old student diagnosed with autism, from her class to the school office, leaving seven TK students alone in her classroom, and that she thereby failed to provide required supervision of her students. The evidence at hearing established that on December 8, 2017, at approximately 1:00 p.m., during free play time in respondent's classroom, S.L. bit another child on the shoulder through the clothing. The child's skin was not broken. Respondent was concerned that S.L. might hurt another child, so she walked S.L. to the office approximately 70 feet away from the classroom. Respondent was gone from her classroom

for approximately 30 to 60 seconds. Later the same day, respondent prepared an Accountability Referral Form, in which respondent summarized the incident and stated: “This is more evidence that the TK class needs a teacher assistant. More ‘active supervision’ given to children by ‘two’ adults will eliminate much of the aggressive behaviors.” Respondent also wrote that she “had to leave [her] TK class ‘alone’ ‘unsupervised’ while [she] walked [S.L.] to the office. Is this considered safe?” Respondent’s purpose in writing this was to notify Ms. Franklin that something needed to be done to provide better supervision of S.L. Respondent had previously advocated for a one-on-one aide to assist with S.L. Respondent did not call the office for assistance instead of taking S.L. to the school office because her telephone was in a place in her fully enclosed classroom office where she could not see her students while using the telephone.

8. The evidence did not establish that respondent acted unreasonably under the circumstances in taking S.L. to the office, even considering that she left her class unattended for approximately 30 to 60 seconds. While this is clearly not optimal, respondent was faced with circumstances where S.L. was acting out against other children. The alternative course of action available to respondent was to call the office on the telephone in her classroom office from which she would be unable to see her students. Under these circumstances, respondent chose a reasonable course of action to prevent S.L. from harming other students, and to minimize the time that they were left unsupervised.

9. Following this incident, Ms. Franklin told respondent not to leave children unsupervised, and to instead call the front office for assistance. Ms. Franklin moved respondent’s telephone to a location in her classroom office closer to the office door, but still not in a location where the classroom would be visible while using the telephone. Respondent moved the telephone back to its original place, because Ms. Franklin had put it in a precarious position on some storage boxes, and not within sight of the classroom. Some months later, on March 7, 2018, Ms. Franklin sent an email to the District’s technicians, asking them to relocate respondent’s telephone to a location requested by respondent as soon as possible. Respondent’s telephone was not relocated.

JANUARY 12, 2018 INCIDENT

10. The District alleged that on January 12, 2018, respondent again left her TK students alone in her classroom, and thereby failed to provide required supervision of her students. The evidence at hearing established that at approximately 10:00 a.m., respondent decided she needed to take S.L. to the office because he was engaged in ongoing misbehavior such as tackling another child for a toy, putting toys away in the wrong storage tub, and kicking another child. At the moment that respondent was leaving the classroom with S.L., Ms. Franklin walked past the classroom door. Respondent explained the situation to Ms. Franklin, who then took S.L. to the office, thereby allowing respondent to remain with her class. The evidence did not establish that respondent failed to provide supervision of her students when, by happenstance, Ms. Franklin was available to take S.L. to the school office.

JANUARY 24, 2018 INCIDENT

11. The District alleged that on January 24, 2018, respondent again left her TK students alone while she took S.L. to the school office, and thereby failed to provide required supervision of her students. The evidence at hearing established that at approximately 10:45 a.m., respondent took S.L. to the office because he would not stay calm as the children were washing their hands before going to lunch. The children were at that time standing outside near the bathroom. Respondent was able to see the other students at all points when she looked back to check as she walked S.L. to the office, and returned. The evidence did not establish that respondent acted inappropriately under the circumstances. S.L. was being disruptive, and respondent was able to see her other students as she took S.L. to the school office.

12. The District presented testimony from Melinda Gulley, who is employed as a secretary at Trinity Valley Elementary School. Ms. Gulley testified that on unspecified dates she saw respondent bring children to the office three to four times per week. These undated incidents were not alleged, and Ms. Gulley's testimony is not sufficiently specific to be persuasive regarding whether respondent's students were left unattended in her class, or under the supervision of another adult in her class, on the playground, or elsewhere.

MARCH 7, 2018 INCIDENT

13. The District alleged that on March 7, 2018, respondent used inappropriate force against S.L. when addressing his misconduct. The evidence at hearing established that at approximately 11:30 a.m., respondent was getting her students ready to bring them back from the playground. She asked the children to line up and sit on the curb. S.L. refused to follow respondent's instructions. He would not sit on the curb, nor would he walk with the class to the classroom. Respondent then asked Ms. Corona, who is the teacher in the classroom next to the playground, to take the rest of her (respondent's) class while she took S.L. to the office. S.L. would not cooperate in going to the office. Respondent was concerned that S.L. may try to elope and run out into the parking lot or the forest next to the school. She had seen S.L. and other students open the gate from the playground to the parking lot on previous occasions, so knew he could do so. To prevent this occurrence, respondent picked up S.L. from behind in a sort of bear hug and began to carry him toward the school office. On the way to the office, she set him down and picked him up repeatedly, and attempted to make him walk by holding his arms and pushing him with her legs. As respondent approached the office, she saw S.L.'s mother, J.L., through the window of the school office (who was present with S.L.'s father) and gestured for her to come help. S.L.'s father came out of the office and snapped his fingers at S.L., who then immediately calmed down and went with his father.

14. J.L. saw respondent trying to bring S.L. to the office. To her observation, respondent was holding S.L.'s wrists above his head, with his back toward respondent, while she pushed him with her knees to get him to move forward. S.L. appeared to be distressed and was trying to get away. J.L. was "disgusted" and "mortified" by what she saw. After

this incident, S.L. began to say that he did not want to go to school, that he did not want to go to respondent's classroom because "she is mean to me" and "does not like me."

15. Shari Hostler, who is employed by the District as a social worker, also observed this incident from the school office. To her observation, respondent was holding S.L. by his wrists as he faced her. He was sort of sitting on the ground in the exterior hallway. S.L. appeared to be upset, and respondent appeared to be frustrated.

16. The evidence did not establish that respondent acted inappropriately or used excessive force under the circumstances. Respondent reasonably determined it was necessary to take S.L. to the office to prevent him from eloping and possibly causing harm to himself. S.L. was clearly upset by the fact that respondent was taking him to the office, but respondent did not use more force than reasonable and necessary by carrying him and pushing him with her legs as a means of taking him to the school office.

MARCH 7, 2018 IEP MEETING

17. On March 7, 2018, an Individualized Education Program (IEP) meeting was held with attendees including respondent, both of S.L.'s parents, Ms. Franklin, Craig Kimball (Assistant Superintendent and Special Education Director), Tom Veeh (a special day class teacher), and a Redwood Coast Regional Center representative. One topic of discussion during the IEP meeting was the future use of a "behavior journal" that respondent and S.L.'s parents had been voluntarily utilizing since February 1, 2018, to note patterns in S.L.'s behavior. The behavior journal provided a means by which S.L.'s parents could write their observations of S.L.'s behavior while at home, and put the journal in his school pack so that respondent could write her observations of S.L.'s behavior at school. In this way, the behavior journal was passed back and forth between S.L.'s parents and respondent with their accumulated observations.

18. The participants of the IEP meeting discussed how to continue utilizing the behavior journal. At the conclusion of the IEP meeting an amendment to the IEP was prepared, which reads in pertinent part as follows:

Christina from CBEM [a behavior consultant] created a behavior plan and chart for [respondent] and SCIA [a one-on one-aid] to use on a daily basis to assist [S.L.] with behavior. The chart will accompany the journal entry and be sent home on a daily basis.

19. Ms. Franklin, Mr. Kimball, and S.L.'s parents understood that the IEP was amended to make respondent's continued participation with the behavior journal a mandatory component of the IEP. Respondent did not understand from the discussions at the IEP meeting or the IEP amendment that the behavior journal was mandatory. Respondent continued writing in the behavior journal until April 2, 2018, one or two days before the District put her on administrative leave.

20. Respondent had been making written notes of S.L.'s behavior since as early as October 2017, partially as a means of demonstrating that she needed a one-on-one aide in her classroom to help with S.L. Respondent shared these notes with Ms. Franklin. A full-time one-on-one aide did not begin working with S.L. until after the District put respondent on administrative leave on or about April 3, 2018.

APRIL 2, 2018 BEHAVIOR JOURNAL ENTRY

21. On April 2, 2018, respondent wrote in S.L.'s behavior journal the following entry:

This is the last day I am writing in this book. It takes too much of my attention and I'm not seeing much improvement in behavior. If they ever do get him a 1 on 1 aid that person can take on the responsibility of daily written communication.

Based on this entry in the behavior journal, and respondent's statements to Ms. Franklin at a meeting on May 3, 2018, discussed below, the District alleged that respondent violated S.L.'s IEP and was derelict in her responsibilities as his teacher. Respondent credibly testified that she wrote the April 2, 2018 entry because she felt like the journaling was accomplishing nothing, and that neither S.L.'s parents nor anyone in the IEP meetings were talking with respondent about the contents of the behavior journal. Respondent credibly testified that nobody from the District explicitly directed her to continue writing in the behavior journal, and that she would have followed any directive that she do so. Ms. Franklin testified that she spoke with respondent on April 3, 2018, and that respondent seemed resistant to the ongoing journaling, but did not refuse to continue with it.

22. On May 3, 2018, Ms. Franklin conducted an interview with respondent on matters including her April 2, 2018 journal entry. Paula Wyant, the Principal of Hoopa Elementary School, took notes and a transcript was prepared. During the interview, respondent stated the following regarding her final journal entry:

It [writing in the behavior journal] is not my job. I was angry, frustrated, pissed off as to why the school was not supporting this child. I came to you several times. I was given a TK class with no help. I wanted to convince them that nothing was improving. S.L. is the worst out of several challenging students. I thought I'm going to write this down. I'm logging it voluntarily and giving it to the parents. I started writing it in the fall. I gave all the copies to administration. I was writing and giving [it] to the parents.

[¶] . . . [¶]

The reality is that I wasn't writing everything S.L. did. I would never not be writing. I couldn't write everything because it would all be negative. Some days I wouldn't or I would forget and have to do it and then run it over to after-school. Then I was thinking, 'Why am I doing this?' Nothing is changed. No aid, I had a classroom aide sometimes. After 4/2 I was done, I was just done.

23. The evidence did not establish that respondent persistently refused to write in the behavior journal. First, she wrote in the behavior journal up until April 2, 2018, which was one or two days before the District suspended her. Second, respondent credibly testified that she would have complied with any directive that she continue to maintain the behavior journal, and that she did not understand that the IEP made it mandatory. Third, respondent's comments to Ms. Franklin during the May 3, 2018 interview approximately one month after the District had suspended her, were a clear expression of frustration, but did not include a refusal to write in the behavior journal if directed to do so.

APRIL 2, 2018 INCIDENT

24. The District alleged that on April 4, 2018,¹ respondent inappropriately placed her hands on S.L. out of frustration and anger, and used an inappropriate physical restraint on S.L. The evidence at hearing established that on April 2, 2018, there was an incident when S.L. began kicking a female student, W.P., as she and other students were sitting on the classroom carpet waiting to be released for recess. When respondent saw S.L. kicking W.P., she verbally told him to stop, but he continued kicking W.P. Respondent was afraid that S.L. would injure W.P., and possibly kick her into unconsciousness. To prevent harm to W.P., respondent put her hands on S.L.'s shoulders and gently pulled him away from W.P. Respondent attempted to talk with S.L., but he was crying and screaming. Respondent then told S.L. that he needed to go sit in his "cubby" to calm down. Each student had a cubby to store their belongings. There is a built-in bench in front of each cubby. S.L. would not voluntarily go to his cubby, so respondent used her hands to guide him. When they got within approximately one foot of the cubby, S.L. resisted and started kicking. S.L. jumped at respondent. She put her hands up, backed away, and again told him to go to his cubby, and that when he calmed down she would come talk with him. S.L. went to his cubby and sat on the built-in bench in front of it, facing outward from the cubby. After approximately 30 to 60 seconds, he began to calm down, and respondent came back to him. Respondent then took S.L. out to the playground where his classmates were on recess. Respondent and S.L. then walked the perimeter of the playground together during which time S.L. willingly held respondent's hand. After they walked the perimeter of the playground, S.L. was totally calm. Respondent then told him he could go play with the other students, which he did.

¹ The Statement of Charges incorrectly states that the incident occurred on April 4, 2018. The District did not move to amend the Statement of Charges to conform to proof, and respondent did not object or make any argument with respect to the variance. The variance between the proof and the pleadings did not result in prejudice to either party.

25. A.P. is W.P.'s mother. A.P. occasionally volunteered in respondent's classroom during the afternoons, and would then take her daughter home at the end of the school day. A.P. observed that respondent was very good at redirecting students. A.P. knows S.L. and his mother J.L. from respondent's classroom. The first time A.P. and W.P. met S.L. and J.L., S.L. punched W.P. in the face. A.P. was not present to observe S.L. kicking her daughter in respondent's classroom on April 2, 2018. Later that day or the next, when A.P. was giving W.P. a bath, she noticed that W.P. had many bruises on her body. A.P. asked what happened, and W.P. explained that S.L. had kicked her while in respondent's classroom.

26. J.L. is S.L.'s mother. During the afternoon or evening of April 2, 2018, J.L. was helping S.L. remove his shoes and socks. When J.L. attempted to remove S.L.'s socks, he withdrew his leg in pain and said "Ouch, ouch, don't touch." J.L. gently removed S.L.'s sock, and saw a dark bruise on the front of his leg near the ankle. S.L. said that respondent had forced him into his cubby because he had "been bad" and that he had kicked the cubby and bruised his leg while resisting respondent. S.L. had not wanted to go into the cubby, but told J.L. it was his fault because he "was bad." J.L. called her husband, who took a photograph of the bruising. No photograph of the bruising was offered as evidence.

27. The evidence did not establish that respondent used more force than reasonably necessary or that she acted in frustration or anger when she pulled S.L. away from W.P., and directed him to a cubby to calm down. Respondent was faced with a situation where S.L. was kicking a young girl as she sat or lay on the floor. Respondent acted reasonably to prevent potential serious harm to W.P. Respondent also acted reasonably when she verbally and with use of her hands directed S.L. to sit on the shelf in front of his cubby, where he began to calm down in less than one minute. The bruising on S.L.'s leg may have been prevented if respondent had instead pulled W.P. away from S.L. as he was kicking her, and then removed the other students to a safe place until help could be summoned to control S.L. This course of action would have presented its own set of problems, including the risk of allowing S.L. to further harm W.P. as respondent pulled her away from him, and the absence of supervision while respondent summoned help to control S.L. Given the situation that respondent faced, she chose a reasonable course of action and used no more force than reasonably necessary to protect the health and safety of her students.

NOTORIETY AND PUBLICITY

28. Two days before the hearing, the District's legal counsel showed a Facebook posting to J.L. The Facebook posting was authored by a man who is in a romantic relationship with the parent of a child who was in respondent's class with S.L. The Facebook posting was sent to approximately 11 other individuals in April 2018, and reads as follows:

For those with kids at trinity valley school [sic] children are being abused by their teacher [respondent] today was shoving an autistic kid into a cubby he has bruised legs and when another

child didn't like that he got smacked in the mouth there is a meeting tomorrow but this is unexcusable [sic] I hope the school does the right thing and fire [sic] her if she doesn't go to jail I am pissed the teachers [sic] the bully HELL NAW!

MANAGEMENT OF MALADAPTIVE STUDENT BEHAVIORS

29. The District alleged that respondent did not use appropriate behavior management techniques in her supervision of S.L., based on the following incidents. First, on December 8, 2017, S.L. bit another child on the shoulder, as described in Factual Finding 7. Second, on April 2, 2018, S.L. kicked another child, as described in Factual Finding 24. Third, on January 16, 2018, while in the school library under respondent's supervision, S.L. tried to grab a book that another girl was reading. The child resisted, and S.L. punched her on the hand. Respondent intervened and told S.L. that the book belonged to the other child, and directed him back to his seat by touching him with her hand. S.L. kicked and screamed at respondent, but then calmed down within approximately two minutes.

30. The evidence did not establish that respondent used ineffective or inappropriate behavior management techniques in her supervision of S.L. The evidence showed that S.L. acted out unpredictably. In each instance, respondent took quick and appropriate action, and used no more force than reasonably necessary to prevent harm to her students.

INCIDENT WITH J.W.

31. J.W. was one of respondent's TK students during the 2017-2018 school year. The District alleged that there were multiple instances when respondent grabbed J.W. and physically pulled him into the main office. Respondent credibly testified that on one occasion during class recess, on a date which respondent could not recall, J.W. was sitting and lying on the school sidewalk screaming and crying. Respondent was concerned that J.W. might hit his head on the sidewalk and injure himself. Respondent wanted to take J.W. to the office before recess ended, when the playground monitors would no longer be supervising her other students. Respondent picked up J.W. in a cradling fashion and carried him to the office. Respondent was not physically restraining J.W., and would have put him down if he had asked her to do so. Respondent carried J.W. to the school office in order to ensure his safety, and in time to supervise her other students when they came back from recess.

32. The evidence did not establish that respondent used inappropriate or excessive force in taking J.W. to the school office. Rather, she took reasonable and appropriate steps, using no more force than reasonably necessary, to prevent him from injuring himself on the sidewalk, all before her other students returned from recess.

INCIDENT WITH K.K.

33. K.K. was one of respondent's TK students during the 2017-2018 school year. The District alleged that in or around November 2017, she pulled and dragged K.K. to a wall outside of her classroom. Respondent testified that she recalled one occasion when she had K.K. sit on a chair outside the classroom door for a few minutes, though she acknowledged that in a previous deposition she testified this had occurred three or four times. Respondent testified credibly that during the time that K.K. was sitting outside the classroom door, respondent would keep the door open so that she could check on K.K. at the same time she was attending to her other students in the classroom.

34. The evidence did not establish that respondent used excessive force or failed to appropriately supervise K.K. There is no evidence that she pulled or dragged K.K. Also, when respondent had K.K. sit outside the classroom, he was close to the open door where she could easily see him.

35. The District presented testimony from Melinda Gulley, who testified that on an unspecified date she saw two students seated outside respondent's classroom with the door closed. These undated incidents were not alleged, and Ms. Gulley's testimony is not sufficiently specific to be persuasive regarding respondent's general level of supervision, or her supervision of K.K.

STUDENT SNACKS

36. The District alleged that respondent withheld snacks from children as a form of discipline during the 2017-2018 school year. Respondent and the children's parents voluntarily brought healthy snacks to be distributed to the children during transitions in the morning and at the end of the day. Respondent credibly testified that she gave snacks to children only when they were sitting down, and would not give snacks to them while they were running around. This gave children an incentive to sit down as requested, and provided for their safety while eating food. A child would most likely not get a snack if he or she did not settle down during the limited time that respondent was handing out snacks.

37. J.L. testified that she saw respondent withhold food from children on three separate occasions. In one instance in October or November 2017, she saw respondent at the end of the day telling some children "you get a snack" and other children "you don't get a snack until you behave and don't move." On another occasion in October or November 2017, J.L. saw respondent tell a child "you don't get a snack; you were bad today" which made the child scream. J.L. also testified that she also saw respondent physically remove a food item from the hands of a child by holding the child's wrist and taking the food, but did not describe the circumstances or the amount of force that respondent used sufficient to make any factual finding that respondent used inappropriate force. Both respondent and J.L. testified credibly regarding their recollections.

38. The evidence did not establish that respondent used snacks as a form of discipline. Respondent voluntarily offered the snacks to her students, which provided good and appropriate incentive for students to quiet down.

TRAINING REGARDING USE OF PHYSICAL FORCE

39. On November 1, 2017, the District provided a two-hour refresher training regarding Nonviolent Crisis Prevention Intervention. The instructor was Paula Wyant, Principal of Hoopa Elementary School. Ms. Wyant is a certified trainer for the Crisis Prevention Institute (CPI). CPI is a training organization that specializes in the safe management of disruptive and assaultive behavior. Ms. Wyant described the CPI training as providing a set of strategies and techniques to reduce an individual's harm to self or others. CPI training emphasizes that physical force should be used only as a last resort when there is imminent risk of harm to self or others, and when all other techniques have been exhausted. Based on CPI standards, physical intervention should be used to manage disruptive or assaultive behavior only with a minimum of three individuals who have been trained in the techniques. Unnecessary use of physical force could cause physical injury to a student or jeopardize the trust between the student and teacher. CPI training includes that if one student is assaulting another, the victim of the assault should be removed, rather than attempting to remove the student committing the assault. Ms. Wyant testified that these CPI techniques apply to TK students.

40. Respondent voluntarily attended approximately one hour of the two-hour CPI refresher course during a professional development day. She did not attend any preceding full CPI training for which the two-hour course served as a refresher. Ms. Wyant testified that respondent said during the training session that she often needs to guide students using physical contact, and that Ms. Wyant stated in response that physical touch must be used only as a last resort, and utilized in a CPI team of at least three individuals. Respondent testified that she does not recall Ms. Wyant saying that physical force may be used only with a team of at least three CPI trained individuals. Both respondent and Ms. Wyant testified credibly regarding their recollections.

41. Respondent did not follow CPI methods in her management of disruptive and assaultive behavior. This, however, is not determinative of whether respondent used more force than reasonably necessary to protect her students from imminent harm to their health or safety. The evidence established that respondent's actions were appropriate under the circumstances, and that they were reasonably necessary to prevent S.L. and other students from causing harm to themselves or others.

INSTRUCTIONS REGARDING USE OF FORCE

42. Craig Kimball regularly attended IEP meetings. Respondent was instructed in his presence, in multiple IEP meetings, as early as October 2017, not to use physical force with S.L. Respondent's reply was something to the effect that they did not know how hard it is to get S.L. to comply with verbal directions. During the IEP meetings, respondent also

advocated for a full-time one-on-one aide to be with S.L. throughout the school day. Mr. Kimball acknowledged, as soon as January 2018, that it was obvious S.L. needed a one-on-one aide.

43. Respondent testified that during one of the IEP meetings, Ms. Franklin instructed her not to touch S.L. Respondent did not recall the date of the IEP meeting. Respondent did not comply with the instructions she received at the IEP meetings not to touch S.L. and to refrain from using physical force. Respondent testified that she believes she utilized best practices under the circumstances on March 7, 2018, when she took S.L. from the playground to the school office, and on April 2, 2018, when she pulled S.L. away from kicking W.P. and directed him to his cubby.

44. The fact that respondent did not follow instructions she received to not touch or use force with S.L. is not conclusive on the issue of whether respondent used more force than reasonably necessary to protect her students from the risk of imminent harm. The most persuasive evidence is that respondent's actions were appropriate under the circumstances. Any deviation from the directions she received from Mr. Kimball and Ms. Franklin occurred in the context of the fact that S.L. needed a one-on-one aide as early as January 2018. In the absence of a one-on-one aide, respondent took appropriate actions to protect her students from harm with the resources she had available at the time.

Respondent's Evidence

LETTERS, AFFIDAVITS OF SUPPORT, AND TESTIMONY FOR RESPONDENT

45. Respondent provided approximately 20 letters of support which were admitted into evidence pursuant to Government Code section 11513, subdivision (d),² and two affidavits of support which were admitted into evidence pursuant to Government Code section 11514.³ The following excerpts provide a sample of the letters and affidavits.

Teresa Cyr, a first grade teacher at Hoopa Elementary School prepared a letter dated May 23, 2018, which states in part as follows:

² Government Code section 11513, subdivision (d), states: "Hearsay evidence may be used for the purpose of supplementing or explaining of the evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

³ Government Code section 11514, provides that a party may introduce an affidavit into evidence, and that it will be given the same effect as if the affiant had testified orally, if the proponent of the affidavit provides a copy to the opposing party 10 or more days prior to the hearing, and the opposing party does not request cross-examination of the affiant.

[Respondent] and I taught almost side-by-side at the primary wing while she taught at Hoopa Elementary [S]chool for well over nine years.

I thoroughly enjoyed my time working with [respondent], and came to know her as a truly valuable asset to absolutely any elementary or primary school team. She is honest, dependable, and incredibly hard-working. Beyond that, she is an impressive transitional kinder teacher who is always consistent, kind and very helpful while she worked with her students.

[¶] . . . [¶]

Along with her undeniable talent, [respondent] has always been an absolute joy to work with. She is a true team player, and always manages to foster positive discussions and bring the best out of other students and staff.

Ramona Sokolow, a special education teacher at Hoopa Valley High School prepared an affidavit dated October 11, 2018, which states in part as follows:

I have known [respondent] for about 10 years. She has been a professional colleague, and she was my daughter's Transitional Kindergarten (TK) teacher four years ago, during the 2014-2015 school year. Additionally, [respondent] has substituted in my classroom at Hoopa Valley High.

[¶] . . . [¶]

During the year [respondent] taught my daughter, I would visit the classroom and chat with [respondent]. Also, I would often watch as she was preparing for the next day. . . .

[Respondent] impressed me with her creativity as a teacher. She taught to all senses. My daughter came home with projects that showed the very tactile lessons along with songs and stories.

[¶] . . . [¶]

Overall, I strongly believe that [respondent] is a consummate teacher. . . .

Shelley Middleton, whose nephew was one of respondent students, prepared an affidavit dated October 12, 2018, which states as in part as follows:

My nephew, [name deleted], was a student in [respondent's] Transitional Kindergarten class in Trinity Valley Elementary School in 2016.

I participated in [respondent's] class by popping in throughout the year. I also drove one of the vans during a school field trip to the beach in Trinidad, CA.

[Respondent] was always a pleasure to be around, and I enjoyed watching her interact with her students.

46. Tom Veeh, a special day teacher at Trinity Valley Elementary School, testified on respondent's behalf and provided a letter of support. Mr. Veeh has worked for the District for approximately four years, and has known respondent for roughly the same amount of time as a colleague and through carpooling. As a special day teacher, Mr. Veeh works with students who spend part of the day with him, and part of the day in general education classes. He did not share any students with respondent prior to her administrative leave, but did have opportunities to observe her classroom and her teaching abilities. Mr. Veeh wrote in his letter of support the following:

I have had the opportunity to see many students get their first experience of school from [respondent]. She provides a welcoming atmosphere in a developmentally appropriate environment for her many young students. She not only supports the students in her class but she is also an important part of the school climate where she supports her fellow teachers and staff.

S.L. was placed on Mr. Veeh's caseload a very short time after respondent was put on administrative leave. S.L. spends approximately 30 minutes per day in Mr. Veeh's class. S.L. now has a one-on-one aide to help throughout each school day. In this regard, Mr. Veeh wrote the following in his letter of support:

[Respondent] worked diligently to convince the IEP team that the autistic child needed a one on one aide to help manage the child's behavior and to [e]nsure a successful experience for the child in Transitional Kindergarten. That child was finally provided with a one on one aide. The one on one aide helps the autistic child when they become frustrated or shows inappropriate behavior. The support of the aide also has helped the other students in the class with their behavior. . . . I feel if there had been appropriate support in [respondent's] class since the beginning of the school year, then she would not have been put in a situation that no teacher wants to experience.

47. Susan Adkins has been employed by the District since 2011, and worked as a classroom aide in respondent's room during the 2017-2018 school year. She worked in respondent's classroom approximately one and a half hours per day, approximately 20 days each in October and November 2017, 10 days in December 2017, and five days in January 2018. Based on her observations, Ms. Adkins has the utmost respect for respondent's calm temperament.

48. The testimony, affidavits, and letters of support are credible. Taken together, they provide persuasive evidence that respondent cares deeply about her students and has a generally cooperative character in her desire to promote their education and protect their safety.

Discussion

49. The evidence established that respondent did not use more force than reasonably necessary to protect the health and safety of her students. Specifically, during the incidents with S.L. on March 7, and April 4, 2018, respondent took appropriate action and used no more force than reasonably necessary. With respect to the incidents with J.W. and K.K., the evidence did not establish that respondent used any force.

50. The evidence did not establish that respondent failed to utilize appropriate behavior management techniques to control S.L., with respect to the incidents when he bit another child on December 8, 2017; tried to take a book from a child and punched her on January 16, 2018; and kicked another child on April 2, 2018. Respondent did what she could to manage S.L.'s behavior with the resources available to her. Respondent had advocated for additional resources in the form of a full-time one-on-one aide for S.L. It was acknowledged by Mr. Kimball as early as January 2018, that S.L. needed a one-on-one aide. These events occurred in the absence of a one-on-one aide, which made it particularly difficult to manage S.L.'s behavior. S.L. now has a one-on-one aide, and his behavior is much easier to manage as a result.

51. The evidence did not establish that respondent inappropriately left her students unattended. On December 8, 2017, respondent did not act unreasonably in taking S.L. to the school office when he had been acting out and bit another student. Respondent was gone from her class for approximately 30 to 60 seconds. She had no ready alternative other than using the telephone in her classroom office, where she would not have been able to see her students. On January 12, 2018, Ms. Franklin took S.L. to the school office at the moment that respondent was preparing to do so, and for this reason respondent's students were not left unattended. On January 24, 2018, respondent did not act unreasonably when she took S.L. to the school office while her other students were standing outside near the bathroom. The students were within respondent's view when she looked back to check on them while walking S.L. to the school office.

52. The evidence did not establish that respondent refused to write in S.L.'s behavior journal. Respondent wrote in the behavior journal consistently up until April 2,

2018, just one or two days before she was placed on administrative leave. Respondent expressed frustration with the behavior journal during her meeting with Ms. Franklin on May 3, 2018, but did not then or at any other time specifically refuse to continue writing in it. Rather, respondent credibly testified that she would have complied with an explicit directive to continue writing in the behavior journal.

53. The evidence did not establish that respondent withheld snacks from children as a means of discipline. Respondent and parents voluntarily brought snacks to give to children during transition times in the morning and afternoon. Respondent would not give a snack to a child until he or she complied with a request to sit or calm down. Consequently, a child would likely not receive a snack if he or she failed to comply during the limited time that snacks were being distributed. Snacks were not used as a disciplinary measure. Rather, they were used to provide healthy nutrition, and an incentive for the children to comply with requests during transition times.

54. Based on the Factual Findings as a whole, and the Legal Conclusions set forth below, the evidence did not establish that respondent engaged in immoral conduct. “Immoral conduct” is defined in Legal Conclusion 3 to include moral indifference and an inconsiderate attitude toward the public welfare. Respondent did not display any of these qualities or characteristics. Rather, the evidence established that respondent desired the best for her students, and took reasonable steps to protect their safety.

55. Based on the Factual Findings as a whole, and the Legal Conclusions set forth below, the evidence did not establish that respondent is evidently unfit for service. “Evident unfitness for service” is defined in Legal Conclusion 4 to include temperamental defects and fixed character traits in failing to meet the expectations of the school district. Respondent did not display any of these characteristics. Rather, the evidence of respondent’s conduct and the testimony and affidavits on her behalf established that respondent has a cooperative character and that her actions manifest her desire to promote her students’ education and protect their safety.

56. Based on the Factual Findings as a whole, and the Legal Conclusions set forth below, the evidence did not establish that respondent engaged in persistent violations of or refusals to obey. As defined in Legal Conclusion 5, this requires a showing of intentional and continual refusals to cooperate. The evidence did not establish that respondent displayed any of these characteristics in her supervision of students or in the implementation of S.L.’s IEP.

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LEGAL CONCLUSIONS

Applicable Law and Regulations

1. A school district which seeks to dismiss a permanent certificated employee from its employment bears the burden of proof and the standard of proof is by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035; *Bevli v. Brisco* (1989) 211 Cal.App.3d 986.)

2. Education Code section 44932, subdivision (a), provides in pertinent part that no permanent employee shall be dismissed by a school district except for one or more of the following causes, including for:

- (1) immoral conduct, . . .
- (6) evident unfitness for service . . .
- (8) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

3. “Immoral conduct” for the purpose of dismissal of a teacher is defined to include “conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful [sic], flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.” (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

4. “Evident unfitness for service” means “clearly not fit, not adapted to or unsuitable 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 the expectations of the employing school district.” (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.)

5. “Persistent violations of or refusal to obey” school laws or reasonable regulations requires a “showing of intentional and continual refusal to cooperate.” (*San Dieguito Union High School District v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1196.)

6. District Board Policy (BP) and Administrative Regulation (AR) 5142 require District staff to be responsible for proper supervision of students during school hours. AR 5142 requires that teachers “be present at their respective rooms and shall open them to admit students not less than 30 minutes before the time when school starts.”

7. District BP and AR 6159 require the District to maintain a valid IEP for all qualifying students, and to provide services to qualifying students in accordance with his/her IEP.

8. Education Code section 44807 prohibits a teacher from using physical control over a student that exceeds “the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning.”

9. Education Code section 49001 prohibits corporal punishment of a student. Section 49001, subdivision (a) states as follows:

For purposes of this section “corporal punishment” means the willful infliction of, or willfully causing the infliction of, physical pain on a pupil. An amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to persons . . . is not and shall not be construed to be corporal punishment within the meaning and intent of this section.

10. Education Code sections 56000, 56032, and 56345 require the District to provide all qualifying students with a free, appropriate public education through the creation and implementation of an IEP.

Alleged Causes for Discipline

11. The District alleged that respondent persistently failed to properly supervise her students during school hours in violation of BP and AR 5142, in that: (1) several students were injured in her classroom on April 2, 2018, and during the 2017-2018 school year; (2) respondent left her class unattended while she took S.L. to the school office on December 8, 2017, and January 12 and 24, 2018; and (3) respondent used inappropriate physical force against S.L. on March 7 and April 4, 2018, against J.W. during the fall of the 2017-2018 school year, and against K.K. in or around November 2017.

12. Based on the Factual Findings and Legal Conclusions as a whole, and the specific Factual Findings set forth in Legal Conclusions 12(a) through (c) below, the evidence did not establish that respondent persistently failed to properly supervise her students during school hours in violation of BP and AR 5142.

12(a). First, based on Factual Findings 7 through 16, 24 through 27, 29, 30, 39 through 44, and 49, the evidence established that respondent exercised all reasonable diligence in her supervision of S.L., and promptly responded when he acted out to prevent and/or minimize any harm that S.L. might cause to himself or other students.

12(b). Second, based on Factual Findings 7 through 12, and 51, the evidence established that respondent left her class unattended only on December 8, 2017, and January 24, 2018, and that she acted reasonably under the circumstances on both occasions. Even if respondent failed to comply with the AR 5142 requirement that teachers “be present at their respective rooms” on December 8, 2017, this, combined with her conduct on January 12 and 24, 2018, does not rise to the level of a persistent violation or refusal to obey a school regulation, and does not under the circumstances of this case warrant dismissal or suspension of respondent.

12(c). Third, based on Factual Findings 13 through 16, 24 through 27, 31 through 35, and 49, the evidence did not establish that respondent used excessive physical force against S.L. on March 7 and April 4, 2018, against J.W. during the fall of the 2017-2018 school year, and against K.K. in or around November 2017.

13. The District alleged that respondent willfully and persistently refused to comply with S.L.’s IEP, which required that respondent report S.L.’s behavior in a daily journal, in persistent violation of BP and AR 6159.

14. Based on the Factual Findings and Legal Conclusions as a whole, and particularly Factual Findings 17 through 23, and 52, the evidence did not establish that respondent willfully and persistently refused to comply with S.L.’s IEP.

15. The District alleged that respondent repeatedly used inappropriate physical force against S.L. on March 7 and April 4, 2018, against J.W. during the fall of the 2017-2018 school year, and against K.K. in or around November 2017, in persistent violation of Education Code sections 44807 and 49001.

16. Based on the Factual Findings and Legal Conclusions as a whole, and particularly Factual Findings 13 through 16, 24 through 27, 31 through 35, and 49, the evidence did not establish that respondent used inappropriate physical force against S.L., J.W., or K.K. or that the force used constituted “corporal punishment.”

17. The District alleged that respondent, by her conduct alleged in the causes for discipline set forth above, willfully and persistently failed to provide S.L. with a free, appropriate public education (FAPE), in persistent violation of Education Code sections 56000, 56032, and 56345.

18. Based on the Factual Findings and Legal Conclusions as a whole, and particularly Factual Findings 17 through 23, and 52, the evidence did not establish that respondent willfully failed to provide S.L. with a FAPE.

19. The District alleged that respondent, by her conduct alleged in the Statement of Charges as a whole, engaged in immoral conduct, committed persistent and willful violations of the school laws or regulations governing her employment, and that she is

evidently unfit for service, as set forth in Education Code section 44932, subdivision (a)(1), (6), and (8).

20. Based on the Factual Findings and Legal Conclusions as a whole, the evidence did not establish that respondent engaged in immoral conduct, persistent and willful violations of the school laws or regulations governing her employment, or that she is evidently unfit for service.

Fitness to Teach

21. Generally, cause for discipline must relate to a certificated employee's fitness to teach, within the meaning of the various factors enumerated in the case of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. Here, the Commission did not find cause to discipline respondent. An analysis of the *Morrison* factors is therefore unnecessary. Separately and in addition, “[t]he Commission has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction.” (*California Teachers Association v. State of California* (1999) 20 Cal.4th 327, 343-344.) Thus, even where cause for dismissal has been established, the Commission still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 222.) Based on a full review and consideration of the evidence and arguments in this case, the Commission has determined that neither dismissal nor suspension of respondent from the District is warranted because the misconduct alleged is unsupported by the evidence and/or not serious enough to support dismissal or suspension.

Conclusion

22. The District did not sustain its burden of proving, by a preponderance of the evidence that respondent engaged in immoral conduct, demonstrated evident unfitness for service, or that she persistently violated or refused to obey the applicable laws and regulations. For this reason, the Statement of Charges must be dismissed.

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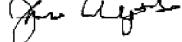
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ORDER

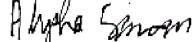
The Statement of Charges filed by the District against Judith Rose is DISMISSED.

DATED: November 26, 2018

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JANI AYERS, Member
Commission on Professional Competence

DATED: November 26, 2018

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ALYSHA SIMONI, Member
Commission on Professional Competence

DATED: November 26, 2018

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TIMOTHY ASPINWALL, Chair
Commission on Professional Competence