

BEFORE A COMMISSION ON PROFESSIONAL COMPETENCE
OAKLAND UNIFIED SCHOOL DISTRICT
COUNTY OF ALAMEDA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DEBORAH PAYNE-KELLEY,
A Permanent Certificated Employee of the
Oakland Unified School District,

Respondent.

OAH No. 2009050315

DECISION

This matter was heard by a Commission on Professional Competence at the Office of Administrative Hearings, Oakland, California, on September 20 – 23 and 27 – 30, and October 1, 2010. The commission members were Nanette Gray, Bill Griffith, and Steven C. Owyang.

Alison C. Neufeld and Matthew M. Nakano of Liebert Cassidy Whitmore represented the Oakland Unified School District. John Rusk, Coordinator for Special Education Compliance, Programs for Exceptional Children, was present as the District's representative.

Margo A. Feinberg and Amy M. Cu of Schwartz, Steinsapir, Dohrmann & Sommers LLP represented respondent Deborah Payne-Kelley, who was present.

To maintain confidentiality, this decision identifies students by first name or by initials only. Further, it is ordered that all documents in the record containing student names shall be placed under seal, and shall be opened for public inspection only pursuant to the order of a court of competent jurisdiction.

A post-hearing briefing schedule was established and subsequently extended. The parties timely filed opening and reply briefs. The District also filed a separate statement responding to respondent's evidentiary objections.

OVERVIEW

The District seeks to dismiss respondent Deborah Payne-Kelley on the grounds of immoral conduct, unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of or refusal to obey the school laws or reasonable regulations. The District cites instances of respondent's performance in the 2005 – 2006,

2006 – 2007, 2007 – 2008, and 2008 – 2009 school years as providing cause to terminate her employment.

FACTUAL FINDINGS

1. Roberta Mayor, Interim Superintendent, Oakland Unified School District, issued the accusation in her official capacity. The accusation is dated April 30, 2009. Attached to the accusation was a March 26, 2009, notice of intent to dismiss and suspend without pay signed by Interim Superintendent Mayor. Also attached to the accusation was a March 20, 2009, Statement of Charges and recommendation for dismissal and suspension without pay signed by Executive Officer Wendy Gudalewicz. (Other documents identify Gudalewicz as Network Executive Officer for High School Network 2.)

2. Respondent Deborah Payne-Kelley is a permanent certificated employee of the District. She first worked for the District in 1985, as a substitute teacher. She is a special education teacher.

3. Respondent was born and raised Oakland. She received an A.A. degree from Merritt College and a B.A. degree from the University of California, Berkeley. She holds a Master of Science degree in educational psychology from the California State University, Hayward. She holds a doctorate in education organization and leadership from the University of San Francisco.

Respondent holds: a Clear Single Subject Teaching Credential in Social Science; a Clear Specialist Instruction Credential in Special Education, Learning Handicapped; a Clear Resource Specialist Certificate of Competence; and, a Clear Designated Subjects Adult Education Teaching Credential, Nutrition Education, Business Education, Basic Education, Social Science.

4. Respondent was a transition specialist at Skyline High School in the 2004 – 2005 school year. The four transition specialist positions at the school, including the position held by respondent, were eliminated after the 2004 – 2005 school year, due to budget constraints.

5. The District provided reasonable accommodation to respondent following a back injury she sustained in 2001. Respondent has lifting restrictions and mobility difficulties, particularly climbing up and down stairs. At Skyline High School respondent had a golf cart with which to move about the campus. She was also given a disabled placard so she could park her car near her classroom.

6. The District's special education program is known as Programs for Exceptional Children (PEC). John Rusk previously served as PEC's Coordinator for Secondary Education. Rusk now serves as PEC's Coordinator for Special Education Compliance.

As Coordinator for Secondary Education, Rusk had shared responsibility with school site principals for supervising special education teachers, such as respondent. According to his testimony, school site principals were the primary lead for supervision, while Rusk supported the site principal.

PAUL ROBESON SCHOOL OF VISUAL & PERFORMING ARTS: AUGUST AND SEPTEMBER 2005

7. The Paul Robeson School of Visual & Performing Arts is one of several small schools in the Fremont Federation at the District's former Fremont High School location. Anisa Rasheed was the principal at Robeson in the 2005 – 2006 school year.

8. John Rusk, then PEC Coordinator for Secondary Education, sent an August 3, 2005, letter notifying respondent that effective Friday, August 26, 2005, her assignment would be "Special Day Class/NSH" at "Fremont/Robeson School [*sic*] Visual & Performing Arts." Rusk instructed respondent to report to the principal at Robeson by 8:00 a.m. and, "If you have any questions or concerns, please call me at [telephone number and extension]."

A "Special Day Class" is a class designed to provide specialized instruction for students who receive special education more than 50 percent of the day. A "Special Day Class/NSH" is a special day class designed to provide instruction for students who are in the mild to moderate category of disability.

9. Respondent received Rusk's letter around August 15, 2005. The next day, August 16, 2005, she received a second letter, dated August 12, from Rusk listing her assignment as "RSP" teacher.

10. Respondent left messages for Rusk, seeking to clarify her assignment. On Friday, August 26, 2005, Rusk spoke with respondent by telephone and told her that the District had not located a classroom for her. Rusk directed respondent to meet with PEC Program Specialist Bill Nelson at the Robeson library at 7:45 a.m. on the first day of instruction (August 29). Nelson was to be responsible for assisting respondent in her new assignment, including providing a class list and other materials.

11. Respondent went to the Fremont campus early on August 29, 2005. She had difficulty walking about, climbing stairs and finding the Robeson school. She eventually located the Robeson library and waited for her 7:45 a.m. meeting with Bill Nelson. Nelson did not show up for the meeting. No classroom and no students had been assigned to respondent. Respondent called John Rusk and informed him that Nelson had not arrived. Rusk told respondent to wait for Nelson and that Nelson had the materials she needed. Respondent waited about an hour for Nelson but he never arrived. At hearing, Rusk acknowledged that Nelson had the responsibility for providing respondent a class list and other information on the morning school began and that Nelson "Quite possibly" did not meet that obligation.

Respondent spoke with Principal Rasheed. Rasheed already had a special education teacher and was not aware that respondent had been assigned to her school. Rasheed had no students to assign to respondent. Respondent informed Rasheed that she was in pain and needed to see her doctor. Rasheed had respondent complete a Report of Injury Form and authorized respondent to leave the school. Respondent called Rusk's office repeatedly and finally spoke to Rusk's secretary and asked her to inform Rusk that Nelson had not shown up for the meeting and that she was leaving the school to seek medical attention.

12. Respondent returned to Robeson the next day (August 30, 2005) to submit a form from her doctor taking her off work for several days. Respondent called in her absence to the District's automated absence/substitute teacher line.

13. PEC Coordinator John Rusk issued an August 31, 2005, Letter of Reprimand (LOR) to respondent. He did not speak with respondent regarding the assertions in the LOR before he issued it. Rusk wrote (capitalization in original):

On August 29, you reported to duty but, [sic] failed to notify the site administrator of your subsequent absence and failed to supervise the students assigned to you.

On August 30 and 31st, you did not report for work; did not notify the school of your absence; and did not provide lesson plans.

**YOUR REPEATED FAILURE TO REPORT TO DUTY
SHALL BE CONSIDERED JOB ABANDONMENT.**

Employment with the district necessitates that: you are present and perform your job so as not to unduly disrupt or adversely affect the operations of the district. Further, your employment as a special education teacher further necessitates the direct supervision of students during instruction/unstructured time, and an awareness of student safety at all times.

Your conduct negatively affected the special education program inasmuch as the students were not provided adequate supervision and were denied federally mandated Free Appropriate Public Education (FAPE). Further, your conduct exposed the district to possible liability in the event a student was injured due to your lack of supervision or a parent pursued a Due Process Hearing on the grounds of failure to provide FAPE.

Effective immediately, you are directed to report to work with lesson plans and in the event of an excusable absence call the substitute office.

Repeated failure to make the necessary corrective action will result in progressive disciplinary proceedings up to and including termination.

14. The assertions in the LOR were false and unsubstantiated in multiple respects:

a. Respondent did not fail “to notify the site administrator of [her] subsequent absence” on August 29, 2005. At hearing, Principal Rasheed acknowledged that she authorized respondent to leave the school site.

b. Respondent did not fail to supervise the students assigned to her. She was present and ready to perform her job on August 29, 2005. The District, however, failed to assign any students to respondent. Program Specialist Bill Nelson failed to show up and provide the assistance and materials Rusk had assured respondent would be given to her.

The LOR did not mention Nelson’s failure to appear or the District’s failure to assign respondent a classroom or students.

c. Respondent did not fail to report to work or provide notice of her absence on August 30 or 31, 2005. She returned to Robeson on August 30 with a doctor’s form taking her off work. Respondent also reported her absence on the District’s automated absence/substitute teacher line.

d. Respondent was given no students and no Individual Education Plans (IEPs) with which to prepare lesson plans. There was no class and no substitute teacher to receive a lesson plan.

Rusk testified that “to leave no lesson plans is inexcusable when these students could have had some work to do.” He did not identify “these students,” but characterized them as being in the ninth through twelfth grades, with an average reading level at the third grade level, with a variety of disabilities, and taking four subjects. Rusk’s testimony was unpersuasive; there was no showing that “these students” existed or that it was “inexcusable” to not leave lesson plans for non-existent students.

e. Respondent did not provide inadequate supervision to any students or deny them a Free Appropriate Public Education. She did not expose the District to liability due to student injury or Due Process Hearing.

15. John Rusk asserted he had personal knowledge regarding respondent’s attendance in that “I had a conversation with the site administrator,” specifically Principal Rasheed. Rusk asserted that Rasheed told him that respondent had left school on August 29,

had not reported to work on August 30 and 31, had not informed the site or called a substitute, and had not prepared any lesson plans.

At hearing, Rasheed contradicted Rusk's assertions. She did not recall conferring with Rusk regarding respondent's attendance. She never recommended that respondent be disciplined and did not have complaints about respondent. Moreover, although Rusk testified that school site principals were the primary lead for supervision, Rasheed was not even aware of the LOR "until very, very recently."

At hearing, Rusk acknowledged that he did not verify the information in the LOR. He testified, "I did not feel I had to." He further acknowledged that he did not check the District's absence/substitute line to see if respondent had called in sick, did not contact the District's risk management office, and did not call respondent before issuing the LOR.

16. Respondent returned to Robeson on September 2, 2005. PEC still had not assigned a classroom or any students to her. Later that day, John Rusk informed respondent by telephone that she had been reassigned to the College Preparatory and Architecture Academy.

17. Respondent sent a September 6, 2005, letter to John Rusk requesting that he withdraw the LOR. Respondent noted, among other things, that Bill Nelson had missed their appointment and that she had informed Principal Rasheed of her need to leave to see her doctor. The LOR was not withdrawn.

COLLEGE PREPARATORY AND ARCHITECTURE ACADEMY: SEPTEMBER AND OCTOBER 2005

18. The College Preparatory and Architecture Academy (CPAA) is another of several schools in the Fremont Federation. Daniel Hurst is the school's principal.

19. Principal Hurst first met respondent on September 9, 2005. He had no prior knowledge that respondent had been assigned to his school. He came into the office, saw respondent, and discovered that she had been assigned to his school as a Special Day Class teacher for a class that had been newly assigned to his school. Respondent requested a class list and the students' IEPs but Hurst did not have them immediately available. Hurst informed her that roll sheets and IEPs for her students would be delivered to her classroom.

20. Respondent went to her classroom. From speaking with her students, she questioned whether they had been appropriately assigned to the class. She also raised concerns with Hurst over a missing telephone and exposed wiring in the classroom, both of which respondent considered safety issues. She and Hurst got into a verbal dispute, which drew the attention of other school site employees as well as the students.

21. Respondent told Hurst that her back hurt. With Hurst's authorization, respondent left CPAA at around 10:30 a.m. Her doctor placed her on disability. Respondent did not again work at CPAA. She remained off work the rest of the 2005 – 2006 school year.

22. On September 19, 2005, Bruce Colwell of the Oakland Education Association/California Teachers Association (respondent's union) sent an email message to John Rusk informing him, among other things, that:

[Respondent] has a Section 504 condition that requires reasonable accommodation. That accommodation requires that she not be assigned to a position that entails climbing up/down stairs. This latter situation may not have been brought to your attention and I have directed Debra [sic] to have her doctor provide a current evaluation of her condition and take it to Risk Management.

23. Principal Hurst issued an October 24, 2005, Notice of Unprofessional Conduct (NUC) to respondent regarding her September 9, 2005, conduct, some 45 days before. Hurst recited that the NUC was in "accordance with the provisions of Education Code Section 44938." Section 44938 provides that the notice "shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee." Section 44660 is applicable to respondent. No evaluation was included with or mentioned in the NUC.

The NUC concerned respondent's conduct on September 9, 2005. Hurst did not write the NUC until his supervisor, Executive Director Sue Woehrle, instructed him to do so. Woehrle was not a witness at the hearing and did not explain why she directed Hurst to issue the NUC. In any event, Hurst wrote:

Immediate and sustained improvement in your conduct with students and staff is expected. You are advised:

1. Report to your classroom on time with lesson plans and ready to teach each day.
2. You must establish a positive classroom atmosphere in which students feel respected and are given clear direction for their academic activities for the day.
3. Provide documentation regarding your back injury that supports your assertion that you cannot walk up stairs.
4. You must interact with your colleagues and supervisors in a professional and respectful manner that sets an example for students and others.
5. Raise any complaint you have at the proper time, in the proper place, and in the proper manner.

During the next 45 days your performance will be monitored to evaluate whether you have improved with respect to the problems outlined in this notice. You may contact me to discuss ways to improve the manner in which you interact with students. Should you continue to demonstrate unprofessional conduct, you will be subject to further disciplinary action, including dismissal or suspension from employment.

The NUC did not explain, for example, how respondent was to “establish a positive classroom atmosphere in which students feel respected” when she had neither a classroom nor any students at CPAA.

Hurst was aware of John Rusk’s August 31, 2005, LOR, as demonstrated by Hurst’s assertion in the NUC, that respondent “. . . had gone home on the first day of school without permission and did not return for 8 school days (see prior letter dated August 31, 2005) . . .” Hurst thus incorporated into the NUC the untrue assertion that respondent left Robeson without permission.

24. Principal Hurst did not discuss the NUC with respondent before he issued it on October 24, 2005. And although Hurst had told respondent “your performance will be monitored to evaluate whether you have improved with respect to the problems outlined in this notice,” he did not speak with or evaluate respondent after he issued the NUC.

CARL MUNCK ELEMENTARY SCHOOL: 2006 – 2007 and 2007 – 2008 SCHOOL YEARS

25. Respondent’s doctor released her to return to work in the 2006 – 2007 school year. Respondent so informed the District in August 2006. The District, however, did not return respondent to work until May 2007.

26. A few weeks before the end of the 2006 – 2007 school year, the District assigned respondent to teach in a Counseling Enriched Special Day Class (CESDC) at Carl Munck Elementary School. Someone from the District’s Legal Department called Principal Denise Burroughs and informed her that respondent had been assigned to her school.

A “Counseling Enriched Special Day Class” is a class designed to provide therapy as well as instruction for special education students.

27. Principal Burroughs received no paperwork about respondent and no materials regarding her need for reasonable accommodation.

28. Respondent was again assigned to teach a CESDC at Carl Munck in the 2007 – 2008 school year.

29. On December 20, 2007, the mother of “D [REDACTED],” a student in respondent’s class, sent a letter complaining about respondent’s treatment of her son. The District did not inform respondent about the letter. Neither D [REDACTED] nor his mother testified at the hearing.

30. Principal Burroughs conducted observations of respondent’s class on November 25, 2007, February 28, 2008, and April 16, 2008.

31. On April 17, 2008, Principal Burroughs provided an evaluation report to respondent. This followed the April 16, 2008, observation of respondent’s class. Burroughs gave respondent a rating of “Does not meet standards: developing” in four areas: Engaging & supporting all students in learning; Creating & maintaining effective student learning environment; Planning & designing instruction/learning experiences for all students; Developing as a professional educator. Burroughs gave respondent a rating of “Meets standards” in two areas: Understanding & organizing subject matter for learning; and, Assessing student learning.

Burroughs made the following recommendations:

Continue efforts toward building rapport with students and staff in the Counseling Enriched Special Day Class. Make effort to understand and implement District expected therapeutic model for CESDC.

Burroughs further recommended “Continued Evaluation” of respondent. Burroughs did not recommend that respondent be dismissed from employment, although that was an option on the evaluation form.

Burroughs testified, and it is found, that “Does not meet standards: developing” is not an unsatisfactory rating; “It means [respondent] was developing and she had room for growth.” This testimony is consistent with the recommendations Burroughs made in the April 17, 2008, evaluation.

Further demonstrating that “Does not meet standards: developing” is not an unsatisfactory rating is the District’s evaluation form itself. The form provides another rating, “Does not meet standards: unsatisfactory” with a one point value. In contrast, “Does not meet standards: developing” is a separate rating with a two point value.

32. Principal Burroughs did not again observe respondent’s class after April 16, 2008. But on May 16, 2008, Burroughs issued a Notice of Unsatisfactory Performance (NUP) to respondent. Burroughs wrote (capitalization in original):

You have demonstrated unsatisfactory performance in the areas of Standards for Engaging & Supporting All Students in Learning, Creating & Maintaining an Effective Learning Environment, Planning Instruction & Designing Learning

Experiences for All Students, and Developing as a Professional Educator.

Your inability to satisfactorily meet the California Standards of the Teaching Profession has negatively affected your students and has negatively impacted the school community. Your students are receiving substandard instruction in your classroom. Because you have consistently failed to engage them in a meaningful way, they are falling behind academically and behaviorally. Your lack of effective teaching, professional classroom leadership, and classroom management strategies has caused me to spend innumerable hours responding to and dealing with parent, student and community complaints. This is valuable time I could be spending enhancing and improving the educational opportunities for all students.

Burroughs had not rated respondent as unsatisfactory in any of these four standards in her April 17, 2008, evaluation. Burroughs wrote further:

This assessment of unsatisfactory performance is based on my observations of your classroom, discussions with support staff, parents and students, several coaching sessions, consultations, and other support. Specifically, during the 2007 – 2008 school year, I formally or informally observed your teaching on the following occasions:

- Frequent informal visits
- November 25, 2007, February 28, 2008, April 16, 2008 (50 minutes) (See Exhibit A: Formal Observation Form)

You consistently fail to complete and turn in lesson plans either weekly or bi-weekly as expected and have failed to leave planned lessons for substitute teachers during your absences.

Since the beginning of school year 2007 – 2008, I have received numerous verbal and written complaints about the quality of your teaching and interactions with students and support staff from parents, staff and students. (See Exhibit B: Parent and Student Complaints. See also Exhibit H.) Your students, parents, and support staff have expressed their concerns about your disposition toward students, lack of relationship building and your inability to manage the classroom. One student stated, “She doesn’t like me. She hates me.” This student is not alone

in his/her feelings. During student “meltdowns,” be they minor or major, they often express these words with reference to their interactions with you.

33. PEC Executive Director Lisa Ryan-Cole did not review the NUP before it was issued to respondent. Neither Principal Burroughs nor other District officials discussed the NUP with respondent.

CASTLEMONT BUSINESS AND INFORMATION TECHNOLOGY SCHOOL: 2008 – 2009 SCHOOL YEAR

34. In August 2008, the District reassigned respondent to Castlemont Business and Information Technology School (CBITS), where Susan Ryan served as principal.

35. PEC Coordinator John Rusk sent respondent an August 29, 2008, letter acknowledging that her medical condition prevented her from reporting for work for the first few weeks of the school year. He also informed respondent that he would be meeting with her upon her return to work to review the evaluation process and his expectations for her work with special education students. The District placed respondent on leave pending verification of her medical restrictions.

36. Respondent began teaching at CBITS in October 2008. About two weeks later, Rusk and respondent met to discuss the evaluation process and her goals and objections for the school year. Rusk did not, however, subsequently conduct an evaluation of respondent.

37. On December 17, 2008, student “M[REDACTED]” threw an object and hit respondent. Whether the object was a piece of candy, a staple remover, or some other object was not established in the record. No student or other percipient witness (except respondent) testified about incident.

Respondent informed the site administration that she was going to call the police about the incident. She called the police.

38. Displayed on the board in respondent’s classroom, among other sayings, was a phrase to the effect of, “You are my friend, right or wrong. You go to jail and I go home.” A January 5, 2009, “Memo of Concern” from Principal Ryan directed respondent, among other things, “to remove the offensive quotation.” The Memo of Concern characterized the offensive quotation as, “. . . I’m your friend . . . You go to jail and I go home.” This and other sayings were on the board for class discussions. Ryan did not speak to respondent about the phrase before directing respondent to remove it. The evidence did not establish that the phrase (in either iteration) is offensive, inappropriate, or that it indicated respondent’s intent to manage her classroom by intimidating her students.

39. On January 7, 2009, respondent mentioned a “grandmother” while speaking with her class. The evidence did not establish that respondent’s remark was directed at

student “J[REDACTED]” or that respondent had any knowledge about J[REDACTED]’s grandmother. J[REDACTED] took offense to the remark and told respondent, “Don’t be talking ‘bout my grandmother, Nigger” and “I’ll kick your motherfuckin’ ass, Nigger, keep talking about my grandmother.” J[REDACTED] pushed respondent and left the class without permission.

Principal Ryan and Network Executive Wendy Gudalewicz later interviewed some students about the incident. According to Ryan’s notes, student A. B. said “He [J[REDACTED]] bumped into her [respondent]” and “Walked by her & left.” Student J. V. told Ryan “J[REDACTED] bumped w/ his shoulder” and “She [respondent] got pushed, moved.” At hearing, Ryan testified (emphasis added), “And he [J[REDACTED]] may have used – I don’t remember exactly, but I think he may have used some profanity, but **no one saw any kind of assault take place.**” Ryan further testified that J[REDACTED] did not touch or move respondent. Ryan’s assertions that no one saw any kind of assault and that J[REDACTED] did not touch or move respondent are belied by her own notes.

The District presented no percipient witnesses of the January 7, 2009, incident. J[REDACTED] did not testify at the hearing. Respondent was the only percipient witness who testified about the incident.

40. A January 7, 2009, letter from Troy Christmas, Director, Labor Management & Employee Relations, informed respondent that the District had placed her on administrative leave with pay:

This letter serves to confirm the District’s decision to place you on Administrative Leave with Pay effective January 7, 2009. The purpose of this leave is to provide the District time to conduct an investigation into allegations of misconduct at Business Information & Technology High School. This action is not and should not be construed as punitive [*sic*] measure or a presumption of the truth of the allegation.

The Administrative Leave will remain in effect pending the completion of the District’s investigation. You are to be available to the District by telephone during your regular work hours in the event it becomes necessary to contact you. You are not to report to school or any other District site except to Payroll or Human Resources until further notice. Your paycheck or direct deposit statement will be mailed to your address of record in Human Resources the day before payday.

41. Respondent and the District had a contentious relationship. There is evidence, for example, that respondent’s interactions with her colleagues and students were often difficult and problematic, that she did not consistently create lesson plans, that she did not implement assigned curricula, that she missed or refused to participate in meetings, and that she questioned some colleagues’ racial motivations. But the evidence also showed a lack of

coordination between PEC and school site administrators, the District's willingness to blame and threaten respondent for problems that did not exist or that the District itself created, that the District did not provide staff and material support to respondent, and that the District did not objectively evaluate respondent.

LEGAL CONCLUSIONS

1. Education Code section 44944, subdivision (a)(5), provides, in pertinent part, "No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice." Applied literally, section 44944, subdivision (a)(5), precludes testimony and evidence on a myriad of matters such as dates of birth, years of education and degrees received, employment history, and anything that happened more than four years before the filing of the notice. For example, evidence that respondent began her teaching career in 1985 would be precluded. John Rusk's testimony that he worked for the San Francisco Unified School District in the 1990s would not be given. We have allowed such evidence and testimony, despite section 44944, subdivision (a)(5).

2. The District seeks to dismiss respondent Deborah Payne-Kelley on the grounds of immoral conduct, unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of or refusal to obey the school laws or reasonable regulations. The District has the burden of establishing cause to terminate respondent's employment.

3. Although PEC coordinator Rusk testified that he shared responsibility with school site principals for supervising special education teachers, the record demonstrated a lack of coordination between PEC and the various school sites to which respondent was assigned. Principal Rasheed at the Paul Robeson School of the Visual and Performing Arts was not aware that respondent had been assigned to her school until the respondent arrived at Robeson. Principal Hurst at CPAA was not aware that respondent had been assigned to his school before she arrived there. Principal Burroughs at Carl Munck Elementary had received a call from the Legal Department, but received no paperwork about respondent. These site administrators were not prepared for respondent's arrival. The lack of coordination between PEC and the school sites to which respondent was assigned contributed to the difficulties between the District and respondent.

4. The Legislature requires that the assessment of certificated personnel be conducted through objective evaluation. (Ed. Code, §44660 et seq.) The District did not objectively evaluate respondent.

a. PEC Coordinator John Rusk (who was also the District's representative at the hearing in this matter) issued an August 31, 2005, Letter of Reprimand to respondent. The District did not mention the LOR in the accusation or the Statement of Charges against respondent. (Gov. Code, §11503, Ed. Code, §44934.) The District nevertheless introduced

the LOR into evidence, had Rusk testify about it, and cited the LOR in its case against respondent, including in its post-hearing briefs.

The LOR demonstrated disorganization and lack of objectivity on the District's part. It did not reflect the factual circumstances at Robeson. It ignored PEC's own responsibility for the situation at the school. It blamed respondent for problems that did not exist. It relied on unsubstantiated assertions to threaten respondent ("YOUR REPEATED FAILURE TO REPORT TO DUTY SHALL BE CONSIDERED JOB ABANDONMENT.").

Rusk did not speak with respondent regarding the LOR before he issued it. He did not verify the information in the LOR, testifying "I did not feel I had to." Although he asserted that he spoke with Principal Rasheed before issuing the LOR, Rasheed recalled no such conversation. To the contrary, Rasheed did not recommend that respondent be disciplined and had no complaints about her. Despite Rusk's testimony that school site principals are the primary leads for supervision and that PEC and site administrators have shared responsibilities for special education teachers, Rasheed was not even aware of the LOR "until very, very recently."

The assertions in the Letter of Reprimand were false and unsubstantiated in multiple respects. (Factual Finding 14.) Respondent did not fail "to notify the site administrator of [her] subsequent absence" on August 29, 2005. To the contrary, Principal Rasheed acknowledged that she authorized respondent to leave the school site. Respondent did not fail to supervise the students assigned to her. Instead, PEC failed to assign any students to respondent. Moreover, the LOR failed to mention that it was PEC Program Specialist Bill Nelson who did not show up and provide the assistance and materials Rusk had assured respondent would be given to her. There was no mention of Nelson in the LOR; instead the LOR placed blame entirely upon respondent. Respondent did not fail to report to work or provide notice of her absence on August 30 or 31, 2005. She returned to Robeson on August 30 with a doctor's form taking her off work. Respondent also called the District's absence/substitute teacher line. Additionally, the LOR faulted respondent for not providing lesson plans, ignoring that it was the District, and PEC specifically, that failed to provide respondent a classroom, students, and IEPs.

Further demonstrating unfairness and lack of objectivity are the LOR's allegations that respondent negatively affected the special education program, denied students federally mandated Free Appropriate Public Education (FAPE), and exposed the District to possible liability due to student injury or due process hearing. There was no evidence that even a single student at Robeson was denied FAPE, was injured, or sought a due process hearing because of respondent's conduct. Those assertions were groundless, hyperbolic, and lacked any evidentiary support.

In a September 6, 2005, letter, respondent asked Rusk to withdraw the LOR. The LOR was not withdrawn. The evidence at hearing (including testimony by the District's own witnesses) demonstrated the many inaccuracies in the LOR. The District did not acknowledge any shortcomings in the LOR, although respondent noted them in her

testimony and post-hearing brief. Instead, the District continued to cite the LOR, including in both of its post-hearing briefs.

b. The events at College Preparatory and Architecture Academy further demonstrated the District's disorganization and lack of objectivity. As had been the case at Robeson, CPAA Principal Hurst did not learn that respondent had been assigned to his school until the day she arrived, September 9, 2005. Shortly after her arrival at CPAA, respondent and Hurst got into a verbal dispute. Hurst and respondent had different recollections of the dispute, which happened more than five years before the hearing in this matter. The details of their encounter were not established in the record. It is clear, however, that Hurst did not take any disciplinary action against respondent at the time, did not do so for about a month and a half (long after respondent had left the school), and did so only at the direction of his supervisor, Executive Director Sue Woehrle. Woehrle was not a witness at the hearing, and provided no explanation why she instructed Hurst to issue a Notice of Unprofessional Conduct (NUC). The NUC, moreover, repeated the unfounded allegation from the LOR that respondent had left Robeson without permission. Finally, although the NUC recited that it was issued in accordance with Education Code section 44938, which requires that the notice include the employee's evaluation, no evaluation was included with or mentioned in the NUC.

c. The District's disorganization and lack of objectivity were further demonstrated at Carl Munck Elementary. Principal Burroughs gave respondent an April 17, 2008, evaluation that included no unsatisfactory ratings. (Factual Finding 31.) Burroughs thereafter conducted no additional observations of respondent.

Burroughs gave respondent a rating of "Does not meet standards: developing" in four areas: Engaging & supporting all students in learning; Creating & maintaining effective student learning environment; Planning & designing instruction/learning experiences for all students; Developing as a professional educator. Burroughs recommended continued evaluation of respondent, not dismissal.

At hearing, Principal Burroughs confirmed that a "Does not meet standards: developing" rating is not an unsatisfactory rating. She was the one who evaluated respondent and her testimony on this point was persuasive. Moreover, the District's own evaluation report form has separate ratings and distinct numerical scores for "Does not meet standards: unsatisfactory" (one point) and "Does not meet standards: developing" (two points).

Barely one month later, and having conducted no additional observations, Burroughs gave respondent a May 16, 2008, Notice of Unsatisfactory Performance (NUP) that starkly contrasted with the April 17, 2008, evaluation. (Factual Finding 32.) The NUP included conclusions and language ("unsatisfactory performance," "inability to satisfactorily meet the California Standards of the Teaching Profession," "negatively affected your students," "negatively impacted the school community," "substandard instruction," "consistently failed") not mentioned in the previous month's evaluation. The NUP stated that respondent

demonstrated unsatisfactory performance in the areas of Standards for Engaging & Supporting All Students in Learning, Creating & Maintaining an Effective Learning Environment, Planning Instruction & Designing Learning Experiences for All Students, and Developing as a Professional Educator. Burroughs had not evaluated respondent as unsatisfactory in any of these areas in the previous month.

The District asserts that “Does not meet standards: developing” is an unsatisfactory rating, ignoring the express language of the two ratings (“developing” versus “unsatisfactory”), that the two ratings have different numerical scores, and the testimony of Principal Burroughs. The District further asserts, “As [Director of Labor Management and Employee Relations] Troy Christmas testified, any rating below ‘(3) Meets Standards’ is considered an unsatisfactory rating.” (District’s reply brief, p. 11.) Christmas’s actual testimony belies the District’s assertion (TR 1195:22 – 1196:8):

There is internal debate. The position that the District has taken is that three indicates “meets standards,” that anything below three must not be meeting standards. So if meeting standards is satisfactory, then anything that doesn’t meet standards is unsatisfactory.

However, the definition of an unsatisfactory evaluation, in terms of you go through the whole evaluation handbook, is talking about evaluations where there are two ones in one of the first five areas, but our position has been anything that does not meet standards is unsatisfactory.

As Christmas’s testimony corroborates, the District’s own evaluation handbook contradicts its assertion that “Does not meet standards: developing” is an unsatisfactory rating. The District’s assertions to the contrary are unconvincing.

The stark change from the April 2008 evaluation to the May 2008 NUP further demonstrates that the District did not objectively or consistently evaluate respondent.

d. Principal Ryan’s testimony about the Jalon incident at CBITS revealed a lack of recall, a lack of objectivity, or both. Ryan maintained that J [REDACTED] did not assault, touch, or move respondent. Her own investigation notes contradicted her testimony; the notes show that students A. B. and J. V. told Ryan that J [REDACTED] “bumped,” “pushed,” and “moved” respondent. (Factual Finding 39.)

5. The circumstances of surrounding student M [REDACTED] throwing an object and hitting respondent on December 17, 2008, including the nature of the object, were not established in the record. Although Principal Ryan interviewed students about the incident, no students or other percipient witnesses testified about the incident. (Factual Finding 37.)

Education Code section 44014 requires school employees to promptly report incidents of attacks, assaults, and physical threats by students to law enforcement authorities. Failure to make the required report can be prosecuted as a misdemeanor offense. Respondent was within her rights to report the December 17, 2008, incident to the police.

6. The District's Statement of Charges alleged that students and parents of students made comments and complaints about respondent. (E.g., Statement of Charges, ¶¶ 8, 35, 36, 42.) The District called no students and no parents of students to testify about such comments and complaints.

7. The Statement of Charges was written by Network Executive Officer Wendy Gudalewicz and alleged several events personally observed by Gudalewicz. (Statement of Charges, ¶¶ 54, 55, 56, 57, 64.) Paragraph 54, for example, alleged, "When Ms. Gudalewicz checked to see if another student understood the material, the student demonstrated no understanding of the material." Although Gudalewicz alleged that she was a percipient witness to the events, she was not a witness at the hearing.

8. The evidence did not establish that the phrase "You are my friend, right or wrong. You go to jail and I go home." is offensive, inappropriate, or that it indicated respondent's intent to manage her classroom by intimidating her students; nor is the phrase as quoted in Principal Ryan's Memo of Concern, ". . . I'm your friend . . . You go to jail and I go home." No student testified that he or she found the phrase was offensive, inappropriate, or intimidating. Moreover, Principal Ryan did not discuss the phrase with respondent before directing her to remove it from the board. (Factual Finding 38.)

9. Respondent and the District had a contentious relationship. There is evidence, moreover, that respondent's interactions with her colleagues and students were often difficult and problematic, that she did not consistently create lesson plans, that she at times did not implement assigned curricula, that she missed or refused to participate in meetings, and that she questioned some colleagues' racial motivations.

The evidence also revealed a lack of coordination between PEC and school site administrators, the District's willingness to blame and threaten respondent for problems that did not exist or that the District itself created, that the District did not provide staff and material support to respondent, and that the District did not objectively evaluate respondent. Under these circumstances, we cannot endorse or ratify the District's efforts to dismiss respondent. The District did not show cause to terminate respondent for immoral conduct, unprofessional conduct, unsatisfactory performance, evident unfitness for service, or persistent violation or refusal to obey school laws. (Ed. Code., §§44932 and 44939.) This conclusion should not be read, however, as a determination that respondent's conduct was faultless or that her interactions with her students and colleagues were not problematic. Nevertheless, the District's accusation shall be dismissed.

10. This is a unanimous decision of the Commission on Professional Competence. Commission members Gray and Griffith authorized Commission Chairman Owyang to affix their names to the decision.

ORDER

1. The accusation against respondent Deborah Payne-Kelley is dismissed.
2. All documents in the record containing student names shall be placed under seal, and shall be opened for public inspection only pursuant to the order of a court of competent jurisdiction.

DATED: February 23, 2011

NANETTE GRAY
Commission Member

BILL GRIFFITH
Commission Member

STEVEN C. OWYANG
Commission Chairperson
Administrative Law Judge
Office of Administrative Hearings