



Decision issued: May 28, 2015  
Citation issued: April 29, 2013  
Amended: September 23, 2014  
File No.: [REDACTED]  
Court reporter: Coast Reporting

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19  
AND  
A HEARING CONCERNING  
CHERYL ANN GOSSE  
(an Authorized Person under the *Teachers Act*)

**REASONS FOR DECISION ON FINDINGS AND DETERMINATION**

Date(s) and location(s): November 17-21, 27 & 28, 2014 at the Teacher Regulation Branch  
Panel: Meg Gaily (Chair), John Hall, Teresa Rezansoff  
Counsel for the Commissioner: John G. Mendes & Alex Chang  
Counsel for the Respondent: Steven Rogers & Shamon Beckett

**INTRODUCTION**

[1] A panel was appointed by the Commissioner to conduct a hearing into a citation, issued on April 29, 2013 and amended on September 23, 2014, under section 56(4) of the *Teachers Act*, S.B.C. 2011, c. 19 (the “Act”) (the “Citation”).

[2] School District No. 36 (Surrey) employed Cheryl Ann Gosse (the “Respondent”) as a Kindergarten teacher at Hjorth Road Elementary School (the “School”) for the 2011-2012 school year.

[3] The Respondent holds a certificate of qualification issued under the *Teaching Profession Act* on March 6, 1989, valid from January 1, 1989, and continuing under the Act as of January 9, 2012.

[4] The Respondent admits that the Citation was delivered to her through her counsel and she waives the requirements of section 56(3) of the Act.

[5] The Citation provides as follows:

At various times during the 2011-2012 school year, while employed as a teacher by School District No. 36 (Surrey) (the “District”), at the Hjorth Road Elementary School (the “School”), Cheryl Ann Gosse did engage in professional misconduct and/or conduct unbecoming a teacher when she committed acts and omissions in which she:

1. Yelled at students in her classroom on a frequent basis, at a volume that was often disruptive to other classrooms;
2. Criticized the work of students in an inappropriate manner, including
  - (a) Crumpling students’ work and discarding it into the garbage,
  - (b) Telling students “you are doing it wrong!” at a volume that could be heard by other students;
3. Reprimanded a student for urinating in the playground in an inappropriate manner, at a volume that could be heard by other students;
4. Told students to go away and leave her alone;
5. Made belittling and disrespectful comments to her students such as “where’s your brain?” and “what’s the matter with you?”;
6. Threatened to call a student’s parents during class in a manner that was belittling and disrespectful, and made frequent, angry telephone calls to the parents, sometimes in the presence of the student, to complain of the student’s behaviour;
7. Put her hand over a student’s mouth when he would not stop talking;
8. Displayed anger in her classroom by throwing chairs and other objects;
9. Pushed students out of her way or into their seats; and
10. Pulled students by their arms to get them to line up or get their attention

and thereby:

1. failed to treat students with respect and dignity, and failed to be responsible for their emotional safety, contrary to Standard 1 of the *Standards for the Education, Competence and Professional Conduct of Educators in British Columbia*, 4<sup>th</sup> edition, January 2012;
2. failed to recognize individual learning differences and special needs, and failed to implement proper instruction, assessment and classroom maintenance techniques,

contrary to Standard 3 of the *Standards for the Education, Competence and Professional Conduct of Educators in British Columbia*, 4<sup>th</sup> edition, January 2012; and

3. failed to facilitate learning for all of the students in her class and failed to implement proper classroom management, instruction, assessment and evaluation practices, contrary to Standard 5 of the *Standards for the Education, Competence and Professional Conduct of Educators in British Columbia*, 4<sup>th</sup> edition, January 2012.

[6] At the commencement of the hearing, the Commissioner said he was not pursuing the allegation in paragraph 7, and also that the allegations in the Citation were confined to professional misconduct, not conduct unbecoming a teacher. Therefore, pursuant to section 63(1)(e) of the Act, the panel directs the Commissioner to further amend the Citation by deleting paragraph 7 and the words “and/or conduct unbecoming a teacher.”

## ISSUES

[7] In a conduct hearing, the panel must make the following three determinations:

- (a) Has the Commissioner proved on a balance of probabilities the conduct set out in the Citation?
- (b) If so, does the proven conduct breach any of the Standards?
- (c) If so, does the conduct amount to professional misconduct such that the Respondent is guilty of professional misconduct under s. 63(1)(b) of the Act?

The panel’s findings with respect to the conduct proved by the Commissioner are set out in its findings of fact. The issues of whether that conduct breaches the Standards and amounts to professional misconduct are addressed in its analysis and decision.

## EVIDENCE AND FINDINGS OF FACT

### Witnesses and Background Information

[8] The panel heard from thirteen witnesses, including the Respondent. The Commissioner’s witnesses were:

Joe Frank, the School Principal from January 2009 through June 2013, who started teaching in 1984 and has been with the District for 19 years, working as a principal or vice principal since 2004;

Megann Swartz, the Education Assistant (“EA”) who was assigned to the Respondent’s class from January 16-April 5, 2012 to replace during that period the regular EA, John Myung, and who had been an on-call EA since 2008;

Zelda Komurcu, a District Aboriginal Education Assistant (“AEA”) whose 2011-2012 assignment included the Aboriginal students in the Respondent’s class who has been with the District for 10 years and who has worked as an AEA with other districts;

Randel Soares, an EA at the School assigned to spend time in the Respondent's class from November 2011 through June 2012 who started as an on-call EA with the District when she completed her training in 2010;

Mary Hammond, a learning support teacher ("LST") who has taught at the School for 34 years, both as a primary teacher and as an LST;

Laura Hodak, an LST at the School who has been with the District for five years after teaching in another province for ten years;

Student A's mother;<sup>1</sup>

Student A's father; and

Student A's grandmother.

[9] The Respondent testified on her own behalf and called the following witnesses:

John Myung, who qualified as an EA in 2011 and whose first assignment was to the Respondent's class (he was on leave from January 16-April 5, 2012);

Helen Kelsey, a teacher since 1985 and a District Integrated Support Teacher ("IST") since 1999, who was assigned to the designated special needs children in the Respondent's class; and

Gail Hall, the School's core music teacher who has been with the District for 26 years and was at the School for five years.

[10] The Respondent had spent over 15 years teaching at First Nations Band schools in Kingcome Inlet, Alert Bay, Klemtu, and Agassiz before the District hired her as an Aboriginal enhancement teacher in 2005, a position she held for 3 years. In June 2009, the Respondent obtained a position as kindergarten teacher at the School, teaching a kindergarten class designated for English language learners ("ELL") for 2009-2010, and regular kindergarten classes in 2010-2011 and 2011-2012. The Respondent was assigned to another school in the District starting in the fall of 2012.

[11] The School was described as one of the top three neediest schools in the District and in the province. Its demographic includes a high proportion of transient families, families living in poverty, and recent immigrants who speak little or no English.

[12] In 2011-2012, the Respondent's kindergarten class had 18-20 students (two of the students moved away during the school year). The Respondent testified that of these students, 11 were designated ELL, 3 were identified as Aboriginal students, 2 were designated as students

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<sup>1</sup> The student in the Respondent's class who is the subject of the allegations in paragraphs 3 and 6 of the Citation is, by agreement of the parties, referred to as "Student A" to protect his anonymity; the other children in the class are also referred to anonymously.

with special needs, and at least one or two other students in the class displayed special needs, but had not been formally designated by the District.

[13] In addition to the Respondent, a number of others also worked with these students in the 2011-12 school year as follows:

Mr. Myung<sup>2</sup> (or Ms. Swartz from January 16-April 5 2012) was assigned exclusively to assist one special needs student in the class, but also assisted other students in the class;

Ms. Soares spent approximately 1-3 hours in the class daily from November 2011 through June 2012 helping students generally;

Ms. Komurcu spent approximately 4 hours per week in the Respondent's class working with the Aboriginal students to whom she was assigned;

Ms. Kelsey spent approximately one hour per week on Wednesday mornings working with the designated special needs students in the Respondent's class and on Monday mornings she would pull these students out of the classroom and work with them in another room;

Ms. Hodak<sup>3</sup> provided in-class support in three 30-45 minute blocks each week during October 2011, which increased to four 45-minute blocks each week from November 7, 2011 through early January 2012, and she also provided pull out support to students, taking them to her LST classroom near the Respondent's classroom;

Ms. Hammond picked up students from the Respondent's class for pull out LST support a few times per week, spending no more than a few minutes in the classroom each time; and

Ms. Hall saw the Respondent's students in her music classroom twice a week (to which they were escorted by the Respondent) and also spent some time toward the end of the school day in the Respondent's classroom two to three times a week for most of the school year.

[14] Student A attended the School until late May 2012 when the family moved. Student A's grandmother said that she regularly picked up her grandson at the end of the school day, arriving 10-15 minutes early and waiting inside the classroom or near the classroom door. Student A's father spent one day in the class with his son shortly before Christmas 2011, and Student A's mother occasionally picked up her son after school.

[15] Student A was a challenging student and had physical altercations with other students in the class. In October 2013 at the beginning of his grade 2 year, Student A was diagnosed with attention deficit hyperactivity disorder combined type impulsivity and inattention, as well as complex neural behaviour and sensory processing problems, and language disorder close to autism spectrum. He was designated special needs and has been assigned an EA at his current

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<sup>2</sup> In addition to Mr. Myung, another EA was assigned to the Respondent's 2011-2012 kindergarten class part-time, working 5 hours per day in the class, but this EA was not called as a witness.

<sup>3</sup> Ms. Hodak created a document for the District's investigation setting out the support provided by the LSTs to the Respondent's class for 2011-2012, tendered as an exhibit at the hearing (Exhibit #3, Joint Book of Documents, Tab 19, Classroom Support).

school. The Respondent said that she suspected Student A had special needs, but admitted that she did not refer Student A to the school-based team during the 2011-2012 school year.

### *Standard of Proof*

[16] The Commissioner bears the onus of proving that the conduct alleged in the Citation occurred. The Supreme Court of Canada has established that the standard of proof is the balance of probabilities<sup>4</sup> - the Commissioner must prove that the evidence establishes that it is more probable than not that the alleged conduct occurred. The Supreme Court said that the evidence as a whole “must always be sufficiently clear, convincing and cogent” in order to establish “whether it is more likely than not that an alleged event occurred.”<sup>5</sup> The Respondent argues that the panel should afford less weight to evidence that is “merely a general description of events with no contextual details such as frequency, time, date and specific individual affected [because it] does not, at law, meet the standard of clear, convincing and cogent.”<sup>6</sup> However, the Supreme Court is clear that the standard is the balance of probabilities. Evidence that is “sufficiently clear, convincing and cogent” will meet that standard.

### *Findings of Fact regarding the Allegations*

#### *Allegation 1*

[17] The Commissioner alleges that the Respondent “yelled at students in her classroom on a frequent basis at a volume that was often disruptive to other classrooms”. This allegation does not refer to a specific incident, but to a pattern of conduct. The Respondent argues that the Commissioner’s evidence on this allegation consisted of “generalized and impressionistic statements without any evidence supporting specific facts” and should be given little weight<sup>7</sup>. The persuasiveness of evidence depends on many factors, one of which is detail. However, proof of a pattern of conduct does not necessarily require detailed evidence of specific incidents. Rather, the evidence must be assessed in its totality.

[18] The witnesses who spent the most time in the Respondent’s classroom were the EAs Mr. Myung, Ms. Swartz, and Ms. Soares. All testified that the Respondent yelled at her students. Ms. Swartz testified that, from January to April 2012, when she was working as an EA in the class, the Respondent yelled at the students regularly. She said that there was a lot of yelling throughout the day. Ms. Soares testified that the Respondent yelled at her students two to three times per week. She expressly described it as yelling, as distinguished from raising her voice, and said that the conduct was troubling to her because it was very loud and she felt that a teacher should not yell at her students. She said that after the Christmas break, the Respondent yelled in class daily. Mr. Myung, who was called by the Respondent also said the Respondent raised her voice to get the attention of the students or to get them to quiet down, and that sometimes this happened a couple of times per day but sometimes not at all. He specifically agreed that the Respondent yelled at students on occasion, but said that it was not a problem and was not out of

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<sup>4</sup> *F.H. v. McDougall*, 2008 SCC 53 at para. 40

<sup>5</sup> *F. H. v. McDougall*, supra at para. 46.

<sup>6</sup> Respondent’s closing submissions, para. 5

<sup>7</sup> Respondent’s closing submissions para. 56.

control. He also agreed that the Respondent might have used a loud, angry voice when dealing with some of the students who were more difficult to control, including special needs students.

[19] Ms. Komurcu said that when she was in the class, the Respondent raised her voice in a loud angry tone most of the time. Ms. Komurcu described the Respondent's class as a tough class and agreed that sometimes the Respondent raised her voice to get the students' attention or to get them to calm down. Ms. Hodak said that in the fall of 2011, the Respondent raised her voice at the students in an angry, aggressive manner on an almost daily basis.

[20] By contrast, Ms. Kelsey said that the Respondent sometimes needed to raise her voice to get the students' attention and that this is typical when teaching kindergarten students. While Ms. Kelsey testified that one of the special needs students in the class was sensitive to noises, counsel did not ask her whether the Respondent's voice upset this particular student. Ms. Hall testified that she never heard the Respondent raise her voice at her students. However, Ms. Hall was in the Respondent's classroom for much less time than the other witnesses.

[21] Ms. Hodak, Ms. Hammond, Ms. Soares and Mr. Frank all testified that the Respondent's voice could be heard outside her classroom. The Respondent testified that the kindergarten classroom was separated from other classrooms at the School, located near the main office and Ms. Hodak's LST classroom. Ms. Hodak said she could often hear the Respondent yelling at her students from her LST classroom, which was separated from the Respondent's classroom by two washrooms, and said that she had to shut her classroom door in September 2011 during testing sessions because the Respondent's voice was disruptive. Ms. Hammond testified that she could hear yelling coming from the Respondent's classroom when she was in the hallway and found this disconcerting. She said that the Respondent sounded impatient and exasperated with her students. Ms. Soares said the Respondent's voice was loud enough to be heard in the School's office, but could not recall a specific incident of this. Mr. Frank said that he could regularly hear the Respondent yelling in her classroom, both when he was in the hallway and when he was in his office, which he described as about 40 feet away. He had provided the Respondent with a letter of expectation in the previous school year directing her not to yell at students.<sup>8</sup>

[22] There was also evidence of specific occasions on which the Respondent yelled at students. Ms. Hodak described one incident where the Respondent yelled across the classroom at Student B who was touching a stuffed lion rocker in the classroom. Student A's father said that on the day he spent with his son in the classroom, he witnessed the Respondent yell across the classroom in an angry tone at Student C for drawing with magic markers on a piece of furniture. Student A's grandmother testified she heard the Respondent using a loud and overpowering voice at a student who was trying to put a chair on one of the tables. Mr. Frank described an occasion in January 2012 where he came into the Respondent's classroom and observed her yelling across the room at a group of students. Mr. Frank provided the Respondent with a second letter of direction dated January 17, 2012, in which he stated that the Respondent is to "refrain from yelling at students."<sup>9</sup>

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<sup>8</sup> Exhibit #3, Joint Book of Documents, Tab 2, letter of expectation, March 7, 2011

<sup>9</sup> Exhibit #3, Joint Book of Documents, Tab 4, letter of expectation, January 17, 2012

[23] Ms. Soares, Ms. Hodak and Ms Hammond also reported concerns about the Respondent's yelling to Mr. Frank. The Respondent said that the testimony of her colleagues on this issue was a surprise to her, and that if they were truly upset about her voice, they should have raised the issue with her. She says if they had done so, she would have altered her behaviour. On this point, Ms. Hodak said that she could not find an appropriate time to talk to the Respondent about this. Ms. Soares felt that as an EA she could not approach the Respondent directly. Whether or not her colleagues spoke to the Respondent about her voice, it is clear that Mr. Frank had done so in two letters of direction. Although the Respondent explained that she disregarded Mr. Frank's letters because she believed they were motivated by ill-will, she was aware her voice was an issue. In any event, this allegation concerns whether the alleged conduct occurred, not whether the Respondent persisted in it after colleagues had raised it with her

[24] The Respondent herself acknowledged that she has a loud voice. She described herself as able to call bingo numbers in a hall without a microphone, and demonstrated to the panel how loud her voice was when she raised it at the students (recounting the incident when she saw Student C drawing on the furniture). She estimated she raised her voice about once per week in her classroom, but that it could vary depending on the situation. The Respondent testified that although she might have raised her voice out of frustration, she would not yell out of anger at kindergarten students as that would be humiliating. She said her class had a high noise level and that there was no soundproofing between her classroom, the adjacent washrooms, and Ms. Hodak's LST classroom.

[25] The Respondent said that she would raise her voice at a child if that child was hurting another child, damaging school property, or intentionally doing something that the child had been told not to do. She admitted she yelled at Student C to stop colouring with markers on the furniture and that she raised her voice across the classroom at Student B because the stuffed lion rocker was old and falling apart. She said that she had to raise her voice when talking to her ELL students to get them to pay attention to her. She testified that she raised her voice at Student A when she was frustrated with him and that he would respond positively to her when she raised her voice at him. She said that she stopped using a loud frustrated voice when Student A left the School in May 2012.

[26] The panel finds that the preponderance of the evidence establishes that the Respondent yelled at students in her classroom on a frequent basis at a volume that was overheard outside the classroom. The evidence establishes that the Respondent's yelling was disruptive to Ms. Hodak's classroom on more than one occasion, and could also be heard in the hallway and School office. The allegation refers to disruption of other "classrooms" and there is no evidence that any classroom other than Ms. Hodak's was affected. However, in the panel's view, "classrooms" is a sufficiently general term that, in context, it can reasonably include one classroom on multiple occasions, as well as multiple classrooms. This allegation is made out.

### *Allegation 2*

[27] The Commissioner alleges that the Respondent criticized the work of students in an inappropriate manner. The allegation gives two examples of inappropriate criticism: crumpling students' work and discarding it in the garbage and telling students "you are doing it wrong!" at a volume that could be heard by other students.



[28] Ms. Soares testified that the students would regularly line up to show the Respondent their work at her desk and if the student had not performed the work correctly, the Respondent would crumple the work and throw it out. Ms. Swartz described an incident around Valentine's Day where the Respondent ripped up and threw in the garbage a student's art project because the student had not done it correctly. She also recalled a couple of other occasions when the Respondent was critical of student work, crumpling it and putting it in the garbage, but she could not remember details. Ms. Swartz said she was troubled by the Respondent's conduct because of the students' young age and because most of the work was art projects.

[29] Ms. Hodak recalled a colouring exercise where the Respondent removed several students' work because they were doing the exercise incorrectly and threw it in the garbage in front of other students. Ms. Hodak specifically recalled Student C having tears in his eyes or crying during this incident. Ms. Hodak also recalled that the Respondent yelled at a student "that's wrong" because the student had made a mistake, and other students heard this. Ms. Komurcu testified that she recalled a colouring exercise during which the Respondent held up a student's work in front of the class, said words to the effect that the work was unacceptable, and put it in the garbage. Ms. Swartz and Ms. Soares reported to Mr. Frank that the Respondent was inappropriately criticizing her kindergarten students by crumpling and throwing out their work, because they felt it was particularly inappropriate with kindergarten students.

[30] Mr. Myung testified that he never saw the Respondent crumple and throw out students' work. He said that the Respondent might have replaced a student's work paper if the student was not following directions, giving the example of a student incorrectly using two colours instead of three in a colouring exercise. Mr. Myung said that he didn't think the Respondent's conduct was inappropriate as the kindergarten students were capable of following directions. Ms. Kelsey also testified that she never saw the Respondent crumple or throw away student work.

[31] The Respondent admitted she was a strict teacher with high expectations of her students. The Respondent expressed adamantly that she would never crumple and throw students' work in the garbage. The Respondent said she would replace the student's paper, fold the previous work and put it in the classroom recycling. Nothing turns on whether the work was put in recycling as opposed to the garbage. She had no recollection of the Valentine's Day incident described by Ms. Swartz, or of the colouring exercise referred to by Ms. Hodak and Ms. Soares. The Respondent denied criticizing a student's work in front of the class, as described by Ms. Komurcu, but said that she might have taken away a student's work and suggested that the student could do a better job.

[32] The panel prefers the evidence of Ms. Soares, Ms. Swartz, Ms. Hodak and Ms. Komurcu to that of Mr. Myung and Ms. Kelsey. The recollections of Ms. Soares, Ms Swartz, Ms Hodak and Ms. Komurcu were detailed and specific. The Respondent could not recall any of the incidents and although she denied that she would put students' work in the garbage, she said she'd put it in the classroom recycling, without acknowledging that this may have been an inappropriate way to deal with kindergarten students. Ms. Soares and Ms. Swartz also reported their concerns to Mr. Frank. Ms. Kelsey's time in the Respondent's classroom was limited to an hour per week and it is likely she was either not present during the incidents or her attention was focused on her assigned special needs students. Mr. Myung's first assignment as an EA was in the Respondent's classroom. He had little experience with other teachers by which to gauge the

Respondent's behaviour, unlike Ms. Hodak, Ms. Komurcu and Ms. Swartz. As well, Mr. Myung's attention was focused on his assigned special needs student.

[33] The crux of this allegation is that the Respondent criticized students' work inappropriately. Crumpling and discarding student work and making the specific comment "you are doing it wrong" are provided only as examples of inappropriate behaviour.

[34] The panel finds that the Respondent criticized her students' work inappropriately, for example by crumpling it up and discarding it, and by telling students in a loud voice that their work was incorrect or unacceptable. There is no evidence that the Respondent used the specific phrase, "you are doing it wrong!" This allegation is substantiated.

### *Allegation 3*

[35] The Commissioner alleges that the Respondent inappropriately reprimanded a student for urinating in the playground, speaking so loudly that she could be heard by other students. This allegation concerns Student A and there is no dispute that he urinated on the playground during recess on at least one occasion. As noted earlier in these reasons, Student A was a challenging student and the Respondent testified that at the time, she suspected he had special needs, but she did not bring this to the attention of the school based team.

[36] Ms. Swartz, Ms. Soares and Ms. Komurcu testified about this incident. Ms. Swartz said that when the students returned to the classroom from recess the Respondent was very upset with Student A and she spoke harshly to him in a loud, angry voice across the classroom. Ms. Soares said that the Respondent reprimanded Student A when he returned from recess, saying across the classroom words to the effect of, "what's this I hear about you peeing on the playground?" Ms. Soares testified that she took Student A out of the classroom to the School office after this incident because Student A was upset and crying. Ms. Komurcu testified that she witnessed the Respondent speaking harshly to Student A in class about urinating on the playground and that the Respondent seemed angry with Student A about it. Ms. Komurcu agreed that it is appropriate for a teacher to reprimand a student for urinating on the playground. However, this allegation is not about whether a reprimand was appropriate, it is about whether the manner in which it was delivered was appropriate.

[37] The Respondent testified she observed Student A urinating on the playground near a restaurant adjacent to the School during recess on one occasion. The Respondent said that she yelled across the playground at Student A to stop what he was doing and later explained to Student A in class that what he was doing was wrong and inappropriate. She could not recall if others overheard her speaking with Student A about the incident and denied that Student A cried.

[38] Ms. Swartz, Ms. Komurcu and Ms. Soares all testified that the Respondent used a harsh and/or raised voice to reprimand Student A, and did so in a way that could be heard by other students in the classroom. The panel prefers the evidence of Ms. Swartz, Ms. Komurcu and Ms. Soares who all recalled similar details of the incident, Student A's reaction and the demeanour and comments of the Respondent. The panel finds that this allegation is substantiated.

*Allegation 4*

[39] The Commissioner alleges that the Respondent told students to go away and leave her alone.

[40] The Respondent testified that she had surgery and missed 4 weeks of work in December 2011 and early January 2012. She said that when she returned to work, she told the students that they weren't allowed to hug her because she'd had surgery and it could hurt her. The Respondent agreed that she may have backed away from students approaching to hug her, but denied that she ever told any student to go away and leave her alone.

[41] Ms. Hammond testified that the Respondent could be abrupt with her students and if a student interrupted her, she would say words to the effect of, "can't you see I'm talking?" Neither Ms. Hammond nor any other witness testified that the Respondent told students to go away and leave her alone.

[42] The panel finds that this allegation is not substantiated.

*Allegation 5*

[43] The Commissioner alleges that the Respondent made belittling and disrespectful comments to her students such as "where's your brain?" and "what's the matter with you?"

[44] Ms. Soares testified that the Respondent used expressions such as, "what's the matter with you?" and "are you crazy?" when speaking to her students. Ms. Soares recalled being concerned about this but could not remember details about the context in which the Respondent used these expressions. No other witness testified that the Respondent used these specific phrases. However, several recalled the Respondent speaking to students angrily and/or disrespectfully. Ms. Hodak recalled the Respondent angrily asking students "what are you doing?" but did not provide further context for the comment. Ms. Swartz testified that the Respondent belittled Student A when she raised her voice and reprimanded him in front of other students for urinating on the playground (as described above). Ms. Komurcu testified that the Respondent told students that their work was unacceptable in front of others.

[45] Student A's mother testified that she overheard the Respondent criticizing her son in front of the other students because he was not able to tell the class his correct birth date. Student A's mother also testified that she found some of the Respondent's comments in the communication book<sup>10</sup> demeaning and disrespectful. However, these comments were made to parents, not to a student. Student A's grandmother said that she often overheard the Respondent speaking to the class and described the Respondent's demeanour as harsh or disrespectful, particularly towards those students Student A's grandmother described as lower income. Student A's grandmother said that one time when she was present in the class during final circle time, Student A knocked a brochure or paper to the floor and the Respondent said loudly to him, "see what you've done."

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<sup>10</sup> The evidence included excerpts from a notebook ("communication book") in which the Respondent and the parents of Student A would communicate with each other on a daily basis in lieu of telephone calls.

[46] Mr. Myung, Ms. Hall and the Respondent herself testified that the Respondent did not make belittling and disrespectful comments to her students. Given the Respondent's testimony that she experienced frustration with some of the students in her class, and that she raised her voice at them, the panel finds the Respondent's denial that she ever made belittling or disrespectful comments to the students lacks plausibility. The panel places less weight on Ms. Hall's evidence because she spent very little time in the Respondent's classroom – only 10-15 minutes at the end of the day a few times a week. As noted earlier, Mr. Myung had no prior experience as an EA, unlike Ms. Hodak, Ms. Komurcu, and Ms. Swartz. Mr. Myung's denial that the Respondent made belittling or disrespectful comments to her students must be assessed in light of his statement that he did not consider that the Respondent's raising her voice at her students was a problem. He also said that during his time in her class, he focused on his assigned student. For these reasons, the panel also places less weight on his evidence.

[47] The substance of this allegation is that the Respondent made belittling and disrespectful comments to her students; the particular expressions "where's your brain?" and "what's the matter with you" are only examples of such comments. There was no evidence that the Respondent used these specific expressions.

[48] Ms. Swartz, Ms. Hodak and Ms. Komurcu, as well as Student A's mother and grandmother gave evidence that the Respondent made various disrespectful and belittling comments to her students. The Respondent's conduct in yelling at students, criticizing their work in front of others and discarding it, and her reprimand of Student A are also evidence of belittling and disrespectful comments. The panel finds this allegation substantiated.

#### *Allegation 6*

[49] The Commissioner alleges that the Respondent threatened to call a student's parents during class in a manner that was belittling and disrespectful, and made frequent, angry telephone calls to the parents, sometimes in the presence of the student, to complain of the student's behaviour. Student A was the subject of this allegation.

[50] At the beginning of the school year, Student A's mother said that if Student A was having difficulties at school, the Respondent was to call his parents or grandmother. Student A's mother testified that the Respondent made several calls to her about her son, at least one a day, and she felt some of the calls were unnecessary or tedious. She complained to Mr. Frank in January 2012.<sup>11</sup> Student A's mother recalled only one telephone call in which the Respondent was abrupt or short with her on the telephone and did not describe the Respondent as angry. Student A's mother and father said that, as a result of the Respondent's telephone calls to them, they would discipline Student A (for example, taking away his toys). Student A's mother said that she could hear her son crying in the background when the Respondent called her from the classroom and wrote in her letter to Mr. Frank that "it got to the point that when she would call, [Student A] would not want to get on the phone to talk to me."<sup>12</sup> Ms. Hodak recalled an incident in which Student A was misbehaving and the Respondent called one of his parents from the classroom.

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<sup>11</sup> Exhibit #3, Joint Book of Documents, Tab 3, letter dated January 11, 2012.

<sup>12</sup> Exhibit #3, Joint Book of Documents, Tab 3.

[51] Student A's mother testified the issue of the Respondent's frequent telephone calls came to a head around Christmas 2011, after which the Respondent agreed to stop calling Student A's parents and a communication book was created, excerpts of which were put before the panel.<sup>13</sup>

[52] Ms. Hodak described Student A as being very upset, clinging to the Respondent's leg, and begging or crying to the Respondent not to call his parents, and she said that the other students could overhear the call and see Student A's distress. Mr. Myung confirmed that the Respondent would call the parents of students in the class to discuss the students' classroom behaviour, including the parents of Student A, and she would make these calls from the classroom during the school day. The Respondent admitted she made several telephone calls to Student A's parents because Student A was defiant. She said that she knew that Student A's parents would discipline him for his classroom misbehaviour and that doing so was "like a switch" because it would positively affect Student A's classroom behaviour. The Respondent denied that Student A was so upset by the phone calls to his parents that he clung to her leg and cried. However, she also agreed that he might have cried and said, "don't call" on a few occasions.

[53] The panel finds that the Respondent made frequent calls to Student A's parents in the presence of Student A and that the Respondent used the threat of phone calls to his parents to manage Student A's classroom behaviour. The Respondent effectively admitted this was the case. However, the evidence does not establish that the telephone calls were angry, or that the Respondent threatened to call Student A's parents "in a manner that was belittling or disrespectful." The allegation is not that the Respondent used phone calls to Student A's parents as a behaviour management technique and that this was inappropriate or harmful to Student A; it alleges that the calls were angry and that the threats were belittling and disrespectful. The evidence does not establish these aspects of the allegation. Therefore, the panel finds that this allegation is not substantiated.

#### *Allegation 8*

[54] The Commissioner alleges that the Respondent displayed anger in her classroom by throwing chairs and other objects.

[55] Ms. Swartz recalled one occasion where the Respondent picked up chairs that were out of place and threw them under the tables in an angry manner. She also thought the Respondent once threw a pencil in the classroom, but could not recall any other details about the incident. Ms. Swartz did not say that these incidents upset any students.

[56] Mr. Myung testified that he never saw the Respondent push or throw chairs under the tables. Ms. Kelsey testified that to her recollection, the Respondent's classroom was too crowded for the Respondent to throw chairs. The Respondent was adamant that she would never throw a chair in her classroom and denied that the incident described by Ms. Swartz ever happened.

[57] The evidence of Ms. Swartz and the Respondent with respect to this allegation cannot be reconciled. The panel cannot prefer that of Ms. Swartz over that of the Respondent because Ms.

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<sup>13</sup> Exhibit #3, Joint Book of Documents, Tab 9.

Swartz's recollection lacks sufficient detail to make it more probable than not that the incident occurred. The panel finds that this allegation is not substantiated.

*Allegations 9 & 10*

[58] The Commissioner alleges that the Respondent pushed students out of her way or into their seats (paragraph 9 of the Citation) and that the Respondent pulled students by their arms to get them to line up or get their attention (paragraph 10). Because the evidence led to support these allegations is similar and overlaps, the panel has considered these allegations together.

[59] Ms. Hodak testified that she saw the Respondent push Student A into his seat to make him sit down by putting her hands on Student A's shoulders. Ms. Hodak felt that it was not an appropriate way for the Respondent to deal with Student A, but did not provide details about the incident or say how often this occurred. Student A's parents and grandmother did not testify that they knew or witnessed the Respondent push Student A into his seat.

[60] Ms. Swartz said that the Respondent would push students out of the way so that she could get past them, but could not recall any details about these occurrences. Ms. Swartz believed that teachers and EAs are not supposed to touch their students and it was in this context she thought it was inappropriate. The Respondent's evidence was that she would never have pushed students out of her way.

[61] Student A's mother testified that she witnessed one incident after school where the Respondent grabbed an older female student by the arm as the student was running past to stop her because the student's mother was calling to her. Student A's mother did not provide further details about the incident or whether the student was upset when stopped by the Respondent. The Respondent admitted that she likely put out her arm or grabbed the older student by the arm to slow her down so she would stop and listen to her mother, but could not recall the specific incident.

[62] Ms. Komurcu said the Respondent would move children into lines by touching them on their shoulders. Like Ms. Swartz, Ms. Komurcu also believed that teachers and EAs are not supposed to touch their students and it was in this context that she considered the Respondent's conduct inappropriate.

[63] In contrast, Ms. Hall and Ms. Kelsey both said that students, particularly kindergarten students, need physical direction to get them to line up or move to certain areas and it is entirely appropriate for a teacher to assist students to move by physically taking them by the arm or by the shoulder. The Respondent agreed she would touch students on occasions, for example, when she helped them put on their coats or when teaching them how to line up in single file.

[64] The panel finds that the Commissioner has not established on a balance of probabilities that the Respondent committed the conduct alleged in paragraphs 9 and 10 of the Citation. The panel accepts the evidence of Ms. Hall and Ms. Kelsey that kindergarten teachers need to physically touch their students for the purposes of teaching them how to line up or to assist them with dressing themselves.

### *Summary of Findings*

[65] In summary, the panel finds that the Commissioner has established that it is more likely than not that the following conduct occurred:

- The Respondent yelled at students in her class on a frequent basis at a volume that could be overheard by others outside her classroom and was disruptive of other classrooms (Allegation 1);
- The Respondent criticized the work of students in an inappropriate manner, including crumpling their work and discarding it in the garbage or recycling (Allegation 2);
- The Respondent reprimanded Student A for urinating in the playground in an inappropriate manner (Allegation 3); and
- The Respondent made belittling and disrespectful comments to students (Allegation 5).

## **ANALYSIS AND DECISION**

### *Preliminary Issue*

[66] The Respondent argued that there was so little evidence supporting the allegations in paragraphs 4, 8, 9 and 10 of the Citation (which the panel has found were not substantiated) that the Commissioner should not have included them in the Citation and should not have pursued them at the hearing. She argues that doing so was improper.

[67] The function of a citation in proceedings before the teacher discipline panel is to set out the allegations that the Commissioner intends to prove based on preliminary investigations. A finding that allegations have not been proved does not mean that the Citation is defective or that the Commissioner has acted improperly.

### *Breach of the Standards*

[68] The Commissioner argues that through her conduct, the Respondent failed to meet one or more of Standards #1, #3 and #5, which provide as follows:

1. Educators value and care for all students and act in their best interests.

Educators are responsible for fostering the emotional, aesthetic, intellectual, physical, social and vocational development of students. They are responsible for the emotional and physical safety of students. Educators treat students with respect and dignity. Educators respect the diversity in their classrooms, schools and communities. Educators have a privileged position of power and trust. They respect confidentiality unless disclosure is required by law. Educators do not abuse or exploit students or minors for personal, sexual, ideological, material or other advantage.

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3. Educators understand and apply knowledge of student growth and development

Educators are knowledgeable about how children develop as learners and as social beings, and demonstrate an understanding of individual learning differences and special needs.

This knowledge is used to assist educators in making decisions about curriculum, instruction, assessment and classroom management.

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5. Educators implement effective practices in areas of classroom management, planning, instruction, assessment, evaluation and reporting.

Educators have the knowledge and skills to facilitate learning for all students and know when to seek additional support for their practice. Educators thoughtfully consider all aspects of teaching, from planning through reporting, and understand the relationships among them. Educators employ a variety of instructional and assessment strategies.

[69] The Respondent said that she regrets some of her conduct during the 2011-2012 school year, in particular, raising her voice at her kindergarten students. She argues that in assessing whether her conduct breached the Standards, the panel should take into account the very challenging composition of her class that year, relying on the finding of the British Columbia Supreme Court that “class size and composition have a ‘direct and fundamental impact on the ability of teachers to do their jobs well’ and greatly [affect] workload and stress of a teacher.”<sup>14</sup>

[70] The Respondent argues that her classroom management and instruction was extremely difficult because her class had a large number of ELL students (11 of 18-20, or more than half the class), 2 designated special needs students, and at least a 1 or 2 other students she suspected of having special needs. She argues that she had insufficient support to meet the educational needs of these students.<sup>15</sup> Effectively, the Respondent argues that but for the make-up of her 2011-2012 kindergarten class – its size and composition – she would not have engaged in conduct that fell below the Standards and for this reason, the panel should find that her conduct did not breach the Standards.

[71] The Respondent argues that the panel should take into account the circumstances of the 2011-2012 school year that were beyond her control. The Respondent argues that “a teacher struggling to contain frustration in a classroom in an inner city school in an under-supported class with students with severe learning and/or behavioural disabilities is significantly less blameworthy than the same behaviour of a teacher in a 10 student kindergarten class on the Westside of Vancouver with no students with special needs and adequate support.”<sup>16</sup> The Respondent asks the panel to consider her background, her personal circumstances in the 2011-2012 school year and “especially the extremely challenging nature of her unsupported class in the neediest school in the District.”<sup>17</sup>

[72] The Commissioner responds that if this panel were to accept that the Respondent’s conduct is excused by the challenging circumstances she faced in the 2011-2012 school year, it would be “to accept that children in classes that are challenging to their teacher (because of class

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<sup>14</sup> Respondent’s closing submissions, para. 49, citing *BCTF v. BC*, 2011 BCSC 469 at para. 283-291 (rev’d 2015 BCCA 184).

<sup>15</sup> Respondent’s closing submissions, para. 36.

<sup>16</sup> Respondent’s closing submissions, para. 16

<sup>17</sup> Respondent’s closing submissions, para. 21.



composition, the personal circumstances of the teacher, or some combination of the two) are not entitled to the protection of the Standards. Many of these children reside in inner cities and poorer areas of the Province, and are in the greatest need of protection. Such a ruling would seriously undermine the intent of the Standards and the regulation of teachers.”<sup>18</sup>

[73] The conditions under which public school teachers engage in their profession can vary dramatically as a result of a whole host of factors. In addition to class size and composition, the students’ age, the teacher’s experience, and the additional learning resources available to the teacher (e.g. EAs and AEAs) all affect the classroom environment. No two classes are alike. The Standards are drafted with that diversity in mind and those contextual factors are taken into account when applying them in particular classes. Here, the composition of the Respondent’s class was challenging, but she was an experienced teacher who had a number of resources available to her. The class she taught was kindergarten, in which the students typically range in age from 4 to 6. The panel takes these circumstances into account in addressing each of the Standards.

[74] Standard 1 provides that educators treat their students with respect and dignity. It also provides that educators are responsible for the emotional safety of their students.

[75] The panel finds that the Respondent breached Standard 1 because she did not treat her kindergarten students with respect and dignity when she yelled at them out of frustration and anger, or when she criticized their work and put it in the classroom recycling or garbage in front of them. By 2011-2012, the Respondent had been teaching for several years. Her students were the youngest in the system, experiencing their first year of elementary school, and included many students who were ELL and/or vulnerable in other respects. The panel also finds that the Respondent did not treat Student A with respect and dignity, a student she suspected had special needs, in the way in which she reprimanded him for urinating on the playground.

[76] Standard 3 provides that educators are knowledgeable about how children develop as learners and as social beings, and demonstrate an understanding of individual learning differences and special needs. The Commissioner argues, with respect to Student A, that the fact that the Respondent suspected that he had an undiagnosed learning disability should have led her to treat him with special care, and she failed to do so. The Respondent is an experienced educator who had previously worked as an Aboriginal Enhancement teacher and as an ELL kindergarten teacher. The Respondent admitted Student A’s behaviour was particularly challenging for her. She also admitted that she regularly raised her voice at those students who were ELL so that they paid attention to her.

[77] The panel finds that the Respondent breached Standard 3 when she yelled at her students in anger or frustration, criticized their work and disposed of it in the classroom recycling or garbage. This conduct is antithetical to the development of learning and appropriate socialization. The panel finds that the Respondent’s raising her voice at her ELL students to get their attention breaches Standard 3 as it displays a lack of understanding of their needs. With respect to the conduct in allegation #3 of the Citation, urinating in the playground is not acceptable behaviour and a reprimand is appropriate; however, in delivering it, a teacher must be

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<sup>18</sup> Commissioner’s reply submissions, para. 16.

sensitive to the age, experience, and personal needs of the student. The panel finds that the Respondent's conduct towards Student A when she reprimanded him for urinating on the playground in front of others does not demonstrate an understanding of and sensitivity to Student A's individual needs and therefore breaches Standard 3.

[78] Standard 5 addresses classroom management, instruction and assessment. The Respondent admitted that she used a raised voice (or yelled) as a classroom management technique for kindergarten students. The students in the Respondent's classroom were young, in their first elementary school experience, and at least half of them were English language learners. The panel finds that the Respondent's frequent raising of her voice and yelling at her students as a means to control their classroom conduct breaches Standard 5. The panel also finds that the Respondent breached Standard 5 when she publicly criticized the work of her kindergarten students and disposed of it in the classroom recycling or garbage, and that this is not an appropriate way of instructing kindergarten students as it is humiliating to them.

[79] Standard 5 also provides that an educator knows when to seek additional support for her practice. The Respondent testified she suspected Student A had special needs and she found him a challenging student, but did not seek additional support from her colleagues for him by bringing her concerns about him to the attention of the school based team. The panel finds that this aspect of the Respondent's conduct also breached Standard 5.

### Professional misconduct

[80] A breach of the Standards does not necessarily result in a finding of professional misconduct. The Act does not define professional misconduct; however, discipline panels of the Branch have adopted the test set out in the Law Society of British Columbia's decision in *Martin*<sup>19</sup> to determine whether a breach of the Standards amounts to professional misconduct under the Act.

[81] Both parties made submissions about the test for professional misconduct. The Commissioner urged this panel to consider whether the Respondent's conduct "may reasonably be regarded by her peers as being improper based on the standards set for teachers."<sup>20</sup> The Commissioner says that if this panel finds that the Respondent's peers considered her conduct improper based on the Standards, then the panel must find the Respondent guilty of professional misconduct under the Act. The panel does not accept this submission. A determination of professional misconduct is made by the disciplinary body applying the test in *Martin*; it is not determined by the opinions of peers.

[82] The Respondent argues that the *Martin* test stipulates that a finding of professional misconduct cannot be made unless the panel finds both that a respondent's conduct constitutes a 'marked departure' from the standards expected of teachers and that there was a 'fundamental degree of fault that displays 'gross culpable neglect' of a teacher's duties."<sup>21</sup>

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<sup>19</sup> *Re Martin*, 2005 LSBC 16 ("*Martin*")

<sup>20</sup> Commissioner's closing submissions para. 29.

<sup>21</sup> Respondent's closing submissions para. 13.

[83] This is not an accurate statement of the *Martin* test or its interpretation by the Branch. *Martin* concerned a lawyer's accountability for public monies he received for the defence of his client. The Law Society panel framed the test as, "whether the facts as made out disclose a marked departure from that conduct the [profession] expects of its members; if so, it is professional misconduct."<sup>22</sup> It explained that "in the circumstances, the Respondent's non-review of the accounts amounted to acting in a manner that was a marked departure from the standard expected of a competent solicitor; it is professional misconduct, because it was conduct which constituted gross culpable neglect in his duties as a lawyer, in particular, his duty to the public funder in this extraordinary case."<sup>23</sup>

[84] Applied to teachers, the test requires a "marked departure" from the Standards. Another way of expressing the test is that the conduct displays "gross culpable neglect" of one's duties as a teacher.<sup>24</sup> That is, gross culpable neglect *is* the marked departure. They are not separate requirements. The *Martin* test does not mandate that to find professional misconduct, a panel must find both that the Respondent's conduct amounts to a marked departure from the conduct expected of teachers in this province and that it also constitutes gross culpable neglect of the Respondent's duties as a teacher.

[85] As discussed above, the Respondent argues that the panel should take into account the circumstances of the 2011-2012 school year that were beyond her control. As the panel noted previously, the Standards must be read contextually, taking into account factors such as those raised by the Respondent. So interpreted, the Standards establish minimum standards of conduct for teachers in British Columbia. The same analytical approach applies to the assessment of professional misconduct. In considering whether the Respondent's conduct is a marked departure from the expected conduct of teachers in this province such that it amounts to professional misconduct under the Act, the panel considers the whole of the proven conduct.

[86] The Respondent's conduct which this panel has found breaches the Standards for teachers in this province is not a single incident, but a pattern of conduct. This pattern of conduct occurred in the context of a kindergarten classroom of young children in their first experience in the school system, and includes frequently yelling at kindergarten students, as well as inappropriately criticizing their work in earshot of other students and disposing of it. A teacher who regularly raises his/her voice in anger or frustration at young children, including students with special vulnerabilities, whether linguistic or otherwise, displays a marked departure from the behaviours expected of teachers in this province. Such conduct displays a significant disregard for the age and individual needs of these young, often vulnerable students. Her conduct constitutes professional misconduct.

[87] The Respondent saw Student A as a major source of the problems in her 2011-2012 kindergarten class and said that after he moved from the School, the dynamic of the class changed. Accepting that Student A's behaviour posed challenges, the Respondent's treatment of him was unacceptable. She engaged in a pattern of conduct that included yelling at him and

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<sup>22</sup> *Martin*, para. 171.

<sup>23</sup> *Martin*, para. 172.

<sup>24</sup> *Punshon* at para. 43 & 44.

reprimanding him for his behaviour in an insensitive manner. This displays a marked departure from the conduct expected of teachers in this province and constitutes professional misconduct.

[88] In conclusion, the panel finds that the Respondent's conduct amounts to a marked departure from the conduct expected of teachers in this province and constitutes professional misconduct under section 63(1)(b) of the Act.

#### **PENALTY & COSTS**

[89] Having found the Respondent guilty of professional misconduct under s. 63(1)(b) of the Act, this panel is empowered to impose a penalty on the Respondent. The panel asks that counsel for the Commissioner and the Respondent advise the Hearing Coordinator of the Teacher Regulation Branch whether submissions on appropriate penalty should be submitted in writing or through an oral hearing. The panel directs that any submissions on costs be submitted in writing. The Hearing Coordinator of the Teacher Regulation Branch shall set the deadlines for submissions.

For the Panel

Date: May 28, 2015



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Meg Gaily, Panel Chair



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John Hall, Panel Member



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Teresa Rezansoff, Panel Member