

July 12, 2012

This pdf file contains two documents.

The first, written by Ms. Robin Oaks on November 25, 2008, is the investigator's report concerning sexual harassment allegations against Mr. Ari Marken, teacher at Santa Monica High School.

The second is a memo written on November 26, 2008 by Dr. Michael D. Matthews, assistant superintendent of the Santa Monica-Malibu Unified School District (SMMUSD) at the time, stating that Mr. Marken violated SMMUSD policy on sexual harassment. Dr. Matthews wrote that Mr. Marken "created an intimidating, hostile or offensive educational environment."

These documents were provided to me by the SMMUSD on July 10, 2012, as the result of a request I made under the California Public Records Act on December 14, 2010. In my request, I asked for all names other than Mr. Marken's to be redacted. However, the SMMUSD redacted only the last name of the student, a girl who at the time was thirteen years old, in the ninth grade.

In the following documents, the few redactions made by the SMMUSD are black rectangles. I made additional redactions. The first name of the thirteen-year-old girl who was the victim of Mr. Marken's sexual harassment is represented by Student. Her mother is represented by Mother and her father is represented by Father.

For more information about this case, please see smmusdsafety.org.

Michael Chwe

**INVESTIGATION REPORT
FOR SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT**

**Investigation of Sexual Harassment Allegations by
Student [REDACTED] ("Student"), Student,
and Student's Parents
against
Ari Marken, Teacher, Santa Monica High School**

**Protected by Attorney-Client Privilege
And Work Product Doctrine**

November 25, 2008

**Robin Oaks
Attorney Investigator
5662 Calle Real #313
Santa Barbara, CA 93117
Tel (805) 685-6773
Fax. (805) 685-6873
Email RobinOaks@aol.com**

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INVESTIGATION REPORT
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Investigation of Sexual Harassment Allegations by
[Student] [REDACTED] ("Student"), Student,
and [Student]'s Parents
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CONFIDENTIAL

Protected by Attorney-Client Privilege and
Work Product Doctrine

I. Introduction and Overview

On October 20, 2008, [Mother], mother of ninth grade student [Student] [REDACTED] spoke with House Principal Larry Boone about concerns that [Student] had been "sexually harassed by her Geometry teacher, Ari Marken." [Mother] submitted a written document outlining the alleged conduct. Attachment A-1. [Mother] requested that [Student] be transferred out of Mr. Marken's second period Geometry I class. Mr. Boone spoke with [Student] on October 20 about what she had observed. See Attachment B. [Student] stated that she became uncomfortable when Mr. Marken showed her special attention during Geometry class and at tennis matches (where she played on the varsity tennis team). Mr. Marken's conduct and comments directed at her caused other students to spread rumors that Mr. Marken had a "crush" on her.

[Student] alleged that Mr. Marken engaged in conduct that included: telling the class that he and his girlfriend had "broken up" and was now single, sending an email to [Student] telling her that she was his favorite and "don't tell others," touching her shoulders and massaging her head and asking her what was wrong when she was putting her head down and withdrawing from class participation, playing tennis with her twice after school and not wearing a shirt, doing a "goofy" dance in front of everyone during a tennis match while she was playing, asking her to make a "high five" with him in front of a few of the girls on the tennis team, pulling his shirt up in Geometry I class and "beating" his stomach and then glancing at her, telling the students in Geometry I class how great [Student] played during the tennis matches that he had attended, and bringing her a granola bar when she was in her third period English class and asking her whether she had a crush on anyone in the class.

Mr. Boone spoke with Mr. Marken on October 22. Mr. Marken admitted he engaged in certain conduct, explained the context, and denied engaging in certain conduct. Attachment C.

Mr. Boone contacted Dr. Michael Matthews, Assistant Superintendent, and explained the information that had been provided to him. Attachment D. The District retained Robin Oaks, an attorney specializing in academic setting investigations, to conduct an investigation of the allegations. See District Policies – Sexual Harassment and Misconduct, SMMUSD BP/AR 5145.7.

On October 30, 2008, the principal received an email from **Mother** stating that she and **Student's** father () had decided that they would not allow **Student** to be questioned or contacted further about the matter. Attachment E. **Mother**, however, was willing to meet with the attorney-investigator to explain the allegations of misconduct, some of which she had observed directly and some of which she had heard about from her daughter. **Mother** met with Ms. Oaks on November 3, 2008. During this interview Ms. **Mother** agreed to reconsider whether **Student** could be interviewed. **Mother** provided the details of her allegations of sexual harassment and provided documents she had researched regarding sexual harassment and its effects. Attachment F. **Mother** left the interview and said she would discuss the possibility of interviewing **Student** with **Student's** father and **Student**, and would communicate later that day their decision as to whether **Student** would be interviewed.

Father called the attorney-investigator in the evening that day and communicated his concerns about the possible effects of an investigation on **Student**. That same evening **Mother** sent an email to the attorney-investigator in which she stated that both she and **Student's** father were opposed to having **Student** (and also any other students) contacted or questioned about Mr. Marken's conduct. Attachment G. **Mother** stated her belief that interviews of students would compound the harm to **Student**. Sometime later, **Mother** spoke directly to Dr. Matthews about her concerns. The District, through Dr. Matthews, then advised the attorney-investigator that **Student's** parents remained "adamant" that she not be interviewed. He advised the attorney investigator that the investigation would end with interviews of Mr. Marken and the other employee witnesses that the attorney-investigator had mentioned (but would include no other student or parent interviews). Employees believed to have relevant information were interviewed for the investigation. Relevant documentation was reviewed and considered. Mr. Marken was interviewed on November 20, with a representative, Attorney Richard J. Schwab, present.

This report sets forth a summary of the evidence gathered. Because no interviews were conducted of students, the investigation was not considered completed (i.e., findings inconclusive) as to all of the allegations; however, based on Mr. Marken's admissions as to much of the conduct alleged, or corroboration from other sources, evidentiary findings were made for certain allegations. This report does not furnish any recommendations for response actions and does not provide a legal opinion concerning other possibly relevant legal or administrative issues that may apply. The report is organized by the following headings: I. Introduction and Overview; II. Investigation Procedure; III. Complaint Allegations; IV. Response by Ari Marken; V. Evidentiary Analysis and Partial Evidentiary Findings.

II. Investigation Procedure

The following people were interviewed:
(Name, Position, Date of interview)

Catherine Baxter, Dean of Students, November 24, 2008
Larry Boone, House Principal, Santa Monica H.S., November 3, 2008
[Mother], mother of [Student], November 3, 2008
Dr. Mark Kelly, Principal Malibu High School, November 25, 2008
Ari Marken, Math Teacher, November 20, 2008
Willston Poon, Tennis Coach, November 3, 2008
Megan Walker, English Teacher, November 3, 2008

The attorney-investigator told each interviewee to maintain confidentiality. All employees were advised that retaliation is prohibited by District policies and the law, and that any concerns should be reported to Dr. Michael Matthews, Assistant Superintendent, Human Resources. The attorney-investigator provided her work telephone number in the event anyone needed to clarify, amend or supplement their interview response. The attorney-investigator explained her role as a professional investigator hired by the District for the purpose of investigating complaints brought to the District's attention.

[Mother] was interviewed by the attorney-investigator on November 3, 2008. [Mother] amended the document she had provided to Mr. Boone on October 20, 2008, adding two additional allegations regarding Mr. Marken. See Attachment A-1, A-2. [Mother] confirmed that she had received the District's Sexual Harassment policies, which outlined the procedures that applied to sexual harassment complaints. [Mother] stated to the attorney-investigator that other parents had communicated to her that they "are disgusted at his [Marken's] behavior at the [tennis] matches," but [Mother] refused to provide any names. [Mother], citing to research she had done concerning "sexual harassment" effects, emphasized that she had observed detrimental impacts to

[Student] over the past few weeks because of Mr. Marken's alleged conduct. Attachment F.

[Student] sent Mr. Marken an email on October 19, 2008, and accused Mr. Marken of "disgusting behavior." Attachment H. Mr. Marken was concerned about the tone and language of the email, and reported the communication to Mr. Boone. Mr. Boone called [Student's] parents after receiving notice from Mr. Marken of [Student's] email. Mr. Boone told [Student's] parents that the language of the communication was unacceptable (see Attachment H) but said that no action would be taken against [Student]. [Student] was transferred out of Mr. Marken's Geometry class based on [Student's] and her parents' request.

Mr. Marken initially met with the attorney-investigator on November 3, 2008; however, based on his representative's (Penny Upton's) advice he requested the written document submitted by [Mother] claiming sexual harassment. Attachment A-1, A-2. Dr. Matthews provided Mr. Marken with [Mother]'s letter alleging "sexual harassment" on November 3, and Mr. Marken then asked for the interview to be postponed in order to review the document. On November 6, 2008, Ms. Upton communicated to the District that the interview of Mr. Marken would not go forward because they did not believe that this "is an appropriate investigation." Dr. Matthews responded that Mr. Marken was directed to cooperate with the investigation. Attachment I. Mr. Marken was interviewed on November 20, 2008, with attorney Richard J. Schwab present. Based on counsel's advice and refusal to allow any recording, Mr. Marken's interview was not recorded. Mr. Marken provided documentation during his interview that he believed were all the emails in his possession addressed to and from [Mother] and [Student] this past semester. Attachments K.

Review of Mr. Marken's personnel files by Dr. Matthews showed no prior discipline. Mr. Marken's evaluations reflect that he was praised for engaging students in class, being an active member of the math department, and preparing and delivering meaningful lessons. He received nothing less than the highest mark (satisfactory) on his performance evaluations.

III. Complaint Allegations

The complaint allegations summarized in this section are derived from Mr. Boone's interview with [Student] and allegations from [Mother], as recited to Mr. Boone and Ms. Oaks directly. Documents from and to [Student] were also reviewed and reflect information about the allegations. [Student] is thirteen years old and currently enrolled as a ninth grade student at Santa Monica High School.

Initially, when **Student** started ninth grade and first interacted with Mr. Marken, her second period Geometry teacher, she thought "he was great" and she told her parents that she "enjoyed" his class. As the weeks proceeded, she began to feel uncomfortable with the attention she was getting from him in front of the class and at tennis matches, where she played on the girls varsity tennis team. **Student** had a "bet" with Mr. Marken that she could beat him playing tennis. Mr. Marken played two tennis games with **Student** at school, and he had his shirt off both times.

Student thought that it was "weird" that Mr. Marken signed his emails to her using the following mark: "a*". He called her his "favorite" in an email one time. Attachment J. **Mother** provided the email from Mr. Marken where he told **Student** she was his favorite and not to tell anyone that he said this. Attachment J. In response to **Student's** request for homework assignments because she had been absent, Mr. Marken responded, "Even without Internet at home, you're still my favorite and I think you will beat me at tennis this year. Don't tell the others that you're my favorite. I'm not supposed to have those. Ask people about a study guide I gave you today. See ya. a*". See Attachment J.

During a recent tennis match on October 8, 2008, Mr. Marken embarrassed **Student** by doing a "dance" (moving his arms and legs around) behind her opponent's back. **Mother** saw Mr. Marken, who was sitting with a couple of other girls from the team, get up when **Student** started to serve the ball and do a dance moving his arms and legs in a "weird" way so that **Student** would notice him. After this match some of the girls were talking about not telling their coach about a school holiday the next day because they didn't want to practice. Mr. Marken, who was standing nearby, heard the conversation and the girls asked him "not to tell" the coach. Mr. Marken told the girls he wouldn't tell if **Student** gave him a high five. **Student** felt "compelled to give him a high five," but she felt irritated with his behavior that day.

Mother and **Student's** father () both observed Mr. Marken often "hanging out" with the "kids on the team" during the matches. **Mother** noted, "There was no delineation between Marken the student and Marken the teacher." It appeared to **Mother** like he was "flirting" with her daughter based on what she observed and her gut instinct. He smiled at **Student**, and made eye contact and engaged in conversation with her and the other girls on the team.

On one occasion, **Student** was talking with another classmate in Geometry class (or in the hallway) about some work they hadn't timely completed for the English teacher, and they made a comment about how they might "get in trouble." Mr. Marken overheard what they said and made a comment to **Student** to the effect that she wouldn't ever get in trouble because she was "too adorable."

Mr. Marken made comments to the Geometry I class on the day after tennis matches about "how great [Student] played." According to [Mother], Mr. Marken singled [Student] out, and didn't mention the other girls in the class who were also on the tennis team. This added to [Student's] discomfort and made it appear that he favored her. See Attachment A-2.

Recently, during third period, Mr. Marken went to [Student's] class (pulled her out of class) and brought her a granola bar. While giving her the granola bar Mr. Marken asked [Student] if she had a "crush on anyone in the room."

In Geometry I class Mr. Marken told students including [Student] that he had been a "nerd" in high school and didn't really have a "fun high school experience." One day recently in class Mr. Marken announced to the students that he "broke up with his girlfriend." In class during announcements [Student] observed him lift up a "small part of his shirt and beat on his stomach." [Student] saw him glance at her at least once when he did this. Because Mr. Marken showed [Student] extra attention, several classmates made comments about Mr. Marken having a "crush" on [Student]. [Student] complained to her mother that he was "giving her the creeps."

On October 10, 2008, during the home football game, Mr. Marken approached [Mother] and told her that [Student] "won't speak to me" and "something is upsetting her." [Student] had recently failed a math test. [Mother] told Mr. Marken that "kids are saying you have a crush on her," and "you give her a lot of attention." "She feels threatened." Mr. Marken told [Mother] that he doesn't have "good luck in relationships." He disclosed that he had a problem in the past where a student "fell in love with" him.

One day when [Student] was in his room during lunchtime tutoring, Mr. Marken held out one arm and [Student] believed he was making a gesture that suggested he wanted a hug. She didn't hug him. He didn't say to her that he wanted a hug, nor did he ever say anything expressly sexual.

[Student] began withdrawing from class, and she would sometimes put her head down on her desk. She began to tell her parents she didn't want to go to school, and appeared upset. She told her parents that Mr. Marken would come up to her, touch her shoulders (more than once), and one time "massaged the top part of her head" when he walked by. He made faces at her when she didn't respond to his inquiries about what was wrong. [Student] complained to her parents that she couldn't pay attention. Her grades were affected. [Mother] felt that "[Student] was shutting down." During this timeframe [Mother] communicated by email with Mr. Marken.

Mother decided she had to "get **Student** out of his class." She asked the principal to have her transferred. After **Student** was moved, **Student** told her mother additional incidents concerning Mr. Marken, i.e., he exposed his stomach in class, pulled her out of class to ask her who she had a crush on, massaged her head, told the students he broke up with his girlfriend. **Mother** became very upset upon hearing about this additional conduct and researched what constituted sexual harassment conduct in academic settings. **Mother** also heard from other parents who observed Mr. Marken's behaviors with students at tennis matches and listened to their perspectives. They told her they felt "disgusted" by his conduct. **Mother** concluded that **Student** had been sexually harassed by Mr. Marken. She memorialized her concerns in a letter dated October 20, 2008, which she provided to the principal. Attachment A-1. **Mother** amended this letter, adding two other incidents to the allegations, and provided this to the attorney-investigator when they met on November 3. Attachment A-2.

IV. Response by Ari Marken

Mr. Marken is a math teacher and has taught seven years in the District. He provided documentation from his computer, which he contends represent all of the emails to and from **Mother** and **Student**. Attachments K.

Emails

Mr. Marken explained that at the beginning of the semester he asks students (and specifically the students in Geometry I class, which **Student** attended) to send him an email to him explaining their responses to four areas of questioning: 1) three things I like about math, 2) three goals for this class (i.e., Geometry I – freshman), 3) extracurricular activities, 4) other information. Mr. Marken did not have any recollection of sending **Student** an email telling her that she was his "favorite." See Attachment J (October 7 email). (This email was provided by **Mother** to the attorney-investigator as evidence of Mr. Marken's communication to her daughter, and was provided to Mr. Marken during his interview for his review.) **Student** used her mother's email address, i.e., **Student**@mac.com when communicating with Mr. Marken.

After reviewing the email dated October 7, 2008, (provided by **Mother**) during his interview with the attorney-investigator, Mr. Marken also responded that he had no idea why he would have made any comment such as "Even without an internet at home." He did recall asking **Student** about her tennis matches, and noted that this part of the October 7 email looked familiar. Mr. Marken has experience as a tennis player, and played on tennis teams in college.

Mr. Marken explained that he never communicated via text messages or other internet methods or sites with students, except after a student graduates. He typically signs all of his emails with an "a*." Several of the emails between Mr. Marken and [Mother] in October mention that he considers [Student] one of his "favorites." See Attachments K. (Mr. Marken did not find any other emails that he sent to [Student] except the one that he provided dated September 13, 2008.)

Mr. Marken explained that he asks students to tell him their "extracurricular activities" so that he would know their interests to tie to their math work. He acknowledged that he did communicate with [Student] (who had told him she plays tennis) about how she did in her recent tennis matches. He admitted that he did send her an email on September 13, in response to her comment that she is "better than" him at tennis. He stated, "Hey, since you love numbers so much, here's a number for ya. O. I chose that number because it represents the number of times that you will ever beat me at tennis plus the number of homework packets you turned in last week." ([Mother] later saw this email and questioned Mr. Marken about the homework that [Student] had failed to submit. She sent Mr. Marken an email. Attachment K, September 15, 2008.)

Tennis matches

Mr. Marken explained that he attends tennis matches and many other sports events at Santa Monica High School, (i.e., soccer, basketball, volleyball, baseball, water polo). He played tennis in college and students talk to him about his ability to play tennis. He knows many students who are in his math classes that are on school sports teams. In the second period Geometry class there are several females (including [Student]) that are on the tennis team. On occasion, he might make a comment to the class about how well [Student] did during a tennis match, but has also made comments when other players have played well. He explained that he sometimes tells certain students that they are his favorites as a way to make them feel good. He has said this to another female student, [redacted], and also a male student, [redacted], in the second period Geometry I class. For example, when [redacted] had thrown a piece of food in class, Mr. Marken took him aside and told him that he can't "do that," but because he was one of his favorites Mr. Marken said he won't do anything further, although the conduct should stop.* Mr. Marken said that he calls certain students his favorite to "make them feel good" and "to have kids feel special." Mr. Marken mentioned that, at times, he also tells parents that their child is one of his "favorites."

He denied that he ever focused inappropriately on [Student] in front of the class, or "singled her out." He has mentioned to the class that she played tennis well but has talked about other students who might have performed well in sports. For instance, he mentioned to the class that the tennis coach had said that [redacted] ([redacted]) was one of the best doubles players.

Mr. Marken recalled that on one occasion this past semester he was playing tennis with the tennis coach, Wilston Poon (his friend), after school and after the team had practiced. Mr. Marken noted that no students were around and he took his shirt off while playing with Mr. Poon. Then **Student** approached him and asked him to play tennis. Mr. Marken agreed to play a game of tennis with **Student** and his shirt was still off. He recognizes that this wasn't the best decision, but he believes it only happened once.

On another occasion Mr. Marken was playing tennis with one of the male students. Mr. Marken was wearing jeans and he believed he had work clothes on. After the boy left the courts **Student** asked Mr. Marken to play a game of tennis. Mr. Marken agreed to play a game of tennis with her that day. Mr. Marken explained that previously **Student** had "challenged" him to a match. They had a bet. If she beat him he told her she would get extra credit on every test in the Geometry class. If he won she would clean his desk. In response to the attorney-investigator's questions about whether he intended to follow through on the bet, Mr. Marken responded that he "would have given her extra credit, but not enough to change her grade." He then emphasized that based on his high skill level in tennis he was confident that he would win any contest. He acknowledged that he never explained to **Student** that the bet was anything but real. (Note: After Mr. Marken's interview, through a voicemail communication from his attorney to the attorney-investigator, Mr. Marken added to his response and clarified that he knew that the bet was a "joke," and he hadn't ever thought through if he lost the bet. He recognized that he shouldn't have used the possibility of getting extra credit on a test as an example with **Student**, who was a student.)

Mr. Marken recalled that he attended approximately two or three tennis matches (girls varsity) this semester. During one match, while **Student** was playing, he did stand up somewhere near the benches behind the courts, and made a motion with his hands because he wanted to "cheer" for **Student** who was winning. He moved his hands up and down for a few seconds. Mr. Marken has no recollection of asking **Student** to give him a "high five," when she was talking with some of the girls on the team. He denied that he ever "hung out" with the players, but might on occasion sit near some of them on the benches outside the courts, where parents, players, and observers also watch the games.

Student's change in demeanor and Mr. Marken's classroom conduct

Mr. Marken explained that sometime towards the end of the first grading period (approximately six weeks into the semester), **Student** came to class and appeared "downtrodden." She wasn't smiling, her head was down, and she appeared disinterested. This behavior went on for about a week. She failed one of the

tests during this timeframe. When Mr. Marken observed **Student** acting so "downtrodden", he asked her, "What is wrong?" One time, when her head was down on the desk, he placed his hand on her shoulder. On one occasion he rubbed her head moving his hand in a back and forth motion on the top of her head. She put her hand up suggesting that she didn't want to respond. (**Student** was assigned to sit in the front row of the class because the seating order is made alphabetically.) Mr. Marken later talked to **Mother** about **Student's** changed demeanor. He never heard directly from any student that there had been rumors about him having a "crush" on **Student**, but learned later that this was likely what was contributing to **Student's** distress.

Mr. Marken admitted that he did make comments to the Geometry I class about how he was "a nerd" in high school, and didn't have fun. Mr. Marken explained that he told the students this to in order that students "would not ask him about his friends." (When asked by the attorney-investigator to explain more completely his reasoning, which wasn't particularly clear, Mr. Marken had no additional information to provide.) Mr. Marken did explain that on every Monday during Geometry I class he asks students, if they wish, to tell the class what they did over the weekend. Sometimes students talk about going to movies and other related events. Mr. Marken explained that if he mentions anything about his activities he always talks about playing tennis and frisbee, and doesn't recall ever disclosing personal information; however, when asked specifically by the attorney-investigator, Mr. Marken did admit that on one Monday a few weeks ago he told the class the he and his girlfriend had "broken up" over the weekend. This sharing time is referred to as "weekend updates."

Mr. Marken denied that he ever pulled his shirt up in class and touched or revealed his stomach. He did admit, "I've been known to put my arms up and stretch" in class.

Mr. Marken denied ever telling **Student** at any time that she was "too adorable to ever get in trouble."

When asked by the attorney-investigator about any prior concerns regarding students, Mr. Marken acknowledged he had shared with **Mother** that seven years ago one of his students had "fallen in love" with him. The female student had expressed her feelings in the yearbook and had located his telephone number and called him at home. There was a meeting with the student, the parent, and school administrators to resolve the situation.

Conduct between classes

Mr. Marken denied that he ever put his arms up towards **Student** during lunchtime tutoring time suggesting that he wanted a hug from her. He acknowledged that he does tutor students during the lunch period but never tutored **Student**.

He admitted that during "nutrition time," which is between second and third period, he did bring a "granola bar" to **Student** who was sitting in her third period class (English). The class had not yet started and Mr. Marken also brought a granola bar to one of the other students, [redacted]. He has granola bars in his classroom in order that students can have some food if they are hungry. **Student** had appeared "downtrodden" that particular day and when Mr. Marken asked her what was wrong she responded that she had slept in late and didn't have any breakfast. She mentioned she was hungry. [redacted] had also said she was hungry. Mr. Marken went to their third period class and brought them both a granola bar to eat. Mr. Marken admitted that he did ask **Student** around this time whether she had a "crush" on anyone in the room.

Mr. Marken added that he has always received good evaluations and has a history of being an effective teacher. He has been commended for his good rapport and communication skills with students and parents. Mr. Marken never had any allegations filed against him in the past.

V. Evidentiary Analysis and Partial Findings

The attorney-investigator evaluated all of the evidence provided. **Student** was not interviewed by the attorney-investigator because her parents would not give permission; however, Mr. Boone, the House Principal, did have an opportunity to interview **Student**. Mr. Boone noted that he found her very credible. The only area of inconsistency or hesitancy he found when he interviewed her involved how frequently certain conduct might have occurred, such as how often **Student** recalled that Mr. Marken touched her on the shoulders or head. **Student's** account of what occurred as communicated to Mr. Boone was consistent with what her mother, **Mother**, recalled, although there were some minor differences as to where or in what context certain conduct occurred.

The attorney-investigator interviewed **Mother** and found her very credible. Mr. Marken also appeared credible and provided a consistent account of what occurred. He did appear somewhat vague or evasive when responding to questions about the email that allegedly was sent to **Student** on October 7, 2008. Although Mr. Marken had no recollection of sending an email to **Student** on October 7, 2008, and hadn't retrieved this from his computer (there were

numerous others he had retrieved to and from [Mother]), based on an evaluation of credibility it is likely that the email produced by [Mother] was legitimate. He admitted that he had sent an email to [Student] on September 13, 2008, referring to his belief that she won't beat him at tennis, but did not recall ever sending her an email on October 7 that stated, "I think you will beat me at tennis this year. Don't tell the others that you're my favorite."

Mr. Marken provided consistent responses to the allegations when being interviewed by Mr. Boone and then later by the attorney-investigator. Mr. Marken added clarifying details about background and context. When questioned by the attorney-investigator about the bet he made with [Student] concerning their tennis match, Mr. Marken candidly admitted the nature of the bet, and then responded somewhat inconsistently when explaining what his intentions were concerning the bet. After the interview he asked his attorney to supplement his response on this topic, and stated that he was only "joking" when he said that [Student] would receive extra credit on her tests if she won the match. The attorney-investigator found Mr. Marken's explanations of his intent for certain actions to be equivocal. Mr. Marken was forthcoming about certain classroom interactions with students, including [Student], emphasizing that he has been commended for his "rapport" with students. He explained certain classroom activities, such as "weekend updates," referring to certain students as his "favorite," sharing his interest in school sports, and asking students about their extracurricular activities and interests.

Mr. Boone has been a principal for this past year at Santa Monica High School. He had no recollection or knowledge of any complaints regarding Mr. Marken. Catherine Baxter, Dean of Students, had no recollection of any complaints (formal or informal) from any student or parent involving conduct by Mr. Marken. Ms. Baxter has worked for the District over twenty years. Dr. Mark Kelly, currently Principal of Malibu High School, has worked ten years in the District, and formerly was an administrator at Santa Monica High School. Dr. Kelly observed and evaluated Mr. Marken. Dr. Kelly had no recollection of any complaints from students about Mr. Marken during the timeframe when Dr. Kelly was at Santa Monica High School. Both Dr. Kelly and Catherine Baxter had no recollection of being involved in resolving any concern about a female student (seven years ago) who had developed a crush on Mr. Marken.

The tennis coach, Wilston Poon, has worked as a walk-on coach (contract) for three seasons. Three other students in Mr. Marken's second period class are on the tennis teams: [redacted] (varsity), [redacted] (j.v.), and [redacted] (j.v.). Mr. Poon had no recall about whether Mr. Marken did or did not wear a shirt while playing tennis with any student. He recalled that Mr. Marken and he have played tennis on weekends and at such times Mr. Marken might not wear a shirt. He did observe on one occasion this past semester that Mr. Marken and

[Student] played a game of tennis after Mr. Marken had been practicing with Mr. Poon on the tennis courts. [Student] asked Mr. Marken to play and there were "a lot of other" students around at the time. Mr. Poon, responding to questions from the attorney-investigator, stated, "I can't remember if his shirt was on." Mr. Poon didn't notice any "dance" or unsportsmanlike behavior by Mr. Marken during any tennis matches. Parents, players and observers all can stand outside the courts to observe tennis games. (The attorney-investigator observed directly that there are a few small metal benches set outside the school tennis courts where people can sit to observe tennis matches.) Mr. Poon has seen Mr. Marken attend both the girls and boys tennis matches in the past. Mr. Poon never saw Mr. Marken with any student off campus. Mr. Poon did not characterize his relationship with Mr. Marken as "a friend." They have played tennis only on a couple of occasions, but don't socialize outside of school.

Megan Walker, [Student's] English teacher, has worked two years for the District. She described [Student] as "very cheerful, and loud." Ms. Walker recalled that on October 24 [Student] hadn't completed her homework. When asked about [Student's] demeanor, Ms. Walker stated that one day she was "quiet" but this behavior didn't last long. [Student] now appears to be back to normal and appears to love the projects in class. Ms. Walker exchanged emails with [Student's] mother about [Student's] changed behavior and assignments. Attachment L.

Ms. Walker explained that [Student's] behavior changed only for a day but based on a review of her emails to [Mother], Ms. Walker had stated that she observed [Student] appearing "withdrawn" for a "couple of weeks." Ms. Walker appeared credible when responding to questions about Mr. Marken ever coming into her class and talking to anyone, including [Student]. Mr. Marken never "pulled [Student] out" of her class while she was teaching. This would have been something Ms. Walker would have noticed; however, Ms. Walker did observe, a couple of times, Mr. Marken talking to [Student] during lunchtime.

Overall, Mr. Marken appeared forthcoming with his responses. Mr. Marken admitted to engaging in most of the conduct alleged, although for certain allegations he disputed either the frequency or the context of the conduct. He denied or had no recollection of ever engaging in the following conduct: 1) lifting his shirt in class and patting ("beating") his stomach; 2) making any gesture with his arms to suggest that he wanted [Student] to hug him; 3) sending an email telling [Student] she was his favorite and not to tell others (Attachment J); 4) telling [Student] that she is "too adorable" to ever get into trouble; 5) asking [Student] to give him a "high five" in order that he not tell the tennis coach that the next day was a holiday when talking to her and other girls on the tennis team after a match on October 8.

The investigation was concluded without interviews of students who might have observed certain conduct that was disputed, or otherwise might have provided relevant information. Because the investigation did not include interviews of all relevant parties who might have observed events, findings could not be made as to certain allegations (i.e., are inconclusive). Further, **Mother** refused to provide names of parents who had told her they were "disgusted" by the behavior they observed at tennis matches. Additional information provided at a later date might change, clarify, or corroborate the conclusions, analysis, and evidence cited herein.

Based on a thorough consideration of the information provided to date, based on Mr. Marken's admissions, taken together with substantial credible corroborating evidence of certain conduct, and after assessing credibility, it is the attorney-investigator's professional opinion that the following conduct more likely than not did occur:

Partial Findings:

1. Mr. Marken communicated with **Student** on September 13, 2008, via email and told her, among other things, that she will never beat him at tennis. Attachment K. Thereafter, **Student** played a tennis match (two tennis games) with Mr. Marken at the school tennis courts. They made a bet about what would happen in the event that Mr. Marken lost or **Student** lost; if Mr. Marken lost the "bet" **Student** was told that she would receive extra credit on her math tests, if **Student** lost she would clean his desk. On at least one occasion while playing tennis with **Student**, Mr. Marken did not wear his shirt.
2. Mr. Marken communicated via email to **Student** on October 7, 2008, and asked her, "How did you do in your matches yesterday?" He commented, "Even without Internet at home, you're still my favorite and I think you will beat me at tennis this year. Don't tell others that you're my favorite. I'm not supposed to have those..." See Attachment J.
3. In second period Geometry I class Mr. Marken made comments, at least once, to the class about how well **Student** played in a particular tennis match. Mr. Marken attends other sports events at the high school in addition to girls tennis matches.
4. On October 8, 2008, Mr. Marken watched the varsity girls tennis team match at the school tennis courts. He stood up when **Student** was playing and moved his arms and legs in a dance motion intending to show his excitement at **Student** leading in the match. **Student's** parents observed this demonstration. Mr. Marken attended a few tennis matches in which **Student** and others played.

5. Sometime in early October, about six weeks into the term, **Student** exhibited behavior in class that suggested she was upset about something, i.e., head down on desk, not smiling, looking down. She failed a math test that Mr. Marken gave the class around this time. Mr. Marken talked to **Mother** about **Student's** withdrawn behavior and heard from **Mother** that students were saying that Mr. Marken had "a crush" on **Student**. **Student** was upset about these rumors.
6. Between October 1 and October 10, on at least one occasion Mr. Marken went to **Student's** desk, touched her shoulder and asked her what was wrong. On one occasion he touched her head on top and moved his hand in a back and forth motion, moving her hair. **Student** responded at least once to his conduct by putting her hand up and motioning that she didn't want to respond.
7. After one second period Geometry I class where **Student** was acting "downtrodden," Mr. Marken asked **Student** as she was leaving class what was wrong. She responded that she had missed breakfast and was hungry. Mr. Marken took a granola bar to **Student's** third period English class during "nutrition time" (between second and third period) and gave it to **Student** to eat. He also asked her at this time whether she had a "crush" on anyone in the room.
8. As a routine, (during what he refers to as "weekend update time"), Mr. Marken asks the Geometry I students every Monday to share whatever happened during the previous weekend. If they wish to respond, students and Mr. Marken share what happened over the weekend. This fall, Mr. Marken told the class that he had broken up with his girlfriend during one weekend. Mr. Marken also shared that he was a "nerd in high school and didn't have any fun."
9. Mr. Marken requests from students at the beginning of a semester a response by email to four areas of questioning: 1) Three things I like about math, 2) Three goals for this class (i.e., Geometry I – freshman), 3) Extracurricular activities, 4) Other information. **Student** responded to this assignment via an email address that was her mother's. Mr. Marken communicated to **Student** via a gmail account, not his school account. See Attachment K. No evidence was produced of any other email communications between Mr. Marken and **Student** except the emails provided in Attachments H, J, and K (first page).
10. In early October **Student** told her mother that she was not comfortable with Mr. Marken's attention during class and at the tennis matches, and was upset that students were spreading rumors about Mr. Marken having "a crush" on her. The Principal, Mr. Boone, moved **Student** out of Mr. Marken's second period math class pursuant to both **Student's** and her parents' request in mid-October.

01-0809

SMMUSD HUMAN RESOURCES

Memo

To: Ari Marken, Teacher

From: Michael D. Matthews, Assistant Superintendent *MM*

CC: Harry Keiley, SMMCTA President

Date: November 26, 2008

Re: Written Reprimand following accusations of sexual harassment of a student

This memo shall serve as a written reprimand, as per Article XII.C of the SMMCTA-SMMUSD Agreement, based on a finding that you violated the District's board policy prohibiting the sexual harassment of students. More specifically, on October 20, 2008, Mr. Larry Boone, House Principal at Santa Monica High School, received a complaint from **Mother**, parent of student **Student** (**Student**), stating that you had "sexually harassed" her. She requested that **Student** be removed from your second period geometry class. After Mr. Boone spoke with the student **Student** he spoke with you on October 22 to report the allegations in that complaint. In that discussion you admitted to engaging in certain conduct, while you denied engaging in other conduct. On that same day, Mr. Boone reported this matter to me.

SMMUSD Board Policy and Administrative Regulation 5145.7 (Sexual Harassment of Students) requires that, "... [I]n cases of complaints filed against an employee, an independent investigator shall investigate the complaint." The administrative regulation also states, "If the alleged harasser or person suspected of sexual misconduct is a district employee or volunteer, then during the course of the investigation, he/she shall discontinue contact with students." Accordingly, the District assigned an independent investigator to initiate an investigation of the complaint. You were placed on home assignment on October 24, 2008.

The investigator completed the investigation on November 25, 2008. As discussed more fully below, the investigator determined that you engaged in conduct that violated SMMUSD board policy prohibiting the sexual harassment of a student.

SMMUSD Board Policy 5145.7 defines sexual harassment as:

Prohibited sexual harassment and misconduct includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors or other unwanted verbal, visual or physical conduct of a sexual nature made against another person of the same or opposite gender, in the educational setting. Egregious examples of sexual harassment and misconduct include: (Education Code 212.5; 5 CCR 4916)

1. Submission to the conduct is explicitly or implicitly made a term or condition of a student's academic status or progress
2. Submission to or rejection of the conduct by a student is used as the basis for academic decisions affecting the student

3. The conduct has the purpose or effect of having a negative impact on the student's academic performance, or of creating an intimidating, hostile or offensive educational environment

4. Submission to or rejection of the conduct by the student is used as the basis for any decision affecting the student regarding benefits and services, honors, programs, or activities available at or through any district program or activity

The accusation from the parent only referred to #3 above (i.e. having a negative impact on the student's academic performance, or of creating an intimidating, hostile or offensive educational environment). With that in mind, the Investigator made the following findings:

1. You communicated with Student on September 13, 2008, via email and told her, among other things, that she will never beat you at tennis. Thereafter Student played a tennis match (two tennis games) with you at the school tennis courts. You made a bet about what would happen in the event that you or Student lost: if you lost the "bet" Student was told that she would receive extra credit on her math tests; if Student lost she would clean your desk. On at least one occasion while playing tennis with Student you did not wear your shirt.
2. You communicated via email to Student on October 7, 2008, and asked her, "How did you do in your matches yesterday?" You commented, "Even without internet at home, you're still my favorite and I think you will beat me at tennis this year. Don't tell others that you're my favorite. I'm not supposed to have those..."
3. In second period Geometry I class, you made comments, at least once, to the class about how well Student played in a particular tennis match.
4. On October 8, 2008, you watched the varsity girls' tennis team match at the school tennis courts. You stood up when Student was playing and moved your arms and legs in a dance motion intending to show your excitement at Student leading in the match. Student's parents observed this demonstration.
5. Sometime in early October, about six weeks into the term, Student exhibited behavior in class that suggested she was upset about something, i.e., head down on desk, not smiling, looking down. She failed a math test you gave the class around this time. You talked to Mother about Student's withdrawn behavior and heard from Mother that students were saying you had "a crush" on Student. Student was upset about these rumors.
6. Between October 1 and October 10, on at least one occasion you went to Student's desk, touched her shoulder and asked her what was wrong. On one occasion you touched her head on top and moved your hand in a back and forth motion, moving her hair. Student responded at least once to your conduct by putting her hand up and motioning that she didn't want to respond.
7. After one second period Geometry I class where Student was acting "downtrodden," You asked Student as she was leaving class what was wrong. She responded that she had missed breakfast and was hungry. You took a granola bar to Student's third period English class during "nutrition time" (between second and third period) and gave it to Student to eat. You also asked her at this time whether she had a "crush" on anyone in the room.

8. As a routine, (during what you refer to as "weekend update time"), you ask the Geometry I students every Monday to share whatever happened during the previous weekend. If they wish to respond, students and you share what happened over the weekend. This Fall, you told the class that you had broken up with your girlfriend. You also shared that you were a "nerd in high school and didn't have any fun."
9. At the beginning of the semester, you requested students to provide an email response to four areas of questioning: 1) Three things I like about math, 2) Three goals for this class (i.e., Geometry I – freshman), 3) Extracurricular activities, 4) Other information. Student responded to this assignment via an email address that was her mother's. You communicated to Student via a private gmail account, not your school email account.
10. In early October Student told her mother that she was not comfortable with your attention during class and at the tennis matches, and was upset that students were spreading rumors about you having "a crush" on her. The Principal, Mr. Boone, moved Student out of your second period math class pursuant to both Student's and her parents' request in mid-October.

As a result of these findings, I conclude that you have violated Board Policy 5145.7, and that your actions had a negative impact on this student. A teacher has a great deal of influence in a classroom, and must take that influence into consideration at all times. By engaging in the conduct contained in the findings above, you made several poor decisions that had nothing to do with providing students with quality math instruction and which cannot be considered good practice for helping students to achieve. Your unwelcome conduct also had a negative impact on a student's academic performance and created an intimidating, hostile or offensive educational environment. Most egregious of those behaviors include:

- Playing tennis on the school campus against one of your female students while not wearing a shirt;
- Making a bet, even though you stated that you knew you would not lose, that if the student won, she would get extra credit in your course;
- Emailing a student with a statement about her being your "favorite." You stated that this is a technique you use with students other than Student but that does not make it less offensive or egregious;
- Touching a student on the back of the head and moving her hair;
- Displaying favoritism by bringing food to a student outside of your classroom; and
- Discussing your dating life with your students.

The Santa Monica – Malibu Unified School District believes that student safety is our most important issue. If our students do not feel safe, then they cannot learn. Your actions have been a threat to student safety and must cease immediately. You are further directed to comply with the following:

1. Conduct yourself in an appropriate and professional manner at all times. Do not engage in sexual harassment or sexual misconduct toward students or District staff.
2. Do not make inappropriate comments or jokes to students and do not touch students unnecessarily or in a manner that can be unwelcome or sexual.
3. Have no interactions with Student [REDACTED]. This includes being in her vicinity in classrooms other than your own, and it includes not observing her tennis practices or matches.

4. Cease any type of extra credit assignments not directly related to the curriculum.
5. Never tell a student that she or he is "your favorite." It is poor practice and has no relevance to positive or professional classroom management techniques.
6. Never take your shirt off, or display unprofessional or inappropriate attire, while you are representing the Santa Monica –Malibu Unified School District.
7. Never discuss your personal dating life with students or ask about their personal dating lives.
8. Do not provide certain students with food or other gifts that could be construed as giving preference.
9. Complete a two-hour online course on the prevention of sexual harassment no later than December 3, 2008. You may complete this course by going to www.ascip.org, registering, and selecting the course titled, "AB 1825: Sexual Harassment Training for Managers & Supervisor - ASCIP." If you need any assistance you may call my office.

Your failure to comply with any of the above directives, or future incidents of sexual harassment or misconduct, will result in further disciplinary action, up to and including suspension and/or dismissal.

As I have found you to be in violation of SMMUSD Board Policy 5145.7, I am also required to report your actions to law enforcement. Consequently, I filed a report with the Santa Monica Police Department on November 26, 2008.

A COPY OF THIS LETTER WILL BE PLACED IN YOUR PERSONNEL FILE TEN (10) DAYS FROM THE ABOVE LISTED DATE. WITHIN THAT PERIOD, YOU MAY SUBMIT A WRITTEN RESPONSE WHICH WILL BE HERETO ATTACHED AND PLACED ALONG WITH IT IN YOUR PERSONNEL FILE.

YOU MAY APPEAL THE REPRIMAND AND/OR WARNING BY PROVIDING A COPY OF THE REPRIMAND AND/OR WARNING AND REBUTTAL TO THE SUPERINTENDENT (OR DESIGNEE) WITHIN FIVE (5) SCHOOL DAYS FROM THE DATE OR RECEIPT OF THE REPRIMAND AND/OR WARNING. THE SUPERINTENDENT (OR DESIGNEE) SHALL RESPOND IN WRITING TO THE APPEAL WITHIN TEN (10) SCHOOL DAYS FROM THE DATE OF RECEIPT OF THE APPEAL, AND THIS RESPONSE SHALL BE ATTACHED TO THE REPRIMAND. THE SUPERINTENDENT SHALL HAVE THE RIGHT TO AFFIRM, AFFIRM WITH MODIFICATION, OR WITHDRAW THE REPRIMAND AND/OR WARNING. THE SUPERINTENDENT'S DECISION SHALL BE FINAL AND BINDING.

I hereby acknowledge receipt of this document. My signature does not necessarily mean I agree with its contents.



 Ari Marken

11/26/08

 Date

My signature acknowledges receipt of this document and not agreement. a rebuttal will be provided within the 5 days.

To be signed only if the employee does not sign and acknowledge receipt of the document:

On (date), I delivered the attached notice to Ari Marken. He refused to sign acknowledging receipt. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

 Dr. Michael D. Matthews

 Date