

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
LOS ANGELES UNIFIED SCHOOL DISTRICT

IN THE MATTER OF THE DISMISSAL  
OF JAMES HILL (EN 672114), A  
PERMANENT CERTIFICATED  
EMPLOYEE,

Respondent.

OAH No. 2013090951

**DECISION**

This matter came on regularly for hearing on November 25, 26, and 27, 2013, in Los Angeles, California, before the Commission on Professional Competence, Los Angeles Unified School District.

The Commission consists of Laura Learned, Russell Harrison, and H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

The Los Angeles Unified School District (LAUSD or District), was represented by the Law Offices of Bergman, Dacey, Goldsmith, by Michelle Goldsmith and Matthew Anderson, Attorneys at Law. James Hill (Respondent) was present and was represented by the Dynasty Legal Group by Ronald C. Lapekas and Peter O. Tong, Attorneys at Law.

Oral and documentary evidence was received. The record was held open to and including December 13, 2013, for the parties to submit closing briefs in accordance to a specified briefing schedule. "Los Angeles Unified School District's Closing Brief" was timely received and was marked as Exhibit 51. "Closing Argument on Behalf of Respondent James Hill" was timely received and was marked as Exhibit P.

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On December 13, 2013, Complainant served its Los Angeles Unified School District's Rebuttal Brief which was marked as Exhibit 52. However, Complainant simultaneously served and filed an uninvited and unauthorized four-page letter objecting to portions of Respondent's closing brief and accusing Respondent's counsel of misconduct. (Exhibit 53.)<sup>1</sup> The letter was received at the Office of Administrative Hearings (OAH) at 2:53 p.m., two hours and seven minutes before the record closed. The record closed at 5:00 p.m. on December 13, 2013.

On December 13, 2013, the Administrative Law Judge re-opened the record to and including January 17, 2014, for the parties to serve and file further argument regarding Complainant's December 13, 2013 letter. The following were timely received: A letter from Respondent's counsel, Ronald Lapekas, dated December 17, 2013, and received at the Office of Administrative Hearings on December 18, 2013, which was marked as Exhibit Q; and the District's "Rebuttal to Respondent's Reply to Complainant's December 13, 2013 Letter," received at the Office of Administrative Hearings on January 17, 2014, which was marked Exhibit 54. The record was closed on January 17, 2014, and the matter was submitted for decision.

#### ALLEGATIONS OF ATTORNEY MISCONDUCT AND THE EX PARTE COMMUNICATION

The following issues were decided by the Administrative Law Judge sitting alone.

##### *The Ex Parte Communication*

On December 16, 2013, Attorney Goldsmith telephoned OAH to check on the status of her December 13, 2013 letter and to ask if the Administrative Law Judge wanted to schedule a status conference. Based on the message he received from OAH staff, the Administrative Law Judge issued a Notice of Ex Parte Communication. In a Declaration attached to Exhibit 54, Attorney Goldsmith admitted making the telephone call but denied asking to speak to the Administrative Law Judge.

Assuming the veracity of Attorney Goldsmith's statement, Attorney Goldsmith nonetheless engaged in an ex parte communication. Government Code section 11430.10, subdivision (a) prohibits all communication, "**direct or indirect**, regarding any issue in the proceeding, to the presiding officer from . . . [a] representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Emphasis added.)

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<sup>1</sup> Complainant's counsel made the same or similar arguments in her rebuttal brief. The brief, rather than the unauthorized letter, was the proper place for those arguments.

In Exhibit 54, Attorney Goldsmith states in regard to the Notice of Ex Parte Communication, "On December 16, 2013, the Administrative Law Judge issued a Notice of *Ex Parte* Communication and Order . . . regarding Complainant's Letter of December 13, 2013 . . . The Administrative Law Judge considered the objection letter an *ex parte* communication." Attorney Goldsmith's statement is untrue. Her letter of December 13, 2013 was unauthorized and improper, but it was not issued *ex parte*. It was her telephone call to OAH on December 16, 2013 that triggered the Notice of Ex Parte Communication.

Attorney Goldsmith is admonished for her *ex parte* communication of December 16, 2013.

#### *Misconduct by Attorney Lapekas*

In her letter of December 13, 2013, Attorney Goldsmith summarized her argument regarding Respondent's closing brief as follows: "(1) Respondent has improperly argued the unavailability of witnesses; (2) Respondent's counsel's personal opinion, not based on the evidence, has no place in a Closing Brief; (3) Respondent has referred to excluded evidence in Respondent's Brief; and (4) Respondent has improperly characterized the District's burden of proof." (Exhibit 53, p. 1.) Attorney Goldsmith variously argued that the portions of Respondent's closing brief she found objectionable be amended, redacted, and/or stricken.

In Exhibit Q, Respondent's attorney, Ronald Lapekas, addressed Complainant's objections to his closing argument, but also offered surrebuttal to Complainant's Rebuttal and further argument regarding Respondent's laches defense. Attorney Lapekas's surrebuttal and laches arguments set forth in Exhibit Q were unauthorized and improper. They were not considered by the Commission. However, the Commission did consider his arguments on those issues in properly submitted documents (i.e., pre-hearing motions, closing argument, etc.).

Attorney Lapekas offered argument in response to Attorney Goldsmith's objections to Respondent's closing argument. However, he conceded that the District's evidentiary objections "may be well taken" and offered to re-write his argument.

Complainant timely responded to Respondent's Exhibit Q with "Los Angeles Unified School District's Rebuttal to Respondent's Reply to Complainant's December 13, 2013 Letter" (Exhibit 54). In that document, Attorney Goldsmith appears to partially change her position. Although, in her letter of December 13, 2013, she suggested that the objectionable portions of Respondent's brief be amended, redacted or stricken, in response to Respondent's offer to re-write the objectionable portions of his closing brief, Attorney Goldsmith demanded, without legal authority, that they be stricken. She asserted that the Commission would be prejudiced by Respondent's closing brief and that it should therefore not be shown to the Commission members. In so doing, she did not explain how or why a document intended to be viewed by all three panel members may properly be viewed by only one, and withheld from the others.

Complainant's objections to the specified portions of Respondent's closing brief are sustained.<sup>2</sup> However, Complainant offered no legal authority mandating that some or all of Respondent's brief be stricken because it contains assertions unsupported by the evidence. Her insistence that the Commission be shielded from the brief because the Commission will be prejudiced by it implies an inability of the Commission to separate fact supported by admitted evidence from assertions unsupported by the evidence. As can readily be seen from the analysis and disposition of this case, the Commission suffers from no such inability.

Attorney Lapekas is admonished for his misconduct with respect to his improper references in his closing brief.

#### *Misconduct by Attorney Goldsmith*

Attorney Goldsmith is also guilty of misconduct in her own right.

The hearing took place on November 25, 26, and 27, 2013, the three days before the four-day Thanksgiving holiday weekend. On the first day of hearing, an eyewitness to the event that resulted in this action drew an illustration of the school yard where the event took place. The hand-drawn illustration was marked and admitted as Respondent's Exhibit K. Attorney Goldsmith photographed Exhibit K with her cellular telephone. However, that photograph was not offered in evidence, and it was not marked for identification.

The parties failed to complete the hearing in the three days allotted for it. Rather than return for additional hearing days, the parties requested that they be permitted to submit a stipulation as to additional evidence and written closing arguments. The Administrative Law Judge granted those requests and set a briefing schedule. He then adjourned the hearing. At the request of the other panel members, the Administrative Law Judge left the hearing room with the other panel members to discuss future procedure. When he returned to the hearing room a few minutes later, no one was present, and Exhibit K had been removed from its easel and taken from the hearing room. The Administrative Law Judge's laptop computer and the official exhibit book remained in the room undisturbed.

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<sup>2</sup> Attorney Goldsmith is correct in her December 13, 2013 letter that the Administrative Law Judge excluded evidence of possible child abuse against the victim in this case. However, evidence was received that the victim and Respondent had developed a rapport over time, and that the victim had confided in Respondent. That evidence is not excluded.

Although Attorney Goldsmith telephoned Attorney Lapekas informing him that she had the exhibit, she did not call the Administrative Law Judge or fax a letter to him. When the Administrative Law Judge returned to OAH following the four-day holiday weekend, there was still no word from Attorney Goldsmith advising him that she had taken the marked and admitted exhibit. It was not until the Administrative Law Judge requested his staff to contact both attorneys in an attempt to locate the exhibit that Attorney Goldsmith admitted she had taken it. She returned Exhibit K to the Administrative Law Judge along with a letter stating that she thought the Administrative Law Judge had forgotten to take the exhibit, and that the OAH front desk had closed by the time she took it from the hearing room. Attorney Goldsmith failed to explain in her letter why she thought the Administrative Law Judge had forgotten to take it when his laptop computer and all of the other exhibits were still in the hearing room, why she failed to call or fax a letter to the Administrative Law Judge advising him of what she had done as she did for Attorney Lapekas, and why she failed to notify the Administrative Law Judge on the Monday following the holiday weekend that she had taken and was still in possession of Exhibit K.

Attorney Goldsmith is admonished for her misconduct with respect to her improperly filing of the December 13, 2013 letter, and for her improperly removing an original admitted exhibit from the hearing room without notifying the Administrative Law Judge and failing to return it for several days.

#### THE DECISION OF THE COMMISSION ON PROFESSIONAL COMPETENCE

The Commission on Professional Competence considered the matter in executive session. After due consideration of the entire record herein, the Commission makes the following factual findings, legal conclusions, and order:

#### FACTUAL FINDINGS

1. Respondent was employed by the District and is a permanent certificated employee of the District. He is presently suspended from the District without compensation.
2. A Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension was issued by the District on September 18, 2013. The action was taken by the Board of Education of the City of Los Angeles at a meeting on September 17, 2013. Respondent was timely served with the Notice, the Accusation and Statement of Charges in "*In the Matter of the Dismissal of James Hill (EN 672114), a Permanent Certificated Employee.*"
3. In the Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension, Respondent was informed that the dismissal would be effective in 30 days from the date of the service of the Notice unless he requested a hearing "as provided in Section 44930 through 44988 of the Education Code of the State of California." (District's Exhibit 2.)

4. In the Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension, Respondent was also informed that he had been suspended from his employment without remuneration.

5. Respondent timely filed a Request for Hearing before the Office of Administrative Hearings (OAH).

6. On October 25, 2013, Respondent served "Respondent's Special Notice of Defense and Request That the OAH Dismiss the Proceeding Sua Sponte on the Ground that the OAH Lacks Jurisdiction to Proceed." In that document, he raised objections and affirmative defenses.<sup>3</sup>

7. All pre-hearing jurisdictional requirements have been met by the parties, and jurisdiction for the proceedings does exist.

#### Respondent's Background

8. Respondent graduated from Harvard University in 1976 with a degree in economic development. Following graduation, he worked in sales and served in the Massachusetts State House in the Black Legislative Caucus, in which he worked on political campaigns and performed community work.

9. Respondent came to California in 1989. After a period of unemployment, he worked for Target and for the United States Postal Service as a mail processor. He attended school at night, receiving a teaching credential through National University. He began his teaching career as a substitute with the Compton School District. He moved to LAUSD in 1995 and taught various grades. Beginning in 2009, he taught fourth grade at Broadous Elementary School (Broadous) where he became the school's Chapter Chair for the United Teachers of Los Angeles (UTLA).<sup>4</sup>

10. At all relevant times, Respondent was familiar with, and was regularly trained in, the District's Child Abuse and Neglect Reporting Requirements (Policy Bulletin BUL-1347.2), the resolution of the District's Board reaffirming the District's commitment to respectful treatment of all persons, the District's Code of Conduct with Students, the District's Ethics Policies (BUL-4748.0), the District's Employee Code of Ethics, and the District's Abolition of Corporal Punishment (BUL-5046.0). The gravamen of each of those documents was, among other things, a strict prohibition against corporal punishment against students, and a prohibition against taking students' belongings.

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<sup>3</sup> Respondent's request that OAH dismiss the action on grounds of lack of jurisdiction was denied on the first day of hearing.

<sup>4</sup> UTLA is the teachers' union in Los Angeles.

11. Respondent ran a quiet classroom in which he assigned his students certain classroom responsibilities according to his criteria. He had a signal system according to which his utterance of "one" required the students to stand, "two" required them to move, and "three" required them to sit. The school's principal, Stannis Steinbeck (Steinbeck), visited Respondent's classroom during the 2011-2012 school year as part of her plan to visit all of the classes that were "going backwards." (Steinbeck's term.) She found the children quiet but inattentive and unengaged. On at least two occasions during her visit, Respondent seemed aggravated and he raised his voice when a student was not paying attention or was unable to answer a question. Respondent sounded angry when that occurred.

12. Respondent shouted at Steinbeck on at least two occasions. On September 20, 2011, Respondent initiated and continued an altercation with Steinbeck during a professional development meeting over the scheduling of a Local School Leadership Council vote. Respondent lost his temper and shouted at Steinbeck, causing the teachers present at the meeting to feel uncomfortable.<sup>5</sup>

13. Although Respondent and Steinbeck had a good relationship for the most part, Steinbeck found that Respondent had certain weaknesses as a teacher, and that he would not abide by any of the well-established standards, instead taking the position that those standards did not apply to him. Steinbeck believes that, by refusing to work with the administration to improve instruction, Respondent was unprofessional and incompetent. Following the incident of September 20, 2011, she held a conference with him and his UTLA representative. Respondent did not speak at the conference, deferring entirely to his representative. On September 26, 2011, Steinbeck wrote a conference memo stating that Respondent's unprofessional conduct constituted insubordination. She required "decided improvement" in his professional conduct beginning with treating everyone with whom he worked with appropriate respect, and she referred him to the Board resolution mandating respectful treatment to all persons. In the same memo, Steinbeck offered to continue to work with Respondent on the "ongoing problems which have occurred due to your unacceptable conduct. There must be immediate and sustained improvement in your behavior." (Exhibit 38.)

14. At all relevant times, Respondent ambulated, and continues to ambulate, with a single-footed cane. He held and holds the cane in either hand, depending on the location of his long-standing and ongoing pain.

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<sup>5</sup> At the administrative hearing, Respondent testified that it was Steinbeck who "blew up" (Respondent's term) during the meeting, and that Steinbeck then attempted to make it appear that Respondent "blew up." That claim was belied by both Steinbeck's testimony and that of Roberto Batres, a Coordinator and Categorical Program Advisor, who was present at the meeting.

The Incident of February 3, 2012

15. J■ L■<sup>6</sup> (J■ L■) was a student in Respondent's fourth grade class during the 2011-2012 school year. He was smaller than most fourth-graders. He had transferred from another school during the previous school year. He resided with his mother, step-father and sister. J■ L■ occasionally misbehaved in school, and he was sent to Steinbeck's office on three or four occasions. Steinbeck found that, although J■ L■ blamed others for his problems and/or claimed that others were as guilty as he, he never lied. While at Broadous, J■ L■ developed a rapport with Respondent, and J■ L■ confided his problems and concerns to Respondent.

16. During the 2011-2012 school year, J■ L■ was enrolled in the Youth Services program, an after-school program in which students were permitted to play on the school's playground after school until their parents could pick them up.

17. For a few days before February 3, 2012, Respondent unsuccessfully attempted to reach J■ L■' parents at least three times to discuss J■ L■' disruptive classroom behavior. Steinbeck encouraged the school's teachers to come to her when they were unable to reach parents because she could employ strategies that made her "99 percent" effective in reaching them.<sup>7</sup> Respondent did not take advantage of that invitation in attempting to reach J■ L■' parents. Instead, after school on February 3, at approximately 3:05 p.m., Respondent entered the playground where J■ L■ had just finished playing basketball, picked up J■ L■' backpack that was on the ground, put the strap over his shoulder, and walked away with it, shouting across the playground at J■ L■ to tell his mother to come and pick up the backpack.

18. J■ L■ ran after Respondent and, upon catching up to him, attempted to pull the backpack from Respondent's shoulder. Respondent refused to release it. He turned and struck J■ L■ on the back and buttocks three to five times with his metal cane while shouting "Let go, let go!" J■ L■ released his grip on the backpack after receiving Respondent's final blow. He returned to the basketball area angry and crying. Respondent continued to walk back toward his classroom with the backpack.

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<sup>6</sup> Initials are used in lieu of surnames of all students referenced in this Decision in order to protect their privacy.

<sup>7</sup> Steinbeck credibly testified that she never had any trouble reaching J■ L■' parents.



19. The incident was witnessed by at least three other students who had an unobstructed view. One of those students, M■■■■L., testified at the administrative hearing. Her testimony was consistent and highly credible. It appeared to M■■■■L. that Respondent intentionally struck J■■■■L. Although, before the incident, she considered Respondent to be "nice," "chill," and "a little bit scary" (M■■■■L.'s terms), following the incident, she would not want him as her teacher because of what she witnessed him do to J■■■■L.<sup>8</sup>

20. At the administrative hearing, Respondent testified that he did not report the incident to his administrator because he did not believe the incident had involved a struggle. However, he did report the incident to J■■■■L.'s parents.<sup>9</sup> Respondent's statement that he did not believe there had been a physical struggle undermines his earlier version of the facts and is inconsistent with his hearing testimony.

### The Investigation

21. Upon receiving notification of the incident from J■■■■L.'s step-father, Principal Steinbeck promptly followed District policy by informing Susan Brandt, the Local District 2 Operations Support Coordinator, writing a child abuse report and placing it into the system, and filing a suspected child abuse report with the District and the Los Angeles Police Department. An officer with the police department instructed her to handle the matter administratively if there were no bruises on the victim. Steinbeck then obtained statements from J■■■■L., the Youth Services Program supervisor, and the three witnesses to the incident. The statements of J■■■■L. were consistent, and Steinbeck found all four to be credible in their statements. On February 7, 2012, Respondent was reassigned to the district office and assigned a substitute to his class. Shortly thereafter, Steinbeck interviewed the three witnesses again to ensure their versions' accuracy over time. All three witnesses were interviewed separately each time, and all of their reports remained consistent and credible.

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<sup>8</sup> Considerable time was spent during the three-day administrative hearing on whether Respondent was holding the cane in his right hand or his left, whether he struck J■■■■L. on the back, buttocks, or other part of his body, and other details relating to the physical altercation. Not all of the testimony was consistent, but it could not be expected to be consistent. This was a sudden and fluid situation. The two individuals were constantly moving and changing position. Although the specific details could have greater relevance in a criminal trial, in which the standard of proof is that of beyond a reasonable doubt, the standard of proof in this administrative proceeding is a preponderance of the evidence. It is the fact that Respondent inappropriately touched a student by striking him with his cane that constitutes cause for dismissal, rather than the precise manner in which it occurred.

<sup>9</sup> The record is silent as to how Respondent was able to contact J■■■■L.'s parents concerning the incident following his earlier unsuccessful attempts to reach them regarding his classroom behavior.

22. During a June 19, 2012 conference between Respondent, Steinbeck, Susan Brandt, and Scott Mandel, UTLA Representative, relating to the subject incident, Respondent read the following written statement:

I categorically deny all of the allegations. I produced written evidence that the allegations were false, evidence which this principal purposely and unethically ignored, as she manufactured and manipulated evidence in this case—which the LAPD threw out immediately. This was the epitome of her campaign of terror against a UTLA chapter chair with whom she has attempted to rid herself of for years. I demand to be reinstated back to Broadous and that this principal be held accountable for her unprofessional and unethical actions against me.

(Exhibit 25.)

23. At the conclusion of the conference, Steinbeck provided Respondent with guidance and instruction, and she offered him a book entitled Diffusing Disruptive Behavior, by Geoff Colvin.

24. On February 24, 2012, Respondent provided a written statement of his version of the incident. In that statement, he blamed J ■ L ■ for the occurrence. Respondent wrote that he informed the Youth Services coach that he intended to remove the backpack and that, when he did, J ■ L ■ “rammed” into him from behind, “seemingly trying to knock me over or knock the backpack off my shoulder with great force.” Respondent wrote that, while J ■ L ■ was “loudly demanding” the return of his backpack, Respondent “explained” to him that he had asked for it before, and that he would hold it until 5:00 when J ■ L ■’ mother arrived. According to Respondent’s statement, J ■ L ■ then “reared back as if to charge me again. He then said something to the effect that I was going to hit him with my cane and that he was going to tell Dr. Steinbeck that I had hit him with my cane. I empathically said I was not, but apparently as he began to menace me, I may have held it defensively in front of me. At that point, he went running round in half circles and towards the playground shouting that I had hit him with the cane.” (Exhibit D.) At the administrative hearing, Respondent testified that, after striking Respondent in the back, J ■ L ■ spun Respondent around with such force that Respondent turned 180 degrees so that they were facing each other. That testimony was not credible given the discrepancy in size and weight between the small child and the full-grown man and the contrary descriptions of the witnesses.

25. No witness or exhibit offered at the administrative hearing corroborated Respondent’s version of the subject incident, and his characterization of J ■ L ■ as the demanding aggressor and himself as calmly explaining why he had taken the backpack was not credible in light of the heat of the moment and the witnesses’ observations. Respondent’s statement that he informed the YS coach of his intent to take the backpack is not credible in light of the fact that Respondent was unable to explain how J ■ L ■ learned that Respondent had taken the backpack without being so informed by Respondent shouting the information to him.

26. Based on her investigation of the incident, Steinbeck came to believe that Respondent was not a good role model for his students, and she lost confidence in his ability to serve as a teacher.

27. Students who were referred to the office with a behavior slip were sent to a coordinator instead of simply sitting in the office. Steinbeck maintained every behavior slip for every such student to determine the efficacy of the school's efforts with respect to each child. She noticed that J ■ L ■ stopped receiving behavior slips after Respondent was reassigned and the substitute was assigned to his class.

28. Principal Steinbeck retired in June 2012 and was succeeded by Maribel Luna (Luna). In August of 2012, Luna and Andriette Keele-Gibson, a District Operations Coordinator, continued the investigation by re-interviewing J ■ L ■ and two of the witnesses. All three remained consistent with their earlier statements. Based on the totality of the investigation, Luna made the recommendation to dismiss Respondent from the District and, on November 30, 2012, she issued a Notice of Unsatisfactory Act.

29. An administrative review, pursuant to Education Code sections 44932 and 44939 (*Skelly* hearing) was scheduled for February 6, 2013. Due to scheduling conflicts for Respondent and his representative, the meeting was postponed four times, but was eventually held on March 8, 2013. During the *Skelly* hearing, Respondent again denied striking J ■ L ■ with his cane. However, in light of all the evidence and the District's zero-tolerance policy toward child abuse, Linda Del Cueto (Del Cueto), the Instructional Area Superintendent who presided over the hearing, concluded that the proposed disciplinary action of dismissal should be forwarded to the Board of Education for disposition. In so doing, Del Cueto considered Respondent's conduct on February 3, 2012 to have been unprofessional because of his failure to exercise good judgment, his failure to model appropriate behavior, his violation of District policy against corporal punishment and inappropriate touching, and his violation of the District's ethics policy. She was concerned that Respondent's conduct could recur because of his denials concerning the subject incident.

30. In May 2013, a telephone conference took place between Katrina Campbell, Assistant General Counsel for the District, and Benjamin Hill, Respondent's brother who is a legal assistant in a local law firm. During that conference, Ms. Campbell informed Mr. Hill that the Board of Education would decide whether to dismiss Respondent. They discussed whether that event would be placed on the Board's May 2013 agenda or on the next available agenda in September 2013. If it were the latter, Respondent would remain in paid status at least until the Board made its decision in September.<sup>10</sup> Ms. Campbell recalls that she and Mr. Hill agreed to have the matter postponed until September. Mr. Hill recalls a discussion in that regard but does not recall reaching an understanding with Ms. Campbell on it. Regardless of whether the two reached an agreement, the matter was decided in September, and Respondent remained in paid status throughout the summer months.

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<sup>10</sup> The parties do not dispute that a teacher may not be dismissed during the summer months when school is not in session.

31. At the administrative hearing, Respondent neither identified nor produced the evidence referred to in his statement of June 19, 2012. At the administrative hearing, he vacillated between denying he struck J ■ L ■ with his cane, claiming he did not intend to do so, and stating that he did not recall doing so.

32. Respondent did not establish that any action taken against him was taken because he was a UTLA Chapter Chair.

33. At the administrative hearing, Respondent testified that a teacher is expected to maintain high ethical standards, to set an example for students, and that he/she is bound by the code of conduct. He admitted that he failed to comply with those standards when he took J ■ I ■' backpack. Respondent also acknowledged that the LAUSD policy abolishing corporal punishment was in effect the entire time he was at Broadous Elementary School. Respondent further admitted that the School Causative Behavioral Support Policy does not permit a teacher to confiscate a student's personal property, but he did not believe it was impermissible to take J ■ L ■' backpack. He did not explain the distinction between the school policy and his belief. Lastly, Respondent testified that, although he did not recall striking J ■ L ■ with his cane, if he did so, the cane could have hit something behind him. That statement belies his earlier statement that J ■ L ■ spun him around so that they were facing each other.

#### LEGAL CONCLUSIONS

1. Cause for dismissal of Respondent, James Hill, exists by reason of unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of or refusal to obey school laws and/or regulations, pursuant to Education Code sections 44932, subdivision (a)(1), (4), (5), and (7), and 44939, as set forth in factual findings 1 through 33.

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2. Education Code section 44932 states in pertinent part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

[¶] ... [¶]

(4) Unsatisfactory performance.

(5) Evident unfitness for service.

[¶] ... [¶]

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

3. The standard of proof in this matter is a preponderance of the evidence. (*Gardiner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

#### *Respondent's Laches Defense*

4. Before, during, and after the hearing, Respondent argued that the action should be dismissed on the basis of laches. He argued that the District engaged in unreasonable delay in its investigation of the facts underlying the Accusation and Statement of Charges, and that the unreasonable delay precluded the appearance of certain witnesses at the hearing. Respondent's argument is not persuasive.

5. A successful laches defense requires the establishment of two elements: An unreasonable delay in bringing the action, and resulting prejudice to the responding party. (*Mt. San Antonio Community College District v. Public Employment Relations Board* (1989) 210 Cal.App.3d 178.

Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.)

6. Respondent argued that the District so delayed its investigation that it resulted in his inability to locate and call two witnesses, one of whom is the victim in this matter, and the other, an eyewitness to the event that led to the filing of the Statement of Charges and the Accusation.

7. Respondent failed to establish that the length of the investigation was due to an unreasonable delay on the District's part. On the contrary, the District responded to the subject incident and began its investigation in a timely manner, and it proceeded through the investigation at a reasonable pace. To the extent that any delay occurred, it was partly due to the passing of the summer months, during which, by law, a teacher may not be dismissed, Respondent's possible involvement in postponing the Board's decision to dismiss from May to September 2013 in order for him to remain in paid status over the summer months, and to Respondent's own delay in convening the *Skelly* hearing.

8. Further, Respondent failed to establish that, had a delay by the District been unreasonable, he was prejudiced by that delay. He failed to demonstrate what efforts, if any, he made to locate, interview, or subpoena either witness who did not appear at the hearing. Instead, he criticized the District for not producing the victim. Although, after his suspension, Respondent had the right to request to return to the campus to interview witnesses, he made no such request.

9. Respondent's failure to establish an unreasonable delay by the District and prejudice due to an unreasonable delay defeats his laches defense.

#### *Exclusivity of the Pleadings*

10. Respondent argued that Complainant brought the Accusation exclusively under Education Code<sup>11</sup> section 44939, thereby waiving all other grounds for dismissal under section 44932. Respondent is incorrect.

11. In its Rebuttal Brief, the District correctly explained the statutory scheme under which the charges in this case were properly alleged. That explanation is set forth, in part, below:

The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes enumerated in Section 44932, subdivision (a), is established. In addition, a governing board may immediately suspend a certificated employee without pay pursuant to Section 44939 upon the filing of a statement of charges alleging immoral conduct.

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<sup>11</sup> All statutory references are to the Education Code unless otherwise indicated.

(1) **Understanding the Education Code Statutory Scheme**

The Education Code provisions, as they apply to a teacher dismissal matter, are found in Article 3 entitled “Resignations, Dismissal and Leaves of Absence” and commence at Education Code §44930. The Section that specifies the sum total of all grounds for dismissal is Section 44932. That Section enumerates the eleven grounds that the District may move to dismiss a teacher [under], including “(1) immoral or unprofessional misconduct . . . (4) Unsatisfactory performance . . . (5) Evident Unfitness for Service . . . (7) Persistent violation of or refusal to obey the school laws. . . .” Should the Board file an Accusation to dismiss a teacher based on any cause(s) “as specified in 44932,” Section 44934 then requires the District to give notice to the teacher of its intention to dismiss. Section 44934 further provides that the teacher will be dismissed if the teacher does not object within 30 days. Section 44939 is a . . . provision that—when a teacher is charged with certain specific causes under Section 44932—permits the District to suspend the teacher without pay while the teacher dismissal hearing is pending. Causes under Section 44932 that warrant suspension without pay under 44939 include immoral conduct and willful refusal to perform regular assignments without reasonable cause. Whether or not there is reason to suspend the teacher without pay under Section 44939, the teacher may still ultimately be dismissed for *any* of the causes under Section 44932 that are alleged in the Accusation.

(2) **The District . . . Moved to Dismiss Respondent Under Various Causes Enumerated in Section 44932**

It is untrue that the District elected to proceed under Education Code section 44939 only. (Resp. Brief, 1:10-15; 12:26-13:10.) The Statement of Charges, filed with the Board of Education, clearly indicated that the District proceeded to dismiss and suspend Respondent under Sections 44934 *and* 44939:

“WHEREFORE, under the provisions of **Education Code section 44934 and 44939**, the undersigned asks that the Board of Education give notice to Hill of its intention to immediately suspend without pay and dismiss him at the expiration of thirty (30) days from the date of service of this notice, and that he be dismissed at the expiration of those thirty (30) days, unless he demand a hearing as provided under Education Code section 44937 and 44939. . . .” (Emphasis added.) (Exhibit 1, 2:19-24.)

And, as stated above, Section 44934 outlines the procedure for the District to give notice to the teacher before dismissing, and Section 44939 allows the District to take the extra step of suspending the teacher without pay for only some of the causes enumerated in Section 44932.

The District . . . moved to dismiss Respondent under Section 44934 for the following five causes enumerated in Section 44932: (1) unprofessional conduct, (2) unsatisfactory performance, (3) immoral conduct, (4) evident unfitness for services, and (5) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him. (Exhibit 1, 1:22-28; Exhibit 6, 1:25-2:5.) In addition to dismissing Respondent for these five causes, the District elected to suspend him without pay under Section 44939<sup>12</sup> This clear statement of the District's intent to dismiss Respondent for these five causes is found in: each of the subject lines on the *Skelly* meeting notice letters read[s] "Administrative Review – Education Code 44932 and 44939"; every notice letter states in the body of the letter that the District is moving under "Education Code 44932 and 44939" (Exhibits 35, 36, 39 and 40) (footnote omitted); the *Skelly* response letter's subject line reads "Recommendation for Dismissal – Education Code §44932 and §44939" (Exhibit 41); the Notice of Intent to Dismiss and the Statement of Charges attached thereto (Exhibits 1 and 2) state that the District is proceeding under sections 44934 and 44939, and the causes for dismissal are listed and made pursuant to Section 44932 and 44939 (Exhibit 1, 1:22-28). The same exact bases for dismissal are included in the Accusation and Statement of Charges that was requested to be filed with the Office of Administrative Hearings. (Exhibit 6, 1:25-2:5.)

(Complainant's Rebuttal Brief, Exhibit 52, page 1, line 10 – page 3, line 12.)

### *The Grounds for Dismissal*

12. The District proved the charging allegations in the Accusation.

13. The Commission specifically finds that Respondent wrongfully took J ■■■ L ■■■' backpack, and that he intentionally struck J ■■■ L ■■■ repeatedly (three to five times) with his cane. However, Respondent struck J ■■■ L ■■■ with his cane without premeditation in response to J ■■■ L ■■■' running up behind him and grabbing the backpack.

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<sup>12</sup> Complainant inserts its Footnote 1 at this point, which reads: "Respondent attempts to confuse the issue by arguing that 'Section 44939 provides that the following grounds permit the Board to dismiss a teacher.' (Resp. Brief, 12:38.) The 'grounds' that he then lists from Section 44939 are those that permit immediate suspension without pay. Some of the 44939 immediate suspension 'grounds' are also found as a basis for dismissal in Section 44932. Respondent's dismissal is based on the five grounds from Section 44932; it is only his immediate suspension without pay that is based on Section 44939." Although Complainant correctly interprets the law in its Footnote 1, the Commission does not find that Respondent deliberately attempted to confuse the issue in his argument.



*Unprofessional Conduct-Section 44932, subdivision (a)(1)*

14. "Unprofessional conduct," as used in section 44932, subdivision (a)(1), may be defined as conduct which violates the rules or ethical code of a profession or is such conduct that is unbecoming of a member of the profession in good standing. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 553.) However, the conduct in question, to amount to unprofessional conduct, must indicate unfitness to teach. (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1174.)

15. Respondent engaged in unprofessional conduct. He wrongfully took J ■■■ L ■■■' backpack despite his acknowledged awareness of the school's policy against confiscation of students' personal property. When J ■■■ L ■■■ attempted to retrieve his property, Respondent intentionally struck him three to five times with his metal cane while repeatedly shouting, "Let go, let go!" instead of attempting to, by other peaceful, non-violent means, diffuse the situation he alone had created. He then walked away from his angry and crying student who was obviously in distress. Respondent's conduct was made even more egregious by the fact that J ■■■ L ■■■ had developed a rapport with Respondent and had confided in Respondent before. Respondent's violent act on J ■■■ L ■■■ betrayed that rapport.

16. Respondent's unprofessional conduct was further evidenced by his raising his voice at students, peers, and the school principal, by his failure or refusal to adhere to school and district standards, and by his failure or refusal to cooperate with the administration to improve classroom education and performance.

*Unsatisfactory Performance-Section 44932, subdivision (a)(4)*

17. Respondent engaged in unsatisfactory performance in the same manner that constitutes his unprofessional conduct. In addition, he engaged in unsatisfactory performance by failing to timely notify the administration that he had been involved in a violent altercation with a fourth-grade student.

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*Immoral Conduct-Sections 44932, subdivision (a)(1), and 44939*

18. Immoral conduct has been defined as follows:

“The term ‘immoral’ has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.” (*Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 811. (See also, *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740 [227 P.2d 449] (quoting Words and Phrases, permanent edition, volume 20, pages 159-160).)

19. Respondent did not engage in immoral conduct as that term is defined above. Although the definition could apply to his conduct on February 3, 2012, Respondent did not have time to reflect and contemplate his actions. Although his striking J ■ L ■ with his cane three to five times was certainly improper and unprofessional, it did not reflect the wilful corruption and depravity associated with immorality.

*Evident Unfitness for Service-Section 44932, subdivision (a)(5)*

20. “Evident unfitness for service,” within the meaning of section 44932, subdivision (a)(5), means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445 (*Woodland*).) Evident unfitness for service requires that unfitness be attributable to a defect in temperament which “connotes a fixed character trait, presumably not remedial upon receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Id.* at 1444.) There is no set formula or definite technical meaning. Rather, “due consideration must be given to the circumstances of the case at hand.” (*Oakland Unified School District v. Olicker* (1972) 25 Cal.App.3d 1098, 1108.)

21. Although the incident involving J ■ L ■ was the only known violent act Respondent committed, his history of anger, raising his voice, and his failure or refusal to adhere to applicable standards, establish the fixed character trait referenced in *Woodland, supra*, that demonstrates an evident unfitness for service.

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*Persistent Violation of or Refusal to Obey the School Law of the State or Reasonable Regulations Prescribed for the Government of the Public Schools by the State Board of Education or by the Governing Board of the School District employing Respondent- (Section 44932, subdivision (a)(7))*

22. During his time at Broadous Elementary School, Respondent violated the District's Child Abuse and Neglect Reporting Requirements, the Board's resolution reaffirming its commitment to respectful treatment of all persons, the District's Code of Conduct With Students, the District's Ethics Policies, the District's Employee Code of Ethics, and the District's Abolition of Corporal Punishment. He angrily shouted at students and Principal Steinbeck. In so doing, he failed to respect applicable school, District, and State standards.

23. However, the fact that the Commission has found that Respondent engaged in unprofessional conduct does not end the inquiry. *In Morrison v. State Board of Education* (1969) 1 Cal.3d 214 [82 Cal.Rptr. 175], the Court stated:

We . . . conclude that the Board of Education cannot abstractly characterize the conduct in this case as "immoral," "unprofessional," or "involving moral turpitude" . . . unless that conduct indicates that the petitioner is unfit to teach. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, [footnote omitted] the type of teaching certificate held by the party involved, [footnote omitted] the extenuating or aggravating circumstances, if any, surrounding the conduct, [footnote omitted] the praiseworthiness or blameworthiness of the motives resulting in the conduct, [footnote omitted] the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. [footnote omitted] These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.

24. An analysis of the factors set forth in *Morrison, supra*, evinces Respondent's unfitness to teach at this time.

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*a. The likelihood that the conduct may have adversely affected students or fellow teachers*

There is more than a likelihood that Respondent's conduct adversely affected students and fellow teachers. The incident of February 3, 2012 had an actual adverse effect on J■■■■ L■■■■ and M■■■■ L. at the very least. J■■■■ I■■■■ was hurt and betrayed by the teacher in whom he had confided and developed a rapport. M■■■■ L. testified that she would be reluctant to be in Respondent's class after witnessing what Respondent did to J■■■■ L■■■■.

In addition, Respondent's violent attack on J■■■■ L■■■■ is likely to have had an adverse effect on other students in at least two ways: First, it increased the risk that they would be fearful of Respondent and/or other teachers, even if they only heard about the incident and did not directly view it. Secondly, as a teacher at the school, Respondent was required to set a proper example for the students. Children at the elementary level of education are highly impressionable. Respondent's striking a student with his cane wrongfully condones on-campus violence. It increases the likelihood of student-instigated violence against other students, faculty and staff, and is likely to engender other problems borne of an insensitivity to violence such as bullying.

Further, Respondent's outburst at Principal Steinbeck during a faculty meeting made Steinbeck and at least one attendee uncomfortable, and his refusal to be bound by applicable standards had, at minimum, a likely adverse effect on the remainder of the faculty who could have difficulty reconciling their obligations and responsibilities to Respondent's attitudes.

*b. The degree of such adversity anticipated*

An episode of on-campus violence by a teacher against an elementary school student is sufficiently anomalous as to prompt strong reactions in students and teachers if Respondent continues to teach at Broadous. Thus, the likelihood of anticipated adversity is high and could easily result in parents seeking to avoid having their children placed in Respondent's class or their requesting transfers if their children are already assigned to his class.

*c. The proximity or remoteness in time of the conduct*

Approximately two years have passed since the incident between Respondent and J■■■■ I■■■■. The event is temporally recent in that it is likely that some students who were enrolled at the school in February 2012 are still enrolled there and may have knowledge of the incident. The same is true for faculty and staff.

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d. *The type of teaching certificate held by the party involved*

Respondent holds an elementary school teaching credential. In addition to having received training in school, district, and state rules of teacher conduct, he has learned pedagogical techniques designed to address the needs and behaviors of children of elementary school age. Therefore, he should have been better prepared to address and handle the confrontation with a fourth grade student after he took the student's backpack, and he should have been able to avoid creating the confrontation in the first place by selecting another course of conduct than taking the student's backpack without consent and shouting at the student across the playground to have his mother come get it. Further, his conduct occurred in an elementary school where he was licensed to teach. Respondent knew or should have known that an act of violence against a student could be, and probably would be, more traumatic to the victim and the witnesses than if those individuals were of high school age.

e. *The extenuating or aggravating circumstances, if any, surrounding the conduct*

The only extenuating circumstance attaching to the matter is the fact that J ■ L ■ assault on Respondent to retrieve his backpack came as a surprise to Respondent.

Aggravating circumstances include the following: (1) Respondent took J ■ L ■ backpack without the consent of J ■ L ■ J ■ L ■ parents, or the school administration. (2) Upon being confronted by J ■ L ■ Respondent continually pulled on J ■ L ■ backpack while repeatedly shouting "Let go, let go!" instead of letting go, returning the backpack to J ■ L ■, diffusing the situation, and more appropriately dealing with the problems he was having in trying to reach J ■ L ■ parents. (3) Respondent used his metal cane as a weapon against a fourth grade student. (4) Respondent struck the student with his cane multiple times. (5) Following the attack, Respondent walked away from the student who was angry, crying, and clearly in distress. (6) The student and Respondent had previously developed a rapport, and the student had confided in Respondent.

f. *The praiseworthiness or blameworthiness of the motives resulting in the conduct*

The only praiseworthiness of Respondent's motives was that he took the backpack in an effort to reach J ■ L ■ parents in order to enlist their assistance in improving their child's in-school behavior and progress.

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The blameworthiness of Respondent's motives include the following: (1) Respondent failed to utilize Principal Steinbeck as a resource in reaching J■■■■ L■■■■' parents. Even assuming the truth of his testimony that he asked Steinbeck for that assistance and that she told him to handle it himself,<sup>13</sup> he should have returned to her when his continued efforts were unsuccessful rather than involving the student and provoking a confrontation by taking the student's backpack. (2) Instead of approaching J■■■■ L■■■■ in class or on the playground and explaining that he intended to take the backpack and return it to J■■■■ L■■■■' mother, Respondent took the backpack and, as he walked away with it, shouted across the playground to J■■■■ L■■■■ to have his mother pick it up.

*g. The likelihood of the recurrence of the questioned conduct*

The evidence did not disclose why, after a 17-year history of no known violent acts, Respondent suddenly and repeatedly struck his fourth-grade student with a metal cane. However, his conduct is consistent with his long-standing history of angry outbursts at students and co-workers, and his failure or refusal to comply with applicable behavioral standards. Those factors, coupled with what appeared to be a complete lack of remorse and a failure to accept responsibility for his misconduct, evince a substantial likelihood of recurrence.

*h. The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.*

This action does not involve any constitutional rights of Respondent or other teachers.

*Credibility Issues*

25. Several credibility issues militate against Respondent.

a. The testimony of a number of witnesses, including but not limited to Steinbeck and M■■■■ L., was both credible and consistent. Their testimony contradicted Respondent's testimony which lacked credibility for the reasons set forth above and below.

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<sup>13</sup> Respondent's testimony in that regard was of doubtful credibility in light of Steinbeck's credible testimony that (1) she maintained an "open door" policy by which teachers were encouraged to come to her when having trouble reaching parents because she had techniques and strategies that were 99 percent effective in reaching parents; and (2) that Respondent did not take advantage of her attempts to help him improve in his effectiveness and that he refused to adhere to accepted standards.

b. In cross-examination, Respondent's attorney continually questioned witnesses on matters Respondent ultimately did not dispute. Perhaps the most significant of those issues was whether the witnesses to the attack on J ■ L ■ had a clear, unobstructed view of the incident. Respondent's counsel repeatedly raised the issues of weather, lighting, and obstructions that could have hindered or completely obstructed the witnesses' observations. However, when Respondent testified, he did not assert that any of those conditions existed, and he did not dispute the witnesses' ability to clearly observe the event. It is unclear whether Respondent was attempting to hide the truth of the incident or, in some manner, obfuscate the issue.

c. Respondent was inconsistent and equivocal in his testimony and written statement (Exhibit D.). He variously denied the incident ever occurred; admitted it could have occurred; and claimed he may have raised his cane defensively.

d. Respondent's version of the facts is inconsistent with that of J ■ L ■ and the three eyewitnesses, all of whom agree that Respondent appeared to intentionally strike J ■ L ■ with his cane rather than accidentally strike him as the cane came around his body, or that Respondent simply held the cane in a defensive manner. None of the witnesses saw J ■ L ■ let go of the backpack, and rear back in preparation for a second attack on Respondent.

e. The wording Respondent chose for his written statement (Exhibit D) made it appear that J ■ L ■ was the perpetrator who was completely at fault, and that Respondent reacted to the attack in a calm and reasonable manner, "explaining" why he took the backpack while the much smaller fourth-grader violently attacked and then reared back for a second attack. The more credible evidence is to the contrary.

f. Respondent's claim that J ■ L ■ suddenly terminated his attack on Respondent and developed a scheme to report that Respondent struck him with his cane is difficult to accept given the situation in which J ■ L ■ was upset and involved in a physical struggle with an older and larger teacher whom he had previously grown to trust.

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### *Denial of Responsibility*

26. Instead of accepting responsibility for his conduct, Respondent chose to blame his victim, a fourth-grader, for the physical altercation, and he chose to blame his former principal for the problems he alone created involving the faculty and administration. Although artificial acts of contrition are not required in a case such as this one (*Calaway v. State Bar* (1986) 41 Cal.3d 743, 747-748; *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 730, 744-745), one would expect a dedicated and compassionate teacher to feel at least some remorse for the event, the effect it must have had on his victim who had previously trusted him enough to confide in him, and his failure to have handled the situation in a more appropriate, non-violent manner. Respondent's denial of responsibility and complete lack of remorse bode poorly for present and future students, parents, faculty and staff.

### ORDER

The District may dismiss Respondent, James Hill, as a permanent certificated employee of the Los Angeles Unified School District.

### COMMISSION ON PROFESSIONAL COMPETENCE



H. STUART WAXMAN, Member  
Administrative Law Judge  
Office of Administrative Hearings

DATED: \_\_\_\_\_

2/7/14

\_\_\_\_\_  
LAURA LEARNED, Member

DATED: \_\_\_\_\_

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RUSSELL HARRISON, Member

DATED: \_\_\_\_\_



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Administrative Law Judge  
Office of Administrative Hearings

  
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LAURA LEARNED, Member

\_\_\_\_\_  
RUSSELL HARRISON, Member

DATED: \_\_\_\_\_

DATED: February 8, 2014

DATED: \_\_\_\_\_

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H. STUART WAXMAN, Member  
Administrative Law Judge  
Office of Administrative Hearings

DATED: \_\_\_\_\_

\_\_\_\_\_  
LAURA LEARNED, Member

DATED: \_\_\_\_\_

*Russell Harrison*  
\_\_\_\_\_  
RUSSELL HARRISON, Member

DATED: 2/7/14