

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Immediate Suspension
and Dismissal of:

NEAL IVAN LEE (EN 989994), a permanent
certificated employee of the Los Angeles
Unified School District,

Respondent.

OAH No. 2015091103

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on November 6, November 20, and December 10-11, 2015, in Los Angeles. The case was submitted for decision upon conclusion of the hearing on December 11, 2015.

My T. Huynh, Associate General Counsel, represented complainant Los Angeles Unified School District (District).

Rosty G. Gore, Esq., represented Neal Ivan Lee (respondent), who was present.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board of Education (Board) is the duly elected, qualified and acting governing board of the District, organized, existing and operating pursuant to the provisions of the California Education Code and other laws of the State of California.

2. Respondent is a permanent certificated employee of the District.

3. Justo H. Avila, in his official capacity as the District's Chief Human Resources Officer, verified on information and belief a Statement of Charges against respondent, alleging factual and legal grounds for respondent's immediate suspension without pay and termination of his employment as a result of separate incidents involving two students.

4. By a letter dated September 2, 2015, respondent was advised that the Statement of Charges had been filed with the Board, and that during a closed session of a Board meeting held on September 1, 2015, the Board decided to suspend respondent without pay and dismiss him from employment. The dismissal would become effective within 30 days, unless he demanded a hearing. Respondent timely requested a hearing.

5. On September 29, 2015, the District filed an Accusation and Statement of Charges with OAH, as well as respondent's aforementioned request for a hearing.

Respondent's Background Information

6. Credentials. Respondent has a clear single subject teaching credential in mathematics, chemistry and physics. Respondent also possesses a cross-cultural, language and academic development (CLAD) certificate.

7. Employment with the District. Since being hired by the District in 2008, respondent has been assigned as a high school teacher at City of Angels Options Virtual Academy (City of Angels).

8. A. City of Angels is an on-line independent study program allowing students to continue their education outside the confines of a traditional, comprehensive high school. Instruction is designed to accommodate a variety of students, including teen mothers, working students, full-time caregivers, students with special medical needs, students with social and anxiety disorders, and those whose parents want to educate their children at home. Students generally come to campus once per week to drop off completed assignments and pick-up new ones, which they do at home. They get credit for completing the assignments, not for going to campus.

B. City of Angels has many campuses spread throughout the City of Los Angeles. Respondent taught at several different such campuses, including Charo, El Sereno Middle School, Barrio Action in El Sereno and Hollenbeck Middle School.

C. During the spring and fall semesters in 2013, respondent was assigned to the City of Angels' Legacy LA campus, along with one other District teacher, Carolina Saucedo. The Legacy LA campus was part of a community center open to the public, which housed programs operated by the City of Los Angeles.

Student A [REDACTED]¹

9. A [REDACTED] enrolled at City of Angels, Legacy LA campus, for the fall 2013 semester. He was 16 years old at the time and in the ninth grade. He had been referred to an independent study program as a result of counseling he had received after the traumatic death of his brother three years earlier.

¹ Last names are omitted to protect the privacy of the involved students.

10. During the fall of 2013, respondent was A[REDACTED]'s assigned teacher at City of Angels. On a date not established, but in either late October or early November 2013, A[REDACTED] was in the Legacy LA multipurpose room helping respondent move tables. Only the two of them were in the multipurpose room at that time. While there, respondent asked A[REDACTED] if he "worked out," and whether he had seen any improvement in his body. When A[REDACTED] told him he had noticed improvement in his chest and stomach, respondent asked if he could see. When A[REDACTED] lifted up his shirt to show him, respondent rubbed A[REDACTED]'s stomach and chest with his hand. A[REDACTED] thought the interaction was weird and he felt uncomfortable, but he did not tell anyone about it at the time.

11. On another day in November 2013, when A[REDACTED] was at the Legacy LA campus, he went to the restroom during class. Respondent later entered the restroom. Respondent talked to A[REDACTED] about his class assignments while A[REDACTED] washed his hands and then respondent asked A[REDACTED] if he still worked out. The two were alone in the restroom at the time. A[REDACTED] again felt uncomfortable with this interaction and left the restroom to return to the classroom. A[REDACTED] finished his work without incident and left the campus. He did not tell anyone about the incident with respondent at the time.

12. On another day in November 2013, A[REDACTED] reported to respondent's classroom to submit assignments. It was not his regularly scheduled day to do so. Only a female student was in the classroom with respondent and A[REDACTED] at the time. A[REDACTED] helped the female student put up some posters in respondent's classroom. She left the classroom after that task was done. A[REDACTED] asked respondent for help on his assignment. While respondent and A[REDACTED] were alone in the classroom, respondent got up and closed the door from the main hallway into the classroom. Respondent sat next to A[REDACTED] and helped him with his assignment. A[REDACTED] began to get ready to leave, but respondent asked him if he was keeping up with his workouts and if his muscles were going away. A[REDACTED] said something about not keeping up with his workouts. Respondent slipped a hand under A[REDACTED]'s shirt and rubbed A[REDACTED]'s stomach and chest area, skin to skin. With his hand still on A[REDACTED]'s chest and stomach area, respondent said, "You are sweating." A female student walked into the classroom, at which time respondent pulled his hand out from A[REDACTED]'s shirt and told him he could leave. A[REDACTED] was confused over this series of uncomfortable interactions with respondent. He quickly left the classroom.

13. Later that day, A[REDACTED]'s mother asked him about a letter(s) she had received from respondent indicating that A[REDACTED] was not doing his assignments and that if he did not complete the assignments on time he would be immediately dropped from City of Angels. A[REDACTED]'s mother was upset with her son. A[REDACTED] explained that he was reluctant to go to City of Angels because he was uncomfortable with respondent. A[REDACTED] told his mother about the three uncomfortable incidents he had with respondent, including the one that happened earlier that day. A[REDACTED]'s mother became upset with respondent. She told A[REDACTED] not to go back to City of Angels, and she made a complaint about respondent to the Los Angeles Police Department (LAPD). A[REDACTED] was interviewed by LAPD officers about respondent later that day.

14. On December 12, 2013, the principal of City of Angels, Vince Carbino, received a phone call from a counselor with Aztecs Rising Counseling Center (Aztecs Rising). The counselor wanted to schedule a meeting with Principal Carbino to discuss a complaint A [REDACTED] had against respondent. The next day, Principal Carbino met with A [REDACTED], his mother and the counselor, during which time A [REDACTED] explained to Principal Carbino the three uncomfortable interactions he had with respondent described above. This was the first time that Principal Carbino had heard any complaint about respondent.

15. After the meeting, Principal Carbino made a report to the LAPD concerning respondent. He was advised that a complaint had already been made and the matter was being investigated. Principal Carbino was asked to hold off any investigation until the police concluded their own. Principal Carbino reported these events to District personnel.

16. On December 13, 2013, Principal Carbino met with respondent and told him he had received a complaint from A [REDACTED] about respondent. At that time, respondent was removed from his classroom and temporarily reassigned to the Educational Service Center East Office, while an investigation was conducted on A [REDACTED]'s complaint.

17. A [REDACTED] never returned to City of Angels. He is now 18 years old and attends a home study program in another county. His goal is to take and pass the GED.

Student M [REDACTED]

18. M [REDACTED] enrolled at City of Angels, Legacy LA campus, for the fall 2013 semester. He was 16 years old at the time and in the tenth grade. By his own admission, he was referred to an independent studies program because he was doing poorly in regular high school. Respondent was M [REDACTED]'s assigned teacher at City of Angels.

19. On a date not established, but probably in late September 2013, M [REDACTED] went to the restroom at the Legacy LA campus during class time. Respondent shortly later came into the restroom. While M [REDACTED] was washing his hands, respondent asked M [REDACTED] if he worked out because he [M [REDACTED]] needed to lose weight. At the time, M [REDACTED] weighed close to 300 pounds. M [REDACTED] went back into the classroom, followed by respondent. M [REDACTED] felt uncomfortable by the interaction because he thought it was weird for a teacher to discuss his fitness while both were in the restroom.

20. In October 2013, and approximately two weeks after the first incident discussed above, M [REDACTED] went to the restroom of the Legacy LA campus during class time. When M [REDACTED] emerged from a stall, he saw respondent washing his hands at the sink. Respondent asked M [REDACTED] if he was working out and that he thought M [REDACTED] needed to lose weight. Respondent asked M [REDACTED] to flex for him and he held M [REDACTED]'s right arm or shoulder for a few seconds to feel. M [REDACTED] felt uncomfortable by this interaction because he thought it was weird for a teacher to discuss his fitness and touch him while both were in the restroom. M [REDACTED] did not tell anyone about this incident at the time.

21. On a date not established but probably in October 2013, M■■■■ stayed after class to catch up on assignments and was alone with respondent. It was approximately 12:30 p.m. At some point, respondent closed the door from the hallway into the classroom and sat close to M■■■■. Respondent asked M■■■■ either if his family had heart trouble or if he [respondent] could feel M■■■■'s heartbeat. Before M■■■■ said anything in response, respondent placed a hand under M■■■■'s shirt (but over a t-shirt) and on his chest. Respondent held his hand there for a few seconds and then removed it. M■■■■ was angry at respondent because he had not consented to being touched and he did not like it. He momentarily considered hitting respondent but decided against it and simply left in a hurry.

22. M■■■■ had a regularly scheduled counseling session that day with a counselor from Aztecs Rising. M■■■■ told his counselor what had happened that day with respondent and the two incidents before. The counselor reported it to LAPD. M■■■■ also told his mother about respondent. She also contacted LAPD. M■■■■ stopped attending City of Angels at this time.

23. LAPD began an investigation of M■■■■'s complaint in January 2014. During that time, LAPD officers contacted Principal Carbino about M■■■■'s complaint. This was the first time Principal Carbino heard of M■■■■'s complaint. By this time, respondent had been reassigned and was not in the classroom. Since Principal Carbino had been asked by the LAPD to stay his own investigation, he did not contact M■■■■ or his family at this time. In fact, Principal Carbino never met with M■■■■ or his family. He learned the particulars of M■■■■'s complaint in September 2014 when he received a written report from the District's Student Safety Investigation Team (SSI Team), which contained a summary of an interview of M■■■■.

24. M■■■■ never returned to City of Angels. He attended a District continuation high school for a short time, but left because he feared for his safety after he learned members of a gang he did not get along with were also in attendance. At the time, M■■■■ was in a tagging crew (graffiti) affiliated with a rival gang. In January 2014, M■■■■ was shot twice by a member of the gang he feared, but he survived. After he recovered, M■■■■ promised his girlfriend he would "straighten up" and no longer be associated with gang activity. M■■■■ is now enrolled in the twelfth grade at another school district. His goal is to graduate from high school.

Credibility Findings Regarding the Students

25. A. Both A■■■■ and M■■■■ were credible and believable. Their narrations of events and details have been generally consistent over time. As pointed out by Principal Carbino, their complaints contained very specific details rendering them more believable than the usual broad complaints he receives from students.

B. Both students appeared credible when they testified. Their demeanor appeared even and calm when describing the events in question, even when challenged extensively on cross-examination. For instance, A■■■■ freely admitted that he may have

mixed up the dates of some of the events in question and he candidly admitted small inconsistencies between what he told police and Principal Carbino. He was also candid in discussing personal issues. At no time did he become hostile or defensive. The same is true of M[REDACTED]. He was very candid when discussing his personal life, and when he admitted that he had lied to his mother about ditching respondent's class and hiding from her letters respondent had sent home about his not completing assignments. It appeared at all times that both students were trying their best to testify honestly and completely.

C1. Respondent's attack on the two students' character was unconvincing. He contends both were members of street gangs and therefore unbelievable. It was not established by a preponderance of the evidence that A[REDACTED] had any gang involvement. While M[REDACTED] had been a member of a tagging crew, which is a gateway to gang activity, it was not established that M[REDACTED] ever joined a gang. More importantly, the evidence indicates after he was shot by a gang member, M[REDACTED] has consciously stayed away from gangs completely. In any event, even if both students had been involved in gang activity, such would not necessarily make them unbelievable as witnesses.

C2. Respondent also contends because both students admitted lying to their parents (and to an extent respondent) about ditching class and failing to do assignments, they cannot be believed in this case. As discussed above, both students candidly admitted those lies in a way making them more believable.

C3. Finally, respondent contends some discrepancies between their testimony and what they had previously reported to the LAPD or the District, combined with their attempts to downplay the fact that they were in the process of being dropped from respondent's class, shows they cannot be trusted. However, the cited discrepancies were not significant, and would be assumed given the number of interactions in question with respondent and the amount of time passed since those events. No truthful witness can be expected to recount with precision every word, sentence, date or fact from the past. It is true both students downplayed the fact respondent either had dropped them from class or was on the verge of doing so. But that attitude more tends to show they did not take being dropped from class as seriously as respondent contends, as opposed to showing a motive to concoct a false story about respondent.

26. A. The students' credibility is bolstered by the fact they independently reported similar accounts of respondent's acts which occurred at roughly the same time. A[REDACTED] and M[REDACTED] did not know each other during the events in question or thereafter, which renders their description of events even more reliable. In fact, they met for the first time during the hearing. Such was established by their convincing testimony. In addition, their testimony was corroborated by the interviews of eight students in respondent's classes at City of Angels randomly selected by the District's SSI Team, all of whom denied knowing either A[REDACTED] or M[REDACTED]. By design, the City of Angels' classes were small and students only came to the classroom once per week. There was usually a handful or less of students in respondent's classroom at any given time. Thus, the mere fact that A[REDACTED] and M[REDACTED] were in respondent's class does not mean they knew each other or would have interacted.

B. Respondent argues A [REDACTED] and M [REDACTED] knew each other and therefore colluded to come up with false complaints about him. This is based on respondent's testimony the two were in the same study group, took some of the same courses and he saw them together at school. Respondent's testimony was unconvincing, as it conflicts with the more persuasive evidence described above indicating the two students did not know each other. Moreover, respondent presented no corroborating evidence on this point. For example, his fellow teacher at Legacy LA, Ms. Saucedo, did not know either student. Finally, respondent argues the fact A [REDACTED] and M [REDACTED] had received counseling at Aztecs Rising shows they knew each other and could have concocted their complaints through that connection. However, respondent's argument is supposition. No evidence indicates the two students interacted with each other at Aztecs Rising. In fact, A [REDACTED] testified he no longer received counseling at Aztecs Rising when he was in respondent's class.

District's Investigation and Actions Against Respondent

27. On May 15, 2014, the LAPD advised the District that it could proceed with an administrative investigation of the matter. On June 11, 2014, the LAPD submitted cases for both students to the Los Angeles City Attorney's Office for filing. Both cases were rejected due to insufficient evidence and no criminal charges were ever filed against respondent.

28. On May 16, 2014, the District's SSI Team opened an investigation into both students' complaints against respondent.

29. The SSI Team completed the investigation by September 17, 2014. The SSI Team interviewed various individuals, including M [REDACTED] (A [REDACTED] could not be located), respondent, Principal Carbino and the aforementioned eight randomly selected students in respondent's classes. A forensic scan of respondent's District-issued lap-top computer revealed no evidence of any inappropriate material. The SSI Team was unable to establish a relationship between A [REDACTED] and M [REDACTED], but could find no other witnesses to corroborate their complaints. Respondent categorically denied all allegations made against him.

30. A. Principal Carbino received the SSI Team's report in September 2014. He began the disciplinary process against respondent at that time.

B. On October 10, 2014, Principal Carbino conducted a conference with respondent (who was represented) to discuss the two students' complaints. Respondent categorically denied all aspects of the complaints, stating that he never interacted with either student in the restroom, never touched them, and never made to them the statements attributed to him. Respondent told Principal Carbino that both students knew each other and he suspected they fabricated their complaints because respondent was in the process of dropping them from his class. Principal Carbino reminded respondent of the training and professional development he had previously received related to the appropriate and respectful treatment of students, including the prohibition of sexual abuse, making inappropriate comments, or touching or having inappropriate physical contact.

C. On or about October 20, 2014, respondent sent a written response to Principal Carbino concerning their discussion during the conference of October 10th. He reiterated that he categorically denied all aspects of the two students' complaints.

31. Principal Carbino again met with respondent and his representatives on December 1, 2014. After that meeting, the District issued to respondent a Notice of Unsatisfactory Acts concerning the events underlying the complaints of A [REDACTED] and M [REDACTED], as well as a Notice of Suspension for 15 Days.

32. On February 4, 2015, respondent and his representative met with District Operations Coordinator Ruben Hernandez to appeal the District's Notice of Unsatisfactory Acts and Notice of Suspension for 15 Days. Respondent denied the students' complaints, stated A [REDACTED] and M [REDACTED] knew each other and opined the students had a motive to make false claims against him because they were in the process of being removed from respondent's class. On February 5, 2015, Mr. Hernandez wrote a letter to respondent's representative, advising her that he denied respondent's appeal.

Findings Regarding Respondent's Defenses

33. A. Respondent argues A [REDACTED] and M [REDACTED] had a motive to make false claims about him because they were in the process of being removed from his class. A [REDACTED] had missed some appointments and failed to turn in assignments in November. Respondent had sent a letter home warning his parents that A [REDACTED] was on probation and could be dropped from City of Angels. M [REDACTED] had frequently missed appointments, failed to turn in assignments, and secreted letters sent home to his parents warning that he could be dropped from the program. Respondent finally sent M [REDACTED] a letter advising him that he was being removed from City of Angels for that reason. Respondent took those actions in October and November, before the two students made their complaints.

B. Respondent's argument is not convincing. As discussed above, in their testimony A [REDACTED] and M [REDACTED] tended to downplay the importance of those events; it did not seem from the content of their testimony or their demeanor in delivering it that their impending removal from respondent's class was a source of much concern for them. Both were poor students who undoubtedly had been removed from other schools, so this was not a unique experience for them. No evidence suggests they had lodged complaints at those times. If they had intended to lodge false complaints of a sexual nature against respondent, it would be odd for them to not have embellished their complaints with more direct and salacious sexual comments or touching by respondent.

C1. Respondent's argument is not convincing for another reason. By respondent's own admission, he had students every semester who ended up being removed from his class and/or City of Angels for similar reasons; none of those students lodged a complaint against him.

C2. Respondent's colleague at Legacy LA, Ms. Saucedo, testified similarly. Sylvia Juarez, a TSP advisor at City of Angels and a character witness presented by respondent, testified the rate of students removed from City of Angels has been high; she had issued many letters similar to those sent by respondent to the two students' parents; and she never received a complaint in return.

C3. Finally, Principal Carbino persuasively testified that the type of letters respondent sent to the homes of A [REDACTED] and M [REDACTED] were not "a big deal" and students of City of Angels commonly received them. Principal Carbino also testified he has yet to see a student removal from City of Angels trigger a complaint like those made by A [REDACTED] and M [REDACTED], and he surmised the right to a Due Process appeal hearing before being removed from a program is the reason.

D. The above evidence indicates being removed from respondent's class would not alone cause A [REDACTED] or M [REDACTED] to make a false claim against respondent.

34. A. Respondent argues he would not have acted as claimed by A [REDACTED] and M [REDACTED] because he was visible at all times on the Legacy LA campus and would have been seen if he had done so. Respondent testified that the doors to his classroom were always open to the hallway, the door to Ms. Saucedo's classroom was always open, the restroom door was always open, Ms. Saucedo was mostly present in her classroom when respondent was in his, and his classroom was visible to the public through its large windows facing a public walkway. Respondent also testified Legacy LA was in a public building and there were always people from the city or the public around in the hallway near his classroom door and the restroom in question.

B. Respondent's argument is not convincing. Respondent admitted on cross-examination the restroom door was not always open and sometimes Ms. Saucedo was not present when he was in his classroom. Arturo S., one of the randomly chosen students interviewed by the SSI Team, corroborated A [REDACTED] and M [REDACTED]'s testimony that respondent had shut the door when he was in the classroom with them, to the extent Arturo stated sometimes respondent did so with him during lunch. No evidence presented suggests Ms. Saucedo heard or saw everything respondent was doing in his classroom. Even if she had a constant sight-line into his classroom from her own, it is unreasonable to assume she saw everything happening in respondent's classroom at all times or that she was always present when respondent was in his classroom. Ms. Saucedo did not testify to that effect. Moreover, respondent's actions in question were rapid and discrete enough to be done without attracting attention even if Ms. Saucedo was in her classroom. The events in the restroom were similarly rapid and discrete enough to not garner attention, whether or not the doors were open.

35. A. Respondent also testified none of the events described by A [REDACTED] and M [REDACTED] occurred. However, his testimony was not persuasive, mainly for the following reasons.

B. In his statements to the SSI Team and Principal Carbino, as well as when he testified during the hearing, respondent made a number of extreme statements later proven to be untrue. This dynamic undercut respondent's credibility. For example, he testified on direct examination that it would have been "ridiculous" for him to be in his classroom during the lunch hour, in an attempt to show M■■■■ could not have been in his classroom during the noon hour. However, he told the SSI Team that M■■■■'s appointment time with him was during the noon hour. He also admitted on cross-examination that on occasion students would sit on the couch in his classroom while he ate his lunch in his classroom during the noon hour. Respondent initially testified he was never alone with students in the classroom and he never engaged in 1:1 teaching with them; however, some of the eight randomly chosen students corroborated A■■■■ and M■■■■'s testimony that respondent had been with them alone in the classroom. Respondent later admitted a few of his more senior students would have been taught 1:1 by him, but he quickly added that Ms. Saucedo or others would have been nearby. Respondent initially testified M■■■■'s mother always came to school with him and she sat in the back of the classroom; later he testified that she came to class most of the time; later he testified she sometimes dropped him off and did not come in.

C. In his testimony, respondent (sometimes grudgingly) admitted some facts of A■■■■'s and M■■■■'s complaint. For example, respondent admitted he told his class about an upcoming 5K run. M■■■■ had mentioned respondent told him about that during one of the three interactions in question. Respondent also told the SSI Team that perhaps he had been in the restroom alone with a student, though he denied ever doing so with A■■■■ or M■■■■. As discussed above, respondent admitted, to various extents, that he had been in his classroom alone with a student, he was in his classroom during the lunch hour on occasion, and at times the classroom and restroom doors in question had been closed.

36. Respondent argues that no part of A■■■■'s or M■■■■'s complaint involved overtly sexual comments, touching of intimate parts of their bodies or evidenced a quid pro quo proposition. Respondent's counsel also argues that some of respondent's conduct described by the two students is better explained by respondent's social awkwardness rather than sexual desire or intention. However, respondent's extreme and categorical denial of all aspects of A■■■■'s and M■■■■'s complaints undercuts that argument, as it is untenable and unconvincing for respondent to testify he did none of those things, but on the other hand argue, if he did, he had innocent intentions in mind. Instead, respondent's categorical and extreme denial of his two students' complaints indicates his knowledge that his actions were improper and motivated by physical interest in the two students.

Other Relevant Facts

37. Respondent has no other record of discipline by the District. He received a "meets standards" performance evaluation by the District in 2009. Principal Carbino recalled receiving no complaints about respondent from a student or parent, other than those concerning A■■■■ and M■■■■. Principal Carbino also testified that respondent had a good record with the District before A■■■■ and M■■■■'s complaints.

38. Respondent presented two character witnesses, Sylvia Juarez and Ms. Saucedo, who are fellow employees of the District. Both testified respondent is a good teacher, honest and works well with high school students. Neither believed the validity of A[REDACTED]'s or M[REDACTED]'s claim because they have never seen respondent behave similarly with any student. Both would entrust their own children with respondent.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving cause for discipline in this matter by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) Preponderance of the evidence means that “the evidence on [the District’s] side outweighs, preponderates over, is more than, the evidence on the other side.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Egregious Misconduct Generally

2. Complainant asserts respondent was properly placed on an immediate suspension without pay pursuant to Education Code section 44939.1² and should be terminated for “egregious misconduct” pursuant to section 44932, subdivision (a)(1), which states in pertinent part:

(a) A permanent employee shall not be dismissed except for one or more of the following causes:

(1) Immoral conduct including, but not limited to, egregious misconduct. For the purposes of this chapter, “egregious misconduct” is defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 or 44011 of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code.

3. A. As shown above, two Education Code sections are used to partially define “egregious misconduct.” But, they do so by themselves referring to other statutory schemes. Section 44011 refers generally to controlled substance offenses, listing various sections of the Health and Safety Code which proscribe the use of controlled substances. None of the charges in this case refer to use of controlled substances, so section 44011 is irrelevant.

///

///

² Further unspecified statutory references are to the Education Code.

B. Section 44010 refers to many sections of the Penal Code that pertain to sex offenses, including Penal Code section 647.6. In this case, the District contends this is one of two Penal Code statutes that apply to respondent's conduct in question. Respondent does not contest Penal Code section 647.6 can be used to define egregious misconduct.

4. A. Another statute used in section 44932, subdivision (a)(1) to define egregious misconduct is Penal Code section 11165.6, which provides:

As used in this article, the term "child abuse or neglect" includes physical injury or death inflicted by other than accidental means upon a child by another person, *sexual abuse as defined in Section 11165.1*, neglect as defined in Section 11165.2, the willful harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4. "Child abuse or neglect" does not include a mutual affray between minors. "Child abuse or neglect" does not include an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer. (Emphasis added.)

B. Penal Code section 11165.6, by referencing Penal Code section 11165.1, brings that latter statute into consideration in cases of this type, even though it was not directly referenced in section 44932, subdivision (a)(1).

C. In this case, the District contends Penal Code section 11165.1 applies to respondent's conduct in question. Respondent does not contest Penal Code section 11165.1 can be used to define egregious misconduct.

Egregious Misconduct as Defined by Penal Code section 647.6

5. A. Penal Code section 647.6, subdivision (a)(1), states: "Every person who annoys or molests a child under 18 years of age shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and the punishment."

B. In the case of *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571, the court defined the term "annoys or molests a child" as used in Penal Code section 647.6, subdivision (a)(1):

The words "annoy" and "molest" are synonymous and "refer to conduct designed 'to disturb or irritate, esp[ecially] by continued or repeated acts' or 'to offend' [citation]; and as used in this statute, they ordinarily relate to 'offenses against children, [with] a connotation of

abnormal sexual motivation on the part of the offender.’ [Citation.] Ordinarily, the annoyance or molestation which is forbidden is ‘not concerned with the state of mind of the child’ but it is ‘the objectionable acts of the defendant which constitute the offense,’ and if his conduct is ‘so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would “annoy or molest” within the purview of’ the statute. [Citation.]” (*People v. Carskaddon* (1957) 49 Cal.2d 423, 426.) The primary purpose of section 647.6 “is the ‘protection of children from interference by sexual offenders. . . .’ [Citations.]” (*Id.* at p. 425.) “The deciding factor for purposes of a Penal Code 647.6 charge is that the defendant has engaged in offensive or annoying sexually motivated *conduct* which invades a child’s privacy and security, conduct which the government has a substantial interest in preventing. . . .” (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1752.) “[T]here can be no normal sexual interest in any child and it is the sexual interest in the child that is the focus of the statute’s intent.” (*People v. Shaw* (2009) 177 Cal.App.4th 92, 103, italics omitted.)

C. The court went on to state that the actual touching of a child is not necessary to constitute a violation of Penal Code section 647.6, subdivision (a)(1); words alone can suffice. (*In re D.G.*, *supra*, 204 Cal.App.4th at 1572.)

6. In this case, it was established by a preponderance of the evidence that respondent engaged in acts with A [REDACTED] and M [REDACTED] constituting annoyance or molestation of a child as defined by Penal Code section 647.6, subdivision (a)(1). At the time of the events in question, both students were under the age of 18 and thus children for purposes of this statute. On three occasions, respondent spoke to and touched both students in ways that were “weird,” “uncomfortable,” and thus annoying to them. By engaging in intimate discussions about the students’ physiques alone in a restroom and/or classroom, respondent invaded the students’ privacy, security and sense of space. Respondent did the same by actually touching them in ways that were uncomfortable and unwelcome. Those acts together annoyed and irritated the students, feelings that would be shared by a reasonable person. The preponderance of the evidence established that respondent was sexually motivated to act as he did. Moreover, respondent denied the students’ versions of events in a way that was not credible and indicated the only motivation he had was improper and sexual. As articulated by the *In re D.G.* court, the sheer act of annoying and/or molesting a child for sexual purposes is, by definition, abnormal, and thus must be deemed immoral.

7. Based on the above, it was established by a preponderance of the evidence that respondent engaged in egregious misconduct, within the meaning of sections 44932, subdivision (a)(1), and 44010, subdivision (a), by annoying or molesting two students under the age of 18 within the meaning of Penal Code section 647.6. (Factual Findings 9-36.)

Egregious Misconduct as Defined by Penal Code section 11165.1

8. Penal Code section 11165.1 makes it a crime to sexually abuse or exploit another person, and it lists a variety of different ways that such a crime can be committed. Subdivision (b)(4) of that statute defines sexual abuse of a child as including:

The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

9. In this case, it was not established that respondent engaged in sexual abuse of A [REDACTED] or M [REDACTED] as defined by Penal Code section 11165.1. Respondent touched both students in the general chest area, but not necessarily in the breast area. Even if he had, it cannot be concluded that touching a male child in the general breast area is necessarily equivalent to touching a female child in the same area. A male's breast area is not considered to be genitalia or an intimate part, as is a female's breast. For example, a male exposing that part of his body would not be considered an indecent act, while a female doing the same would be. And while touching a female anywhere in the breast area necessarily would be considered provocative and inappropriate, doing the same to a male would not be.

10. Under these circumstances, it was not established that respondent committed egregious misconduct by engaging in acts constituting sexual abuse of a child within the meaning of Penal Code section 11165.1. (Factual Findings 9-24.)

Analysis of the Morrison Factors

11. Since the definition of egregious misconduct includes acts that are deemed to be immoral, it is necessary to analyze respondent's misconduct as it relates to his fitness to teach within the meaning of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 227-230. The factors suggested by *Morrison* are compared to the facts established in this case. Not all *Morrison* factors need be present for the *Morrison* test to be satisfied. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369.) Moreover, the *Morrison* analysis need not be conducted on each individual fact established, but rather can be applied to the accumulated facts established collectively. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1457.) In this case, the *Morrison* factors demonstrate respondent is unfit to teach as follows (Factual Findings 6-38):

(A) The likelihood the conduct may adversely affect students or fellow teachers. Respondent's misconduct adversely affected two students. They stopped going to respondent's class due to his misconduct and later left the District.

(B) The degree of such adversity. There was a moderate level of adversity. The two students described respondent's conduct as uncomfortable and weird, but neither described any actual injury.

(C) The proximity or remoteness in time of the conduct. The events in question were proximate to each other, which show a pattern of related misconduct.

(D) The type of teaching certificate held by the party involved. This factor is not applicable.

(E) The existence of extenuating or aggravating circumstances, if any, surrounding the conduct. Respondent presented no mitigating facts that justified his actions. Aggravating circumstances were established, namely that respondent has not demonstrated any remorse or contrition.

(F) The praiseworthiness or blameworthiness of the motives resulting in the conduct. There is only blame for the way respondent acted.

(G) The likelihood of recurrence of the questioned conduct. As respondent has demonstrated no recognition of his misconduct and has taken no steps to address it, it must be concluded it is more likely than not respondent would engage in similar misconduct.

(H) The extent discipline may cause adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. This is not foreseen.

Disposition

12. A. "[An ALJ] has broad discretion in determining what constitutes unfitness to teach . . . , and whether dismissal or suspension is the appropriate sanction." (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343-344.) Even where cause for dismissal has been established, an ALJ still has broad discretion to determine whether such discipline is actually warranted. (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

B. Since it was established that respondent engaged in egregious misconduct, the District had cause to immediately suspend him without pay pursuant to section 44939.1. (Factual Findings 1-38; Legal Conclusions 1-11.)

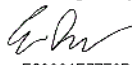
C. Respondent engaged in egregious misconduct with two students. His actions ultimately caused those two students to leave the City of Angels and the District, as well as interrupted their education. It is concerning that instead of showing remorse,

respondent attacked the character of the two students involved. Respondent presented no evidence of rehabilitation or actions taken to address his misconduct. He put the District at risk of civil liability. Terminating his employment is the only available course of action. (Factual Findings 1-38; Legal Conclusions 1-11.)

ORDER

The immediate suspension without pay of respondent Neal Ivan Lee is affirmed. Respondent Neal Ivan Lee is terminated from employment with the Los Angeles Unified School District.

DATED: January 21, 2016

DocuSigned by:

E08381E7779D4F0...

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings