

BEFORE THE  
COMMISSION ON PROFESSIONAL COMPETENCE  
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

ANTHONY LIALI (EN 671331),  
A Permanent Certificated Employee,

Respondent.

OAH No. 2015091133

**DECISION**

The Commission on Professional Competence (Commission), comprised of Administrative Law Judge (ALJ) Angela Villegas, State of California, Office of Administrative Hearings (OAH), Mary Bennett, and Gordon Brown, heard this matter March 21-April 6 and May 16-19, 2016, in Los Angeles, California.

Kristine E. Kwong, of Musick, Peeler & Garrett, LLP, represented complainant Justo H. Avila, Chief Human Resources Officer of the Los Angeles Unified School District (LAUSD or District).

Rosemary O. Ward, attorney at law, and Rosty G. Gore, of Trygstad, Schwab & Trystad, represented respondent Anthony Liali, who was also present.

Evidence was received. The matter was submitted May 19, 2016.<sup>1</sup> The Commission deliberated on May 24, 2016.

**ADDITION OF HEARING TIME**

This matter was initially set for hearing from March 21-April 8, 2016. The parties requested and were given additional hearing days, from May 16-19, 2016. When the record closed on May 19, 2016, more than seven months had elapsed since respondent's request for hearing, dated September 24, 2015.

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<sup>1</sup> After the submission of the matter, it was discovered that a document designated as complainant's exhibit 11, but not marked or admitted, remained in an exhibit binder due to inadvertence. That document has not been read or considered in rendering this decision.

As stated on the record of the proceeding, good cause existed for the delayed closing of the record. (Ed. Code, § 44944, subd. (b)(1).) On four of the days initially scheduled for the hearing, evidence could not be taken. On two of those days, this was due to the replacement of one Commission member; on the other two days, a Commission member was out of the country. The parties were unable to complete the presentation of evidence in the shortened time available, and the additional dates selected were the earliest on which all parties, counsel, panelists, and OAH were available.

#### AMENDMENT OF STATEMENT OF CHARGES AND ACCUSATION

On May 17, 2016, complainant orally moved to add the words “and erasers” to the Statement of Charges and Accusation at page 5, paragraph 9(c), to conform to proof, so that the allegation would read, “Threw dry erase board erasers *and erasers* at students[.]” (Emphasis supplied.)

Respondent opposed the motion to amend. Both parties presented argument. For the reasons stated on the record, good cause existed for the amendment, and respondent had an adequate opportunity to defend, and did defend, against the proposed amended allegation. (Ed. Code,<sup>2</sup> §§ 44934, subd. (d); 44944, subd. (b)(1)(B); Gov. Code, § 11507.) On May 19, 2016, the motion was granted, and the Statement of Charges and Accusation<sup>3</sup> were amended by interlineation to include the new language

#### SEALING AND REDACTION OF CONFIDENTIAL INFORMATION

After the hearing concluded, the ALJ ordered portions of the hearing transcripts sealed, as reflected in the record of the proceeding. The ALJ also ordered the following exhibits sealed: Complainant’s exhibits 38 (pp. -10 – 38-16 and 38-18 – 38-25), 41 (pp. 41-18 – 41-24 and 41-26 – 41-33), and 42 (pp. 42-18 – 42-24 and 42-26 – 42-33); respondent’s exhibits F, J, L, V, FF-MM, PP-RR, TT, UU, WW, ZZ, CCC-GGG, KKK, PPP, TTT, GGGG, HHHH, JJJJ, MMMM, PPPP, ZZZZ, PPPPPP, GGGGGGG, JJJJJJJ, and RRRRRRR.

The ALJ also redacted children’s surnames (except for initial) from exhibits EEEEE, HHHHHH and IIIII.

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<sup>2</sup> Further statutory references are to the Education Code, unless otherwise indicated.

<sup>3</sup> The Statement of Charges and Accusation are congruent except for their dates; unless the context dictates otherwise, further references are to the Statement of Charges only.

## ADDITIONAL PROCEDURAL HISTORY AND PRELIMINARY MATTERS

### *Prehearing Motion for Immediate Reversal of Suspension (MIRS)*

On September 29, 2015, respondent filed a motion to reinstate respondent to paid status, with benefits, pending the hearing; the motion was deemed a MIRS. OAH assigned case number 2015091099 to the MIRS. On October 6, 2015, complainant filed an opposition to the MIRS; on October 12, 2015, respondent filed a reply. On October 16, 2015, the ALJ heard oral argument on the MIRS, and on October 20, 2015, issued an order denying it.

### *Prehearing Motion to Strike and/or Dismiss Portions of the Accusation*

On October 13, 2015, respondent filed a motion to strike and/or dismiss portions of the Accusation. On December 3, 2015, complainant filed an opposition to the motion; on December 14, 2015, respondent filed a reply. On December 18, 2015, the ALJ heard oral argument on the motion, and on December 21, 2015, issued an order denying it.

### *Intrahearing Motions*

Complainant and respondent brought various oral and written motions as the hearing progressed, including motions in limine, a motion to close the proceedings to the public, a motion regarding hearing conduct, and a motion by respondent, renewed several times, to redact and/or remove material from various exhibits. The rulings on those motions are as reflected on the record of the proceeding.<sup>4</sup>

## INTRODUCTION; ISSUES; SUMMARY OF DECISION

1. Complainant seeks to dismiss a tenured teacher, respondent Anthony Liali, on the following grounds:

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<sup>4</sup> Respondent's motions to redact and/or remove material concerned documents imposing discipline on respondent in the past. Under section 44944, subdivision (b)(2)(B), the ALJ ruled prior-discipline documents were admissible as "records regularly kept" by the District, but to the extent they reflected "matters occurring more than four years before the filing of the notice" in the present case, they could not be used as a basis for this decision, except to the extent they concerned Charges 11-13. As such, the District conceded, and the ALJ ruled, that the relevance of the prior-discipline documents in question was limited to respondent's notice of District expectations and policies, and the existence of progressive discipline. The ALJ declined to redact or remove information from these materials, but the Commission has not considered the portions of the materials relating to matters other than notice and the existence of progressive discipline, and has not based this decision on any other such matters appearing in those documents.

- (a)(1));
- (1) immoral conduct, including egregious misconduct (§ 44932, subd. (a)(1));
  - (2) immoral conduct (§ 44939);
  - (3) unprofessional conduct (§ 44932, subd. (a)(2));
  - (4) evident unfitness for service (§ 44932, subd. (a)(6));
  - (5) persistent violation of school laws and/or regulations (§44932, subd. (a)(8)); and
  - (6) willful refusal to perform regular assignments (§ 44939).

2. The issues in this case are:

(a) Did complainant establish that the factual matters alleged in the Statement of Charges occurred?

(b) If so, do these matters constitute cause to dismiss respondent from his position as a tenured teacher with LAUSD?

3. This decision finds complainant established three of the factual matters alleged in the Statement of Charges: namely, yelling during the period between August 12, 2014 and January 28, 2015,<sup>5</sup> and, on April 26, 2010, tossing a chair to the side and slamming a phone receiver down three or four times. The Commission concludes these matters do not constitute cause to dismiss respondent from his tenured teaching position with LAUSD.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Complainant brought the Statement of Charges (and Accusation) in his official capacity.<sup>6</sup> On September 1, 2015, LAUSD gave respondent written notice of its intent to dismiss and suspend him and a copy of the Statement of Charges (ex. 2), and removed him from the classroom. On September 24, 2015, respondent timely demanded a hearing. This proceeding followed.

2. Respondent, who holds a multiple-subject credential, has been a certificated employee of LAUSD since July 1, 1995.

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<sup>5</sup> This time period is sometimes referred to as the “first semester” or “Fall semester” of the 2014-2015 school year. This denomination is for ease of reference only, and does not imply a finding that the school year was divided in any particular manner.

<sup>6</sup> The Statement of Charges is dated August 14, 2014; since the Statement of Charges refers to matters occurring after August 14, 2014, this date appears to be incorrect.

3. The Statement of Charges concerns events that allegedly occurred at two different times and at two different schools: over the course of the first semester of the 2014-2015 school year at 49th Street Elementary School (49th St.) (Charges 1-10 and 14-16), and on April 26, 2010 at Los Angeles Academy Middle School (LAAMS) (Charges 11-16).

*Background; Respondent's Disciplinary History, Performance, and Notice of District's Expectations and Policies*

4. (a) Until mid-2010, respondent taught elementary school, including at Wadsworth Elementary School,<sup>7</sup> where his principal was Lorraine Abner.

(b) On December 18, 2009, Principal Abner issued a conference memorandum to respondent (ex. 12), which attached various LAUSD policies, including the Respectful Treatment Policy, and directed respondent to follow the policies. Principal Abner's conference memorandum was followed by a May 5, 2010 letter of reprimand, also directing respondent to follow the LAUSD Respectful Treatment Policy. (Ex. 23.)

(c) On March 4, 2010, respondent received a Notice of Unsatisfactory Act and a notice of a three-day or five-day unpaid suspension (the notice is ambiguous), arising from a different incident. (Exs. 17 and 18.)

5. On March 15, 2010, respondent was reassigned to LAAMS (ex. 19) to teach eighth-grade math and science. Respondent received notice of his transfer to LAAMS via a March 12, 2010 letter from Assistant Superintendent Christopher Ziegel, which also directed respondent to follow policies including the LAUSD Ethics Policy, Code of Conduct with Students, Respectful Treatment Policy, and "Anti-bullying Policies" (*id.*), and to cooperate with staff, follow administrators' directives, and conduct himself respectfully toward everyone. The policies referenced in Mr. Ziegel's letter were not attached to the copy of the letter received in evidence, though respondent believably testified he received them from Mr. Ziegel.

6. (a) LAAMS's principal while respondent taught there was Maria Borges. On April 27, 2010, Principal Borges issued a conference memorandum to respondent arising from an incident that had occurred the previous day, directing respondent "to behave in a professional manner at all time[s] and to follow both the LAUSD Code of Conduct and Respectful Treatment of all Persons policies[,] and attaching those policies. (Ex 21.)

(b) On June 10, 2010, respondent received a Notice of Unsatisfactory Act and a Notice of Suspension arising from the April 26, 2010 incident. (Exs. 25 and 26.)

(c) Respondent's May 19, 2010 performance evaluation from LAAMS, prepared shortly after the incident that led to his discipline, rated him "meets standards"

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<sup>7</sup> The evidence did not readily disclose whether respondent taught at other LAUSD schools before Wadsworth Elementary.

overall, but “below standards” in the areas of “[e]stablish[ing] and maintain[ing] standards for student behavior and creat[ing] a climate that promotes fairness and respect”; “plan[ning] and implement[ing] classroom procedures and routines that support student learning”; and “provid[ing] an effective classroom environment[.]” (Exs. 41; 49; D.) Nevertheless, the evaluation noted respondent to be “open to input from colleagues.”

(d) By respondent’s next performance evaluation from LAAMS on May 23, 2011, his overall rating continued to be “meets standards,” but with no “below standards” categories. Respondent was noted to “operate[ ] in a positive way to help student[s] overcome their problems.” (Exs. 41; B.)

7. (a) In July 2011, Respondent was assigned to 49th St., where he taught first grade. Respondent’s April 26, 2013 performance evaluation (prepared by 49th St.’s former principal, Heather Lowe) rated respondent as “meets standards” and praised his “positive classroom environment” and collaborative work with his grade level. (Exs. 41; A.)

(b) Beginning in October 2014, the principal of 49th St. was Maria “Maya” Rosas. On February 18, 2015, Principal Rosas issued a conference memorandum to respondent (ex. 37), in which she reminded him of his previous discipline, and directed him to follow District policies, including the Code of Conduct with Students, the Employee Code of Ethics (also referred to as the Ethics Policy), the Board Resolution on the Respectful Treatment of All Persons (also referred to as the Respectful Treatment Policy), and to treat students with respect, courtesy, and sensitivity. (*Id.*) Principal Rosas’ conference memorandum attached policies including the ones noted above.

(c) On March 20, 2015, respondent received a Notice of Unsatisfactory Act (ex. 41) and a notice of a 15-day unpaid suspension. (Ex. 42.)

(d) Respondent taught at 49th St. for the remainder of the 2014-2015 school year, and 11 days of the 2015-2016 school year, without further incident. As noted above, on September 1, 2015, the District suspended respondent indefinitely and removed him from the classroom.

#### *Findings on the Allegations Against Respondent Regarding His 49th St. First-Grade Class*

##### PHYSICAL LAYOUT OF RESPONDENT’S CLASSROOM

8. Respondent’s first-grade classroom at 49th St. had a white board at the front of the room. (Exs. T, Z, DD, and JJJJJJ; respondent’s testimony.) A large area rug, used as a student seating area for some lessons, took up the front-middle portion of the room. The rug’s front edge lay approximately 18 inches to two feet from the front wall, where the white board hung, so that there was little space between the students seated on the rug and respondent, when he was teaching at the white board. (*Id.*)

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9. Near a back outer corner of the area rug stood a desk with an overhead “Elmo” projector, where respondent sometimes sat or stood to teach. (*Id.*) Student tables were arranged around the edges of the area rug. (*Id.*) Bookcases and closets lined the walls of the classroom. (*Id.*)

#### CHARGES 1 AND 2

10. Charge 1, alleging that on or about January 20, 2015, respondent “threw a dry erase board eraser at 6-year-old student R■■■■ V., hitting him in or around R■■■■ V.’s leg[,]” was not substantiated.

11. R■■■■ V. testified at the hearing, but did not recount this incident. Even if he had, his testimony lacked credibility. R■■■■ was reputed and acknowledged, even by his mother, to have an active imagination, which was on display during his testimony. He was also markedly inattentive while testifying, and often contradicted himself and manifestly exaggerated. He appeared to have difficulty separating truth from fancy, even acknowledging his testimony had contained “a lot of lies and a lot of truths.” No other student witness from respondent’s 49th St. first-grade class recounted this alleged incident.

12. R■■■■ V.’s mother testified to R■■■■’s having complained to her that respondent “threw an eraser at me[,]” but that statement was not tied to any particular occasion; rather, R■■■■’s mother testified that “almost every day[,]” R■■■■ reported it. (Testimony of Erica Nunez.) Although R■■■■’s mother credited R■■■■’s reports because of their consistency, R■■■■’s own testimony belied the reliability of his reporting. Moreover, the statements R■■■■ made to his mother are not sufficient by themselves to support a finding that an eraser was thrown at him, let alone that it occurred on the date(s) alleged. (Gov. Code, § 11513, subd. (d).) Likewise, they did not supplement or explain any other non-hearsay evidence.

13. The same is true of R■■■■’s undated written statement about respondent, which reads, “[H]e changes my pin still changes my pin<sup>8</sup> when he throws the eraser at Mauricio it bump the window. It bump on my leg he yells wen it is P.E.” (Ex. 56.) Although R■■■■’s statement notes an eraser “bump [his] leg[,]” the statement does not indicate the eraser was thrown at R■■■■, and does not indicate when the bump supposedly occurred. Given R■■■■’s overall lack of credibility, his written statement must also be viewed skeptically, though some aspects of it are consistent with other students’ accounts. (See, e.g., Factual Finding 48.) Even if R■■■■’s statement could be read as indicating that

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<sup>8</sup> The reference to changing a student’s “pin” refers to a behavior chart respondent employed in his classroom. Each student’s behavior was tracked with a clothespin, and the chart was divided into various colors: green for good behavior, yellow for a warning, red for an office referral, and so forth. Students would start the day with their pins on green, and changing the pin meant the student’s clothespin was moved into a different color on the behavior chart.

respondent threw an eraser at R[REDACTED] on or about January 20, 2015, which hit R[REDACTED] in the leg, that statement alone could not support such a finding. (Gov. Code, § 11513, subd. (d).)

14. In addition, notes from an interview Principal Rosas conducted with R[REDACTED] on January 28, 2015, reflect that R[REDACTED] did not recount respondent's throwing an eraser at him and hitting his leg, despite the principal's suggestive instruction to him: "Tell me about the time he threw the eraser @ you." (Ex. 63.) R[REDACTED]'s response to that query was, "Last time he did it but not. . . . He had one + then he threw at me + then at M[REDACTED] . . . . It bounced on the window." (*Id.*) The suggestive nature of Principal Rosas' prompt made the information solicited unreliable, and R[REDACTED] was already an unreliable source. Hence, R[REDACTED]'s interview statements do not indicate that the incident alleged in Charge 1 more likely than not occurred. In any event, the interview statements alone would not be sufficient to support a finding. (Gov. Code, § 11513, subd. (d).)

15. Respondent's explanation for this allegation, by contrast, was believable. He claimed he had been erasing the white board while teaching a lesson with the class seated on the area rug. He lost his grip on the eraser, which popped out of his hand and landed on R[REDACTED]'s leg. When this occurred, R[REDACTED] was seated in his assigned place in the row closest to the white board, to respondent's right. (Ex. Z.) The eraser would not have had to travel very far out of respondent's hand to land on a student's leg in the first row. (Exs. T and DD.)

16. In sum, Charge 1 was not established. By extension, Charge 2, alleging respondent's "misconduct in Charge #1" violated administrative directives and policies, also was not substantiated.

#### CHARGES 3 AND 4

17. Charge 3, alleging that sometime between August 12, 2014 and January 28, 2015—i.e, the first semester of the school year—respondent "threw a dry erase board eraser at 6-year old S[REDACTED] E.,<sup>9</sup> hitting her in or around her head[.]" was not substantiated.

18. (a) S[REDACTED] E. did testify respondent threw an eraser, which "touched [her] face." S[REDACTED], however, was also a non-credible witness. She had a reputation for being untruthful, and the evidence revealed malleability in her reporting.

(b) For example, in S[REDACTED]'s written statement and in her interview with Principal Rosas on February 3, 2015, S[REDACTED] indicated respondent would "pull ther pen" [*sic*] (ex. 57) or "pull their pin" (ex. 64) when students misbehaved. These were obvious references to respondent's behavior chart, but when questioned about the behavior chart during her testimony, S[REDACTED] denied its existence, and explained that when she wrote "pull their pen," she had meant respondent takes away students' pens as punishment. This was not credible; indeed, the evidence showed respondent's first-grade students did not use pens. It

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<sup>9</sup> Various spellings of S[REDACTED] E.'s name appeared in the evidence; this is the spelling used in the Statement of Charges.



appeared S [REDACTED] was trying to explain away what she herself perceived as an inconsistency in her accounts.

(c) In addition, S [REDACTED] claimed not to have misbehaved in class, but other students, as well as respondent himself, consistently attested the contrary. Her behavior as a witness was likewise somewhat uncooperative. These matters cast doubt on S [REDACTED]'s overall veracity and the reliability of her recollection.

(d) No other student witness from respondent's 49th St. first-grade class recounted this alleged incident.

19. S [REDACTED]'s written statement from February 3, 2015 does not mention that respondent threw an eraser at her, hitting her in the head. Her statement does indicate, "Mistr Leyale tros tens at studens hed" (ex. 57), but the evidence did not disclose what occurrence(s) S [REDACTED] had in mind when she wrote this, and given S [REDACTED]'s overall unreliability, the soundness of this statement was also dubious. In any event, the statement could not independently support a finding. (Gov. Code, § 11513, subd. (d).)

20. The same is true for Principal Rosas' notes of her February 3, 2015 interview with S [REDACTED]. (Ex. 64.) The notes recount S [REDACTED]'s report that respondent threw an eraser to her, which landed on her head. (*Id.*) This is not necessarily the same thing as respondent's throwing an eraser at S [REDACTED] (see Factual Findings 24, 35, 36, and 42), but even if S [REDACTED]'s remarks had indicated the incident happened as alleged in Charge 3, her overall lack of credibility would still have cast doubt on those claims. Moreover, even to the extent S [REDACTED]'s interview statements tended to substantiate Charge 3, they could not, by themselves, support a finding that the incident occurred. (Gov. Code, § 11513, subd. (d).)

21. Conversely, respondent's account of the alleged incident was believable. He credibly explained that, once again, the students were seated on the area rug, and the eraser came out of his hand while he was vigorously erasing the white board, and landed on S [REDACTED]'s head. Respondent's explanation was once again bolstered by the seating arrangement in the class and the proximity of the white board to the students. (Exs. T, DD, and Z.)

22. In sum, Charge 3 was not established, and by extension, neither was Charge 4, alleging respondent's "misconduct in Charge #3" violated administrative directives and policies.

#### CHARGES 5 AND 6

23. Charge 5, alleging that during the first semester of the 2014-2015 school year, respondent "threw a dry erase board eraser at 6-year old M [REDACTED] B., missing M [REDACTED] and hitting the window[,]" was not substantiated.

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24. Respondent did not dispute that he cast such an eraser in M█████'s direction, but the evidence did not show respondent more likely than not threw the eraser *at* M█████, or intended to hit M█████ with the eraser,<sup>10</sup> or that the eraser hit the window.

25. As respondent credibly explained the incident,<sup>11</sup> the children were seated on the rug; M█████'s spot was near the back edge of the rug. M█████ became fixated on the windows at the back of the classroom, and did not respond to respondent's verbal attempts to refocus him. As a means of trying to get M█████'s attention, respondent moved from the front of the room to the back part of the rug, and lobbed the eraser into the area he believed to be the focal point of M█████'s gaze: i.e., not at M█████ himself. The eraser landed and bounced on the floor in the then-unoccupied back part of the classroom.

26. Although R█████ V.'s written statement and interview notes mention the eraser being thrown at M█████ (exs. 56 and 63), no student testified to this alleged incident. R█████'s written and interview statements did not establish, more likely than not, that respondent cast the eraser with the intention of hitting M█████ with it. Even if they had unequivocally stated such a thing occurred, their source was unreliable. And even if that were not the case, they still would be insufficient, by themselves, to support a finding. (Gov. Code, § 11513, subd. (d).)

27. Respondent acknowledged, in retrospect, that throwing the eraser was an error in judgment and a poor way to get M█████'s attention. He now recognizes he should have walked over to M█████ and personally intervened to get his attention.

28. Nevertheless, Charge 5 was not established. Likewise, Charge 6, alleging respondent's "misconduct in Charge #5" violated administrative directives and policies, was also not substantiated.<sup>12</sup>

#### CHARGES 7 AND 8

29. Charge 7, alleging that during the first semester of the 2014-2015 school year, respondent "grabbed 6-year-old student A█████ B. by the shirt and pushed him out of the classroom[,] was not substantiated.

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<sup>10</sup> Such an intention is implied by Charge 5's allegation that the eraser was thrown "at" Mauricio, but "missed" him.

<sup>11</sup> Respondent's explanation was consistent with the account he gave at the time of the school's investigation, and accorded with the physical arrangement of his classroom.

<sup>12</sup> Even if respondent's action Charge 5 were deemed partially substantiated by respondent's action, it did not violate the policies and directives invoked in the Statement of Charges. (See Factual Findings 51-59.) Although showing questionable judgment, respondent's action was not unprofessional, unethical, disrespectful, or bullying.

30. No student testified this incident occurred as alleged. Student A■■■■ D. testified he saw respondent pull A■■■■'s shirt collar and "push" A■■■■, but only to stop a physical fight between A■■■■ and S■■■■; A■■■■ did not testify that respondent pushed A■■■■ out of the classroom. The only evidence presented that respondent "[g]rab[bed] the front of [A■■■■'s] shirt and pushe[d] him out of the door" was Principal Rosas' undated notes of an interview with student K■■■■ H. (Ex. 61.) The reliability of K■■■■'s statements to Principal Rosas was doubtful—for example, K■■■■ did not make a similar report to her mother. (Testimony of S■■■■ H.;<sup>13</sup> ex. IIIII.) Even if K■■■■'s interview statements had been wholly believable, they would not be sufficient, by themselves, to support a finding. (Gov. Code, § 11513, subd. (d).)

31. Moreover, Principal Rosas' interview with A■■■■ himself did not support the allegation. Even when she asked A■■■■ a suggestive, closed-ended question about whether respondent had grabbed him by the hand or the shirt, A■■■■ denied respondent grabbed his shirt.<sup>14</sup> (Testimony of Maria Rosas; ex. 59.) Rather, when asked, "What about to you? What has [respondent] done to you?", A■■■■ told Principal Rosas, "He put[s] me on time out, he sends me to the Principal office, he calls your mom, that's it." (Ex. 59.)

32. For respondent's part, he recalled writing a referral for A■■■■, and shepherding or corralling, not pushing, him out the door. Respondent's testimony was believable and was consistent with his prior recounting of the incident, as related by respondent's union representative, Jose Govea, to LAUSD administrator Kristen Murphy.

33. In sum, Charge 7 was not established, and neither was Charge 8, alleging that respondent's "misconduct in Charge #7" violated administrative directives and policies.

#### CHARGES 9 AND 10

34. Charge 9, alleging various types of conduct during the first semester of the 2014-2015 school year, consisted of five subparts, one of which was substantiated. Each subpart is addressed in turn.

35. Charge 9(a), alleging respondent "[t]hrew pencils at students," was not substantiated.

36. Respondent more likely than not occasionally *tossed pencils to students*, but did not *throw* pencils *at* students. (E.g., testimony of A■■■■ D.; S■■■■ O.; I■■■■ J.; R■■■■ A.; Maria Rosas; Jose Govea; exs. 38, HHHHHH, OOOOOO, and PPPPPP.) The wording of Charge 9(a) implies a forceful action with the intent of striking a student with the object thrown. The evidence did not indicate respondent forcefully hurled objects or intended to strike children with them. Rather, respondent more likely than not occasionally

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<sup>13</sup> The last initial, rather than the full surname, is used to protect the child's privacy.

<sup>14</sup> A■■■■ did maintain respondent had held his wrist.

lightly pitched pencils to students who asked for them, and sometimes tossed pencils he picked up from the floor into the receptacle where they were kept.<sup>15</sup>

37. Charge 9(b), alleging respondent “[t]hrew pencil boxes at students,” was not substantiated.

38. No student testified to it. Moreover, respondent’s explanation of the incident that was the likely source of this charge was believable and consistent with his prior explanations. (Testimony of respondent, Kristen Murphy, and Jose Govea; ex. 38.) According to respondent, he had provided each student with a plastic pencil box filled with school supplies at the beginning of the school year, and one day in class, student A ■ G. was playing with his pencil box in a disruptive way and would not stop. Accordingly, respondent took A ■’s pencil box, and reached behind his own chair to drop the pencil box to the floor.

39. Principal Rosas’ notes of her interview with K ■ H. indicate K ■ said respondent threw “pencil boxes” (ex. 61), but the accuracy of this statement was doubtful, because it stood alone, and because K ■ did not report any such thing to her mother. (Testimony of S ■ H.; ex. IIIII.) Besides, even if K ■’s interview statement were sufficiently credible to overcome the contrary evidence, it could not, by itself, support a finding.<sup>16</sup> (Gov. Code, § 11513, subd. (d).)

40. Charge 9(c), as amended, alleging respondent “threw dry erase board erasers and erasers at students,” was not substantiated.

41. The evidence did not demonstrate that respondent, more likely than not, threw dry erase board erasers at students. The dry erase board eraser incidents have already been discussed. No incidents beyond these were substantiated. (See Factual Findings 10-28.)

42. With regard to erasers, respondent more likely than not did occasionally toss “Pink Pearl” eraser halves to students, just as he occasionally tossed pencils to students.<sup>17</sup> (See Factual Findings 35 and 36.)

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<sup>15</sup> Respondent credibly explained that knee pain discouraged him from walking around the classroom to put objects away or hand them to students. Nevertheless, respondent conceded, also credibly, that his knee pain did not actually prevent him from walking to accomplish these tasks.

<sup>16</sup> According to another student, R ■ A., it was S ■ E. who actually threw a pencil box.

<sup>17</sup> These were standard oblong pencil erasers, approximately one-and-a-half inches long, bisected to make two roughly square halves. (Ex. BBBB.)

43. Charge 9(d), alleging respondent “threw markers at students,” was not substantiated.

44. Two students, R■■■■ V. and S■■■■ E., testified respondent threw markers. Their testimony in this regard was consistent with the notes Principal Rosas took of her interviews with them (exs. 63, 64, and P P P P P P P), but was not consistent with their handwritten statements (exs. 56 and 57). Moreover, R■■■■ recanted his testimony, and both of these students’ testimony lacked credibility in any event, for the reasons previously noted.

45. Other students denied respondent threw things, and the parents of two additional students indicated their children never reported respondent’s throwing things. (Testimony of A■■■■ D., I■■■■ J., Azucena Calderon, and Patricia Lopez.) Respondent likewise consistently and credibly denied throwing markers. (Respondent’s testimony; testimony of Kristen Murphy.)

46. Notes from Principal Rosas’ interviews with three other students—A■■■■ G., A■■■■ B., and J■■■■ P.—indicate those students reported that respondent threw a pen or a marker. J■■■■ P. recanted this in a later statement (ex. C C C C C), which was consistent with what he reported to his mother: i.e., that respondent did not throw things. (Testimony of Rebeca Santos Alcala.) Principal Rosas’ interview notes were insufficient to bolster R■■■■’s or S■■■■’s testimony on the subject, and could not, by themselves, support a finding that respondent threw markers. (Gov. Code, § 11513, subd. (d).)

47. Charge 9(e), alleging respondent “[y]elled at students,” was substantiated. The colloquial, common understanding of the word “yell” includes speaking in a loud, sharp, and/or assertive voice. It was with this understanding that the Commission determined respondent “yelled” at students.

48. One student, A■■■■ D., credibly described respondent as having yelled and turned pink or red in the face.<sup>18</sup> A■■■■ D.’s testimony was corroborated by that of I■■■■ J. and S■■■■ E., by S■■■■ E.’s written statement (ex. 57), and by the notes of Principal Rosas’ interviews with A■■■■ B., A■■■■, J■■■■ P., R■■■■ V., and S■■■■ E. (Exs. 59, 60, 62, 63, and 64.)<sup>19</sup> Even respondent admitted he had “raised [his] voice on a couple of occasions” (ex. 38), though respondent unconvincingly attributed his raised voice to a throat infection.

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<sup>18</sup> Respondent denied this, but his denial was not credible, since respondent most likely could not have seen his own face redden. He also suggested he might have “blood pressure issues” that could have caused reddening, but this was implausible since it such reddening would not likely be confined to times when respondent spoke loudly.

<sup>19</sup> Although the testimony and reporting of R■■■■ V. and S■■■■ E. lacked credibility overall, on this subject, their testimony and reporting found substantial and reliable corroboration; therefore, in this instance, it was credible. (See *Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67-68 [factfinder may accept or rejects portions of testimony, and “weav[e] a cloth of truth out of selected available material”].)

It was more believable that respondent raised his voice, sometimes to a yell, when trying to control the class or certain students and refocus them on the lesson.

49. (a) Other evidence, however, bolstered the conclusion that respondent's yelling was in the nature of an occasionally raised voice, and did not constitute verbal abuse.

(b) Principal Rosas did not observe respondent yelling when she visited his class. (Testimony of Maria Rosas.) Respondent's teacher's aide also did not hear him yelling at students. (Testimony of Christopher Epps.) Two parents who observed respondent, sometimes unbeknownst to him, did not hear him yell at students. (Testimony of S██████ H. and Saleena Twyman.)

(c) Likewise, another student, S██████ O., described respondent's yelling as "a raised voice," of "medium" intensity, not a scream. (Testimony of S██████ O.) Student R██████ A. denied that respondent "scream[ed] loud" or scared him. (Testimony of R██████ A.) According to several parents (and guardians), their children did not report yelling. (Testimony of A██████ C██████, P██████ L██████, R██████ S██████ A██████, M██████ M██████, S██████ H., and S██████ T██████.)

50. All of this was largely consistent with, and supported, respondent's assessment that he sometimes used his "teacher voice," (testimony of respondent and Jose Govea), a voice that is projected assertively, but not harshly or abrasively. On the other hand, it was not believable that respondent never, during the entire first semester of the 2014-2015 school year, used a voice sharper or louder than a "teacher voice." Accordingly, Charge 9(e) was substantiated to the extent that respondent sometimes used a voice that could be described as "yelling."

51. Charge 10 alleges that "the misconduct in Charge #9 above" contravened an administrative directive "to behave in a professional manner at all times," and violated the following District policies: (a) the LAUSD Code of Conduct with Students; (b) the LAUSD Ethics Policy; (c) the LAUSD Anti-bullying Policy; and (d) the LAUSD Respectful Treatment of All Persons Policy, and that these policies had been made known to respondent when he received discipline in 2009 and 2010 (see Factual Findings 4-6).

52. Even assuming an ongoing, specific directive to behave in a professional manner at all times could be inferred from respondent's 2009 and 2010 discipline, and even assuming respondent should reasonably have interpreted that directive to apply to his vocal volume (see Factual Findings 4-6), respondent's yelling at students did not contravene that directive. Respondent's yelling was not shown to have risen to an "unprofessional" level. On the contrary, it was an occasional occurrence, which, although not maximally effective to control students' behavior (testimony of Laura Zeff), was nevertheless within the realm of what is normal and acceptable for teachers. (Gov. Code, § 11425.50, subd. (c).)

53. (a) Respondent's yelling at students did not violate the District's Code of Conduct with Students. (E.g., ex 37.) The Code of Conduct with Students directs teachers,



in the interest of student safety, “to avoid situations including, but not limited to, the following[.]” and then lists 12 situations. The only situation listed that might connect with respondent’s yelling is number 3: “Engaging in any behaviors, either directly or indirectly with a student(s) or in the presence of a student(s), that are unprofessional, unethical, illegal, immoral, or exploitative.”

(b) Respondent’s yelling was not unethical, illegal, immoral, or exploitative. As explained in Factual Finding 52, above, it was not unprofessional either. Accordingly, respondent’s yelling did not violate the Code of Conduct with Students.

54 Furthermore, although Charges 9(a) and 9(c), alleging respondent threw objects at students, were not substantiated, the conduct in which respondent did engage—tossing pencils and pencil eraser halves to students—would not have violated this policy either. Although it did not represent the best choice respondent could have made, it also did not rise to the level of “unprofessional.” (Gov. Code, § 11425.50, subd. (c).)

55. (a) Respondent’s yelling at students did not violate the District’s Ethics Policy. The Ethics Policy, also known as the Employee Code of Ethics (e.g., ex 37), “is intended to help us achieve success by setting common expectations and increasing trust, commitment and teamwork within the District, and between the District and the community.”

(b) The Ethics Policy is largely concerned with avoiding conflicts of interest and maintaining institutional integrity, but its “Commitment to Excellence” section also sets forth guidelines for teacher behavior in the classroom. Among those guidelines are for teachers to “provid[e] the best example we can, striving to demonstrate excellence, integrity and responsibility” and to “[c]reate an environment of trust, respect and non-discrimination.”

(c) Respondent’s yelling did not violate the Ethics Policy because it was not unprofessional, did not create an environment of distrust, disrespect, or discrimination, and did not indicate that respondent failed to do his best to strive for excellence, integrity, and responsibility.

(d) The same applies to respondent’s tossing pencils and eraser halves to students.

56. The Anti-bullying Policy was not among the evidence presented to the Commission.<sup>20</sup> Even if such a policy had been presented, respondent’s yelling would not have violated it, because the evidence did not show respondent yelled in such a way as to bully, frighten, or coerce students. Neither would tossing pencils and eraser halves to students have violated such a policy, also because that behavior also was not for the purpose of intimidating, dominating, or scaring students.

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<sup>20</sup> If the Anti-bullying Policy was present among the materials received, the Commission could not locate it, despite a thorough and careful effort to do so.

57. (a) Respondent's yelling at students did not violate the Respectful Treatment Policy—actually a Board of Education resolution (e.g., ex. 37)—which in relevant part reaffirms District

policy that students and adults in both schools and offices should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person on the basis or [sic] race, language spoken, color, sex, religion, handicap, national origin, immigration status, age, sexual orientation, or political belief[.]

(b) There was no indication that respondent's yelling had any connection to students' race, language spoken, color, sex, religion, or other category listed. The same is true for tossing pencils and eraser halves to students. Indeed, these behaviors cannot fairly be characterized as disrespectful even in a general sense, apart from the specific wording of the Respectful Treatment policy.

58. Complainant presented evidence that respondent's approaches to classroom discipline and management were inconsistent in some ways with LAUSD's Discipline Foundation Policy and policy of Schoolwide Positive Behavior Support, and the school-specific versions of those policies.<sup>21</sup> But the Statement of Charges did not allege respondent violated these particular policies, and complainant's presentation regarding these policies had no bearing on whether respondent violated the policies actually mentioned in the Statement of Charges.

59. In sum, despite the substantiation of Charge 9(e), Charge 10 was not substantiated by respondent's yelling at students. Moreover, even if Charges 9(a) and 9(c) were deemed partially substantiated by respondent's having tossed pencils and eraser halves to students, that conduct was also insufficient to substantiate Charge 10.

*Findings on the Allegations Against Respondent Regarding the April 26, 2010 Incident at LAAMS*

60. Charges 11 through 13 arise from an April 26, 2010 incident at LAAMS. Charge 11 alleges that,

while attempting to deal with a student problem, [respondent] threw a book at the student, tossed a chair to the side, slammed the class phone three to four times, kicked the trash can and told the class to get out of the class prior to the bell ringing for the end of class.

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<sup>21</sup> Curiously, positive behavior support has been accepted by the District as its approach to improving and managing student behavior, but no such policy is in force for employees. (Testimony of Laura Zeff.)

61. Of these alleged instances of misconduct, two were established. More likely than not, respondent did “toss[ ] a chair to the side,” and did slam or, in respondent’s words, “jiggle,” the classroom phone a few times in a futile attempt to summon help. (Respondent’s testimony. Accord, testimony of Bertha Parra and Joseph Zeccola.)

62. The remaining instances of alleged misconduct were not established. (Testimony of Maria Borges and respondent; exs. 21 and 22.)

63. The April 26, 2010 incident occurred within six weeks of respondent’s transfer from Wadsworth Elementary School to LAAMS (see Factual Findings 4-6), and respondent was not accustomed to teaching middle-school students (see Factual Findings 2 and 4). In addition, on April 26, 2010 respondent had a new group of eighth-grade students for his “flex” period—a temporary remedial math class.

64. (a) A few of the students in that class defied and challenged respondent verbally, and confronted him physically.

(b) Respondent’s response to the situation included moving rapidly across the classroom toward the phone so he could call for help. On the way across the classroom, respondent did move, shove, or toss a chair out of his way—though not toward any students. He also ran into a trash can, kicking it accidentally. When he reached the phone, he could not make it work, and slammed or “jiggled” it in an attempt to use it. The evidence did not establish that respondent more likely than not threw a book or evicted the class before the bell rang. (Testimony of Maria Borges, respondent, S█████ P█████, B█████ P█████, and E█████ M█████; exs. 21 and 22.)<sup>22</sup>

65. Three of respondents’ students—Ms. P█████, Ms. P█████, and Ms. M█████—characterized respondent as having thrown the chair aside in a violent manner, and indicated respondent did throw a book.

66. Nevertheless, the contemporaneous documents memorializing the incident—particularly Principal Borges’ conference memorandum—did not indicate respondent violently threw the chair or threw a book. (Exs. 21 and 22.) Principal Borges convincingly testified that if such things had been reported or alleged, she would have put them in her memorandum, and also would have called police. She did neither. Principal Borges’ testimony thus implied that these things were not reported, which in turn implied they did not occur. (Testimony of Maria Borges and respondent; exs. 21 and 22.) Rather, the students’ testimony, nearly six years after the fact, appeared to reflect inaccurate recollections of events and exaggerated impressions of respondent’s conduct.

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<sup>22</sup> Respondent did tell a student to “sit the fuck down” and otherwise verbally engaged the students, but these matters were not pled in the Statement of Charges, and were outside the four-year rule in any event (see Legal Conclusions 4-11).

67. No student was harmed or endangered, mentally or physically, by respondent's actions. Consequently, Charge 12, alleging that respondent intended to and did cause harm and/or mental suffering to student(s), was not substantiated.

68. Charge 13 alleges respondent's conduct on April 26, 2010 constituted an act described in Penal Code sections 11165.2 through 11165.6. This is a legal contention, not a factual allegation. As discussed in Legal Conclusions 4 through 11, Charge 13 was not substantiated.

### *Findings on the Remaining Charges*

#### CHARGE 14

69. Charge 14, alleging, "The above conduct identified in [Charges] 1, 3, 5, 7, 9, and 11" violated the District's rules and regulations, "including, but not limited to, the Code of Conduct with Students, the Ethics Policy, the Anti-bullying Policy, and the Respectful Treatment of All Persons Policy[.]" was not substantiated.

70. As previously explained, the conduct alleged in Charge 9, as established in this case, did not violate the enumerated policies.<sup>23</sup>

71. (a) With regard to respondent's conduct on April 26, 2010, it occurred more than four years before "the filing of the notice" of respondent's dismissal and suspension. (See Factual Findings 1 and 7.) As is explained in Legal Conclusions 4 through 11, respondent's April 26, 2010 conduct did not constitute "an act described" in Penal Code sections 11165.2 through 11165.6; therefore, no decision relating to respondent's dismissal can be based on it. Hence, the question whether respondent's April 26, 2010 conduct violated the enumerated policies need not be answered.

(b) Nevertheless, it did not. In the context of the incident, respondent's moving the chair and slamming or jiggling the phone was not unprofessional; rather, it was a predictable response to an unexpected and alarming situation. (Gov. Code, § 11425.50, subd. (c).) Nor can respondent's brushing the chair aside or slamming the phone be deemed unethical, bullying, or disrespectful.

#### CHARGE 15

72. Charge 15, alleging that respondent's violation of "the above reasonable rules of the District" constituted a willful refusal to perform regular assignments, was not substantiated. As previously noted, respondent did not violate the District's "rules and regulations[.]" (See Factual Findings 51-59.)

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<sup>23</sup> It was not clear what other "rules and regulations" respondent's conduct allegedly violated; therefore, the phrase "including, but not limited to" is deemed surplusage.

## CHARGE 16

73. Charge 16, alleging that “[t]he above charges, separately and in any combination, support [respondent’s] dismissal from the District[,]” is a legal contention, and is addressed in the Legal Conclusions, below. Charge 16 was not substantiated.

### *Findings Concerning Respondent’s Overall Fitness to Teach*

74. Respondent’s yelling during the 2014-2015 school year did not have a material adverse effect on students or coworkers. It was in the nature of normal teacher behavior, and was not shown to have been worse than that.<sup>24</sup>

75. Respondent’s multiple-subject credentialing means he is likely to teach elementary school—younger children—more often than not, as has been the case during his career. Teaching younger children, who are especially impressionable, means the teacher must be sensitive to the effects of his or her behavior on students. (Testimony of Laura Zeff.) Respondent seemed to have been unaware he was perceived as yelling in class.

76. Respondent’s yelling is somewhat likely to recur, but is not likely to exceed what is customary and tolerable for a teacher, since that is the kind of yelling respondent has previously done. It is to some extent unavoidable that students will perceive a teacher as “yelling,” whether or not the teacher’s conduct actually warrants such a label. Nevertheless, to the extent the present proceeding has chastened respondent, he is likely to be more careful in his future vocal expression.

77. To discipline a teacher for “yelling” in the manner respondent did would have a significant adverse or chilling effect on respondent and other teachers. Occasionally raising the voice is a normal part of teaching and of a teacher’s expression. (Gov. Code, § 11425.50, subd. (c).) For a teacher to be disciplined for engaging in this behavior would send a message to students that they can wrest control from a teacher by reporting, or threatening to report, the teacher for “yelling,” and thereby jeopardize the teacher’s livelihood.<sup>25</sup>

78. Furthermore, respondent took conscientious measures, at both LAAMS and 49th St., to help students learn, and rewarded them for good behavior and academic accomplishments. Overall, although respondent displayed questionable judgment,

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<sup>24</sup> Likewise, respondent’s use of a dry erase board eraser to get a child’s attention on one occasion, and his tossing pencils and erasers to students, while not ideal classroom procedure, also did not have material adverse effects, and is not likely to recur in light of the present proceeding.

<sup>25</sup> This is not to suggest that a teacher who verbally abused students should not be disciplined, but verbal abuse was not established in this case.

exasperation, and ineffective classroom management on some occasions, including during the first semester of the 2014-2015 school year at 49th St., he is fit to teach.

## LEGAL CONCLUSIONS

### *Introduction*

1. Jurisdiction exists. (Factual Finding 1.)
2. Complainant had the burden to establish the matters alleged in the Accusation by a preponderance of the evidence. (*Gardner v. Com. on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.)
3. Complainant did not establish any cause to dismiss respondent. This conclusion dispenses with Charge 16, which alleges the contrary.

### *No Cause for Dismissal Based on Respondent's April 26, 2010 Conduct*

4. Under section 44944, subdivision (b)(2), evidence “relating to matters that occurred more than four years” before the “filing of the notice” of dismissal is inadmissible in a teacher-dismissal proceeding, and “no decision relating to the dismissal . . . shall be made based on charges or evidence of any nature relating to matters occurring more than four years before the filing of the notice[.]” This is commonly referred to as the four-year rule.
5. An exception to the four-year rule exists for “records regularly kept” by the school district (§ 44944, subd. (b)(2)(B)), though their use is circumscribed as set forth above. (*Id.*) In this case, “records regularly kept” of respondent’s discipline from Wadsworth Elementary School were received for the limited purposes of establishing the fact of discipline and notice of District policies and directives. (Factual Findings 4-6.)
6. Another exception to the four-year rule exists for “allegations of an act described in Section 44010 of this code or Sections 11165.2 to 11165.6, inclusive, of the Penal Code.” (§ 44944, subd. (b)(2)(A) & (B).) For such allegations, evidence may be received and may form the basis for a decision to dismiss.
7. Section 44010 defines “sex offense” according to various provisions of the Penal Code. Penal Code sections 11165.2 through 11165.6 encompass child neglect (§ 11165.2), willful child harm or endangerment (§ 11165.3), unlawful corporal punishment or injury (§ 11165.4), abuse or neglect in out-of-home care (§ 11165.5), and child abuse or neglect (§ 11165.6).
8. April 26, 2010 was more than four years prior to September 1, 2015, the date of “filing” of respondent’s notice of dismissal and suspension. (Factual Findings 1, 3, 7, and



60-68.) Thus, respondent's April 26, 2010 conduct would presumptively be subject to the four-year rule.

9. Nevertheless, respondent's alleged conduct on April 26, 2010 was claimed to constitute an act described in one or more of the cited Penal Code sections, which is why evidence of the April 26, 2010 incident was admitted and why findings about that incident have been made in this decision.<sup>26</sup> (Factual Finding 60-68.)

10. The conduct in which respondent was shown to have engaged on April 26, 2010—tossing a chair to the side and slamming the classroom phone (Factual Findings 60-68)—did not constitute an act described in any of the statutory exceptions to the four-year rule, because it was not sexual in nature, did not harm or endanger any child, and did not constitute neglect or a failure to supervise. (*Id.*)

11. Accordingly, respondent's April 26, 2010 conduct was not within any of the exceptions to the four-year rule, and cannot form the basis of any decision to dismiss him. Charge 13, alleging the contrary, is not substantiated. Since respondent's April 26, 2010 conduct is not cause for dismissal, it will not be further addressed in the sections of this decision discussing the asserted causes for dismissal, except where appropriate in context.

#### *No Cause for Dismissal Based on Egregious Misconduct or Immoral Conduct*

12. Causes for dismissal 1 and 2 assert respondent's employment should be terminated for immoral conduct, including without limitation egregious misconduct, within the meaning of sections 44932, subdivision (a)(1), and 44939. Complainant did not establish these causes for dismissal. Respondent's conduct, as established in this case, was neither egregious nor immoral.

#### NO EGREGIOUS MISCONDUCT

13. 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." (§ 44932, subd (a)(1).)

14. As noted above, section 44010 defines "sex offense" according to various provisions of the Penal Code. Section 44011 likewise defines "controlled substance offense" according to various provisions of the Health and Safety Code. Penal Code sections 11165.2 through 11165.6 are as previously described.

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<sup>26</sup> As noted previously (Factual Finding 64), respondent's verbal utterances during that incident were not pled in the Statement of Charges, and even if they had been, they would not likely fall within any of the Penal Code exceptions to the four-year rule.

15. Respondent's occasional yelling and tossing of items during the first semester of the 2014-2015 school year did not constitute, or even approach, any of these things. (Factual Findings 10-50.) Hence it was not "egregious misconduct."<sup>27</sup>

#### NO IMMORAL CONDUCT

16. "Immoral conduct" is hostile to the welfare of the general public and contrary to good morals, inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness. It can also be conduct that is willful, flagrant, or shameless, showing moral indifference to the opinions of respectable members of the community and an inconsiderate attitude toward good order and the public welfare. (*Bd. of Education of the San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

17. Respondent's conduct during the 2014-2015 school year at 49th St., as described in the substantiated portion of Charge 9, was not immoral. It included occasional "yelling" and the tossing of implements to students for their use—and the latter was not the conduct actually charged. (Factual Findings 10-50.) These actions cannot fairly be characterized as hostile to general welfare, contrary to good morals, corrupt, indecent, depraved, dissolute, flagrant, shameless, or demonstrative of moral indifference.

#### *No Cause for Dismissal Based on Unprofessional Conduct*

18. Cause 3 asserts respondent should be dismissed for unprofessional conduct, within the meaning of section 44932, subdivision (a)(2). Complainant did not establish this cause for dismissal.

19. "Unprofessional conduct" violates the rules or ethical code of a profession, or is unbecoming of a member of the profession in good standing (*Bd. of Education v. Swan* (1953) 41 Cal.2d 546, 553), and indicates unfitness to teach. (*Perez v. Com. on Prof. Competence* (1983) 149 Cal.App.3d 1167, 1174.) Dismissal based on unprofessional conduct requires the school district to give the teacher written notice of the objectionable conduct and "an opportunity to correct his or her faults and overcome the grounds for the charge." (§ 44938, subd. (a).)

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<sup>27</sup> Although similar sets of Penal Code and Education Code sections define "egregious misconduct" and constitute an exception to the four-year rule (see Legal Conclusions 6 and 7), those statutes still do not apply to respondent's chair-tossing and phone-slamming on April 26, 2010. That conduct cannot be considered cause for dismissal for the reasons previously stated. Even if it could constitute grounds for dismissal, it was not "the basis for an offense described" in section 44010 or 44011, or any of the cited Penal Code sections: No criminal prosecution or conviction was alleged or proven; indeed, the police were not even called. (Factual Finding 66.) The conduct was not sexual in nature, did not involve controlled substances, did not harm or endanger any student, and did not constitute a failure to supervise. (Factual Findings 60-68.) Accordingly, respondent's April 26, 2010 conduct was not "egregious misconduct."

20. Respondent's conduct at 49th St. during the first semester of the 2014-2015 school year did not rise to the level of "unprofessional." (Factual Findings 51-59.) It did not violate the rules or ethical code of the District. (*Id.*)

21. Even if some of respondent's choices could be characterized as unbecoming of a teacher in good standing—which they were not shown to be—respondent corrected his behavior after receiving notice of them: he finished the 2014-2015 school year without further incident. (Factual Finding 7.) Accordingly, no cause to dismiss respondent for unprofessional conduct was shown.

*No Cause for Dismissal Based on Persistent Violation of School Laws and/or Regulations, or Based on Willful Refusal to Perform Regular Assignments*

22. Causes for dismissal 5 and 6, respectively, assert respondent should be dismissed for violating school rules and regulations—i.e., the District policies enumerated in the Statement of Charges—and that his violation of those policies constitutes a willful refusal to perform regular assignments. Charge 15 (Factual Finding 72) is in accord. Complainant did not establish these causes for dismissal.

23. As implied by the word "persistent," a single violation of a law or rule is not cause for dismissal. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-84, rehearing denied, *id.* at p. 85.) The District must establish more than a single violation.

24. In this case, no violations were established with regard to respondent's conduct during the first semester of the 2014-2015 school year. (Factual Findings 51-59.) Accordingly, no cause for dismissal exists based on violation of District policy, rule, or regulation.

25. "Willful refusal to perform regular assignments," is not defined by either statute or case law. Nevertheless, since the Statement of Charges equates it with respondent's alleged violation of District policies, rules, and regulations, complainant's failure to establish any violations means complainant also failed to establish respondent's willful refusal to perform regular assignments. (Factual Findings 51-59; see Legal Conclusion 27.)

*No Cause for Dismissal Based on Evident Unfitness for Service*

26. Cause 4 asserts respondent should be dismissed on grounds of evident unfitness for service. (§ 44932, subd. (a)(6).) Complainant did not establish this cause for dismissal.

27. A teacher displaying "evident unfitness for service" is one who is "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. Unlike unprofessional conduct, evident unfitness for service connotes a

fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district.” (*Woodland Joint Unified School Dist. v. Com. on Prof. Competence* (1992) 2 Cal.App.4th 1429, 1444 [internal quotation marks omitted].)

28. Respondent's conduct at 49th St. during the 2014-2015 school year did not reveal temperamental defects or inadequacies in his character rendering him unfit to teach. (Factual Findings 10-50 and 74-78.) To the extent respondent's conduct was undesirable or deficient, when advised of those problems, he made corrections, and finished the 2014-2015 school year without further incident. (Factual Finding 7.)

*Even if Cause Had Been Established, Dismissal Would Not Be Appropriate*

29. Even where cause for dismissal appears, the Commission has broad latitude in determining whether dismissal is the appropriate sanction. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343; *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 215-222.) On the other hand, the Commission has no discretion to fashion discipline short of dismissal. (§ 44944, subd. (d)(1).) The relationship between a teacher's conduct and his or her overall fitness to teach must be considered in deciding whether dismissal is warranted. (*Morrison v. State Bd. of Education* (1969) 1 Cal.3d 214, 229. (*Morrison*.)

30. Under *Morrison*, the operative factors include 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; the type of certificate held by the teacher; extenuating or aggravating circumstances; the praiseworthiness or blameworthiness of the teacher's motives; the probability of recurrence; and the likelihood that discipline will cause an adverse or chilling impact on the constitutional rights of the teacher involved or other teachers. With regard to the last factor, public employers may regulate on-the-job speech or expression of their employees. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421; *Kaye v. Bd. of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 56-59.)

31. In this case, although respondent's relevant conduct—that is, his yelling—was recent, it was not shown to have had material adverse effects. (Factual Findings 47-50.) No significant extenuating or aggravating circumstances appeared. Although prior discipline might have been an aggravating circumstance in another context, here it was not, because it had occurred several years before, at other schools, based on unrelated events. (Factual Findings 4-6.) On the other hand, respondent's motives for yelling were not likely blameworthy; rather, he was trying to control the classroom and focus the students on instruction—albeit yelling was not the ideal way to accomplish these things. (Factual Findings 47-50.)

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ORDER

Respondent Anthony Liali shall not be dismissed as a certificated employee of the Los Angeles Unified School District.

Dated: June 16, 2016 \_\_\_\_\_

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ANGELA VILLEGAS  
Administrative Law Judge  
Office of Administrative Hearings

Dated: June 16, 2016 \_\_\_\_\_

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MARY BENNETT  
Commission Member

Dated: June 16, 2016 \_\_\_\_\_

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Commission Member