BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
STATE OF CALIFORNIA

In the Matter of the Dismissal of: RICHARD HOUSTON (EN 655401), A Permanent Certificated Employee, Respondent.	OAH No. 2015100881

DECISION

The Commission on Professional Competence (Commission), comprised of Administrative Law Judge (ALJ) Angela Villegas, State of California, Office of Administrative Hearings (OAH), Ryan S. Hickman, and Henry D. Montelongo, heard this matter February 16-18, May 9-11,[1] June 29, and July 1, 6, and 7, 2016, in Los Angeles, California.

Attorneys Michele M. Goldsmith and Jonathan M. Lebe, of Bergman Dacey Goldsmith, represented complainant Justo H. Avila, Chief Human Resources Officer of the Los Angeles Unified School District (LAUSD or District).

Attorneys Daniel J. Kolodziej, Rosty G. Gore, and Roshanne Katouzian, of Trygstad, Schwab & Trygstad, represented respondent Richard Houston, who was also present.

Evidence was received and argument was presented. The matter was submitted July 7, 2016. The Commission deliberated July 8, 2016.

ADDITION OF HEARING TIME AND DELAYED CLOSING OF RECORD

1. This matter was initially set for hearing February 16-18, 2016. The parties were unable to complete the presentation of evidence within the time allotted. They requested and were given additional hearing time, from May 9-11, 2016; evidence was received on May 9 and 10, 2016. The parties were again unable complete their presentation of the case. As a result, three more hearing days were added and scheduled for August 29-31, 2016, the earliest dates on which all parties, counsel, OAH, and Commission members

[1] Evidence could not be taken May 11, 2016, due to the unexpected absence of a Commission member.

were then available. Later, with the parties' agreement, the August 29-31, 2016 hearing dates were advanced, to June 29, July 1, and July 6, 2016, and an additional day of hearing was added on July 7, 2016.

2. The record closed July 7, 2016, more than seven months after respondent's request for hearing, which was dated October 19, 2015. Nevertheless, as acknowledged by the parties on the record of the proceeding, good cause existed for the delayed closing of the record. (Ed. Code, § 44944, subd. (b)(1).)[2]

SEALING AND REDACTION OF CONFIDENTIAL INFORMATION

During and after the hearing, the ALJ ordered the following exhibits sealed: 30, 67, 88, 89, and AAA. The ALJ also redacted children's surnames (except for initials) from exhibits 51, 53, 98 through 100, B, H, and LLL.

OTHER PRELMINARY MATTERS

Before and during the hearing, complainant and respondent brought various motions, including a motion to compel, a motion to exclude, written objections, motions in limine, and a motion to have an "affidavit" (actually, a declaration) admitted in evidence. The rulings on those matters are as indicated on the record of the proceeding.

ISSUES AND SUMMARY OF DECISION

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

(1) immoral conduct, including without limitation egregious misconduct (§ 44932, subd. (a)(1));
(2) immoral conduct (§ 44939);
(3) unprofessional conduct (§ 44932, subd. (a)(2));
(4) unsatisfactory performance (§ 44932, subd. (a)(5));
(5) evident unfitness for service (§ 44932, subd. (a)(6)); and
(6) persistent violation of school laws and/or regulations (§ 44932, subd. (a)(8)).

2. The issues in this case are:

(a) Did respondent engage in the conduct alleged in the Statement of Charges?

[2] Further statutory references are to the Education Code, unless otherwise indicated.

(b) If so, does that conduct constitute cause to dismiss respondent from his position as a tenured teacher with LAUSD?

(c) Assuming cause for dismissal exists, is dismissal appropriate?

3. This decision concludes respondent did engage in conduct substantially as alleged in the Statement of Charges, that cause for dismissal exists, and that dismissal is appropriate.

FACTUAL FINDINGS

Parties; Jurisdiction; Background

1. On September 25, 2015, complainant executed the Statement of Charges against respondent. On October 14, 2015, LAUSD gave respondent written notice of its intent to dismiss him, and served him with a copy of the Statement of Charges. On October 19, 2016, respondent demanded a hearing, which led to the issuance of an Accusation.[3] Respondent filed a Notice of Defense and Request for Hearing. This proceeding followed.

2. Respondent holds a clear single-subject credential to teach social science, issued by the California Commission on Teacher Credentialing on September 1, 2001, and renewed through September 1, 2016.

3. Respondent's teaching career began in 1991, before he obtained his clear credential. From 1991 to 1994, under an emergency credential or waiver, respondent taught English, history, and other subjects at a non-public school, Valley High School, to severely emotionally disturbed students, ages 12 through 22.

4. Respondent began working for LAUSD in 1994, at Le Conte Middle School, still under an emergency or substitute credential, where he taught "mild to moderate" (respondent's testimony) special education students, with disabilities including audio-visual difficulties, processing deficits, and emotional disturbance. Respondent remained at Le Conte Middle School through May 1995.

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[3] The Statement of Charges and Accusation are almost congruent, the differences being (a) dates; (b) the relief sought (the Accusation seeks only respondent's dismissal, while the Statement of Charges seeks both immediate unpaid suspension and dismissal); (c) minor changes in wording; (d) added verbiage at the end of the Accusation; and (e) erroneous statutory references in the Accusation (see ex. 9, Accusation, at pp. 1, line 26, to 2, line 3). Neither party appeared to notice the erroneous statutory references; no request was made to amend them; and respondent did not object. Moreover, the Statement of Charges, which is the operative pleading (§ 44934, subd. (e)), did not contain similar errors. Further references in this decision are to the Statement of Charges, unless the context requires otherwise.

5. From May 1995 to June 1996, respondent, still with LAUSD, moved to Henry Clay Middle School, where he taught English and history to mild to moderate specific learning-disabled students.

6. From 1996 to 2000, respondent was assigned to LAUSD's Wright Middle School, where he initially taught a special day class for students with mild to moderate specific learning disabilities. At some point during this period, respondent became a resource teacher, providing remedial and tutorial services to special education students.

7. Respondent was next assigned to Mark Twain Middle School (MTMS), where he taught social studies, including history, to seventh– and eighth-grade students. The events giving rise to this case occurred while respondent was teaching at MTMS, and respondent's last day teaching there was November 21, 2014, the date of those events. (See Factual Finding 10.)

8. Other than the matters giving rise to this case, respondent has no history of discipline, either in his employment or of his credential, revealed by the evidence.

Findings on the Factual Allegations Against Respondent

9. The Statement of Charges specifies a single charge, articulated in several subparts. Each is addressed in turn.

10. As alleged in Charge 1, the events giving rise to this case occurred on November 21, 2014, the final day of school before the Thanksgiving break that year. As also alleged in Charge 1, A[redacted]G. was an eighth-grade special education student in respondent's fifth-period history class. Moreover, as further alleged in Charge 1, the events occurred in the presence of other students in the classroom.

11. As alleged in Charge 1(a), respondent forcefully removed A[redacted] from the classroom, substantially in the manner described in Charges 1(a)(ii) and 1(a)(iv), as follows.

(a) It was the passing period leading into fifth period, and respondent was writing an assignment on the white board at the front of the classroom. He became aware of a "blur" in his peripheral vision (respondent's testimony), and turned to see two students, E[redacted]D. and A[redacted]G., running in the classroom. E[redacted] was chasing A[redacted]. Respondent did not tell the students to stop running or sit down.

(b) Respondent intercepted A[redacted]'s path of travel and the two found themselves face to face. The evidence did not disclose by a preponderance exactly how the physical contact between respondent and A[redacted] began, but respondent ended up behind

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A[redacted], securing A[redacted] with one arm around A[redacted]'s neck/clavicle area, in a headlock or chokehold grip, as alleged in Charge 1(a)(ii).[4]

(c) As respondent continued to secure A[redacted] in the headlock or chokehold, he moved A[redacted] to the classroom door, opened it, and maneuvered A[redacted] through the door, across a concrete walkway, and onto a grass quadrangle area approximately eight feet from the classroom door, as alleged in Charge 1(a)(iv).[5] Several students from respondent's class followed respondent and A[redacted] outside and continued to watch the incident.

(d) On the grass, respondent continued to restrain A[redacted] and tried to place him on the ground, but A[redacted] resisted and told respondent, "Get the fuck off me," at which point respondent released him, as alleged in Charge 1(b). The entire incident lasted between 10 and 30 seconds.

(e) Immediately following the incident, A[redacted] and two other students found the school's Dean, Kary Pounders, across the grass quadrangle and reported the incident to him. As alleged in Charge 1(b), A[redacted] had red marks on his throat from the pressure of respondent's arm. Dean Pounders took A[redacted] to the school nurse, who examined him, gave him some ice for his neck, and released him. (See Factual Finding 22.)

12. At the administrative hearing, respondent initially claimed he had not used a headlock or chokehold on A[redacted], but instead had grasped A[redacted]'s shoulders, facing him rather than holding him from the back, and had simply led A[redacted] out of the room by the shoulders.

13. (a) Respondent's version of events was not believable. It was contravened by at least one prior admission by respondent and by the accounts of many students. (Testimony of respondent, A[redacted] G., J[redacted] C., L[redacted] G.; exs. 51, 52, 54-59, 61, 63, 64, K, and W.)

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[4] Given this finding, the evidence did not establish that respondent more likely than not "*[a]pproached* A[redacted] from behind[,]" as alleged in Charge 1(a)(i) (emphasis supplied). Likewise, the evidence was equivocal as to what respondent did with his other arm: that is, the arm he was not using to brace A[redacted]'s neck/clavicle area. Accordingly, the evidence did not establish that respondent more likely than not "[p]laced his other arm around A[redacted]'s abdomen[,]" as alleged in Charge 1(a)(iii).

[5] Charge 1(a)(iv) alleges respondent "pushed" A[redacted] of the classroom. The verb "push" does not accurately depict what occurred. To "push" something connotes a shoving movement from the rear of the thing being pushed. The evidence did not establish respondent more likely than not shoved or pushed A[redacted] through the door from behind. Rather, as noted above, the evidence indicated respondent physically moved A[redacted] through the door while continuing to restrain him in the headlock or chokehold.

(b) Respondent likewise acknowledged "maybe" he had caused the redness to appear on A[redacted]'s neck, which was inconsistent with his denial that he touched A[redacted]'s neck. (Respondent's testimony.)

(c) In addition, in communications with school administrators, respondent described his action as "immobiliz[ing]" A[redacted]. (Exs. 32 and 69.2; see Factual Finding 26.) The shoulder-grasping action respondent described at the administrative hearing would have been ineffective to immobilize A[redacted], and respondent could not have had any reasonable expectation of immobilizing A[redacted] using such a maneuver. A headlock or chokehold, on the other hand, could readily have been expected to immobilize the person on whom it was used. It could also reasonably be expected to cause injury such as redness or bruising.

14. In sum, respondent's account of the November 21, 2014 incident was not credible and appeared to reflect either deliberate untruthfulness or self-deception. Respondent attempted to explain the inconsistencies in his accounts by claiming it was hard to remember what he did because the incident was "very scary," "out of control," and it had been "the fastest [respondent had] ever seen students run in a classroom." This explanation did not ring true. For most people, an unusual incident is more memorable than a usual one. Moreover, respondent's apparently-vivid recall of the students' running suggested his memory of the incident was not clouded. It was not believable that respondent's recollection would have been compromised only as to his own conduct.

History Between Respondent and Austin Leading to the November 21, 2014 Incident

15. A[redacted] had been a student in respondent's fifth-period history class since the beginning of the 2014-2015 school year. A[redacted] was eligible for special education services because of a specific learning disability;[6] he had an Individualized Education Program and a Behavior Support Plan. Information about A[redacted]'s needs and accommodations was made available to his teachers, including respondent, at the beginning of the 2014-2015 school year. Among A[redacted]'s needs was to be allowed to explain himself, and not to be treated confrontationally, which "tend[ed] to set him off." (Ex. 72; testimony of Raye Robertson.)

16. A[redacted] had difficulty focusing in class and staying on-task, and displayed behavior problems in classes including respondent's. Indeed, the November 21, 2014 incident was precipitated by A[redacted]'s poor behavior. He "hummed" persistently in the ear of E[redacted], who is autistic, to taunt him. E[redacted] became annoyed and chased A[redacted] through the classroom.

17. The relationship between respondent and A[redacted] had been troubled virtually from the start of the 2014-2015 school year. A[redacted]'s behavior in respondent's class was often disruptive. In addition, he had shot a rubber band toward another student, and had "flipped off" respondent. Respondent also reasonably suspected A[redacted] of throwing a book

[6] According to A[redacted]'s parents, he also had attention-deficit hyperactivity disorder. (Testimony of A[redacted] C. and D[redacted] C.)

in class and of placing water on the floor to create a slipping hazard for respondent. Two weeks before the November 21, 2014 incident, A[redacted] had dangled from the classroom door regulator and respondent had told him to get down; A[redacted] felt respondent was "in his face" (testimony of A[redacted] G.) and threatened to hit respondent if respondent "got any closer" (ex. 49), or words to that effect.

18. (a) Respondent dealt with A[redacted]'s behavior using various approaches, including some positive reinforcement, and also progressive discipline, including verbal reprimands and changing A[redacted]'s seat assignment. On several occasions, respondent sent A[redacted] out of the classroom, sometimes on referral to the Dean, sometimes to another teacher's room, and sometimes simply to stand outside until he calmed down.

(b) Respondent also talked with A[redacted]s parents about A[redacted]'s behavior issues. Initially, A[redacted]'s parents welcomed respondent's communications and tried to reinforce discipline at home, but eventually they came to feel respondent was contacting them too much and stopped cooperating with him.

(c) In addition, respondent communicated with A[redacted]'s other teachers, including special education teacher Raye Robertson, and with the school's Dean and administrators, about A[redacted]'s behavior problems. Despite respondent's efforts, A[redacted]'s behavior did not improve.

(d) On one occasion, when respondent became frustrated with A[redacted] respondent said words to the effect of, "I'll see you when you get out of college," implying he wanted to confront A[redacted] when A[redacted] grew up.

Intent or Motivation for Respondent's November 21, 2014 Conduct Toward A[redacted]

19. The evidence varied as to how respondent appeared during the November 21, 2014 incident. A[redacted] and some student statements described respondent as looking angry, while another student, J[redacted] C., testified respondent had looked as though he was simply trying to calm A[redacted] down.

20. (a) Respondent himself claimed he restrained A[redacted] not out of emotion, but as a safety measure. That was not believable. The evidence indicated respondent impulsively restrained A[redacted] at least in part out of frustration with him (see Factual Findings 15-18), and that safety was not the motivating factor, but respondent's post-hoc rationale for his action. Nevertheless, the evidence did not show respondent intended to harm A[redacted]; rather, respondent's statements to school administrators that he had wanted to "immobilize" A[redacted] appeared, more likely than not, accurate. (See Factual Finding 26; exs. 32 and 69.2.)

(b) Even if respondent's action had been motivated by safety concerns, as he claimed, it showed exceedingly poor judgment. Although students running in the classroom might pose a potential danger to themselves and/or others, physically restraining

one of the running students also posed a danger of injury to that student, left the other student's running unaddressed, and was neither a necessary nor effective means of addressing the potential danger caused by the students' activity in the first instance.

Aftermath of Incident

21. As Austin was leaving school on the day of the incident, he walked by Mr. Bear's classroom, across the grass quadrangle from respondent's classroom. A[redacted] cursed loudly at respondent, who was listening from his own classroom. Respondent yelled back at A[redacted], "You were out of control!" and other words to similar effect.

22. When A[redacted] saw the school nurse immediately following the November 21, 2014 incident (see Factual Finding 11), he did not have pain or range-of-motion limitation. (Testimony of Lori Nelson; ex. 67.) The following day, however, A[redacted] went to the hospital and was diagnosed with a cervical contusion and strain, for which he was given a single dose of Acetaminophen (also known as Tylenol) and a cervical collar neck brace.[7] (Exs. 30 and AAA.) The doctor also excused A[redacted] from contact sports, other sporting activities, and gym class.

23. A[redacted]'s family retained an attorney and notified the media of the incident; they later sued the District, among others. During the Thanksgiving break, channel KTLA-5 news ran a story in which A[redacted] appeared wearing the cervical collar. Many people saw the news story, including students and employees of MTMS.

24. Students who observed the incident between A[redacted] and respondent were alarmed and shaken. When students and school employees returned from the Thanksgiving break, many of them having seen the KTLA-5 news story about A[redacted], the incident became a topic of conversation and rumor among students for approximately one week. A[redacted] was the butt of bawdy teasing, including students' claiming he had choked on respondent's "dick." (Testimony of A[redacted] G.; J[redacted] C.; A[redacted] C.; D[redacted] C.) In addition, someone changed the screen saver in the school's computer laboratory to show a picture of A[redacted] wearing the cervical collar.

25. MTMS administration notified police of the incident and police investigated. Respondent was not criminally charged.

26. On January 28, 2015, MTMS administrators met with respondent and his union representative to discuss the incident, and on February 11, 2015, MTMS administrators held a formal conference with respondent and his union representative. On February 13, 2015, Instructional Specialist Carol Ariza issued a conference memorandum (ex. 69.1), to which respondent provided a written response. (Ex. 69.2.) It was in the

[7] The records from A[redacted]'s visit to the hospital (exs. 30 and AAA) are ambiguous regarding the cervical collar. Although the records indicate the doctor ordered the cervical collar, they also indicate the order was discontinued the same day.

interview and respondent's response to Ms. Ariza's conference memorandum that respondent explained his action as an attempt to "immobilize" A[redacted]. (Exs. 32 and 69.2; see Factual Finding 20.)

27. On March 18, 2015, the District issued a Notice of Unsatisfactory Acts and a Notice of Suspension to respondent (collectively, Notice) (exs. 69 and 70); respondent provided a written response (ex. Z). The Notice concluded with the statement:

> This notice is being given to you in order to allow you an opportunity to correct the above-listed deficiencies and overcome the grounds for the charges. Additionally, your failure to show marked and sustained improvement . . . will result in further discipline[.]

(Ex. 69.)

28. Respondent was not thereafter given an opportunity to return to teaching.

LAUSD Policies

29. The Statement of Charges alleges respondent violated District policies, "including" (ex. 1) the Code of Conduct with Students; the Employee Code of Ethics; Bulletin 5046.0, Abolition of Corporal Punishment; the Board Resolution regarding Respectful Treatment of All Persons; Bulletin 1347.0, Child Abuse and Neglect Reporting Requirements; Bulletin 5212.1, Bullying and Hazing Policy; and the Discipline Foundation Policy.[8] District policies are distributed to employees regularly, and respondent was aware of them.

30. (a) Of the policies identified in the Statement of Charges, respondent's November 21, 2014 conduct toward A[redacted] violated one: the Code of Conduct with Students.

(b) In relevant part, the Code of Conduct with Students prohibits "[e]ngaging 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[,]" and/or "[t]ouching or having physical contact with a student(s) that is not age-appropriate or within the scope of the employee's individual's responsibilities and/or duties." (Ex. 69.12.)

(c) Respondent's physical restraint of A[redacted] on November 21, 2014 was unprofessional and outside the scope of his duties. (See Factual Findings 11-20.) Accordingly, the physical restraint violated the Code of Conduct with Students.

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[8] It was not clear from the Statement of Charges what other policies the District intended to invoke by using the word "including"; therefore, "including" is deemed surplusage.

31. The remaining policies identified in the Statement of Charges and included in complainant's evidentiary presentation were inapposite, were not violated, and/or were not yet fully implemented.

32. (a) For example, the evidence did not show, more likely than not, that respondent failed to strive to demonstrate excellence, integrity, or responsibility, and a single instance of conduct did not constitute a failure on respondent's part to create an overall environment of trust, respect, and non-discrimination. Rather, respondent's November 21, 2014 physical restraint of A[redacted] was an impulsive act. Hence, the Employee Code of Ethics was not implicated.

(b) In addition, respondent's November 21, 2014 conduct toward A[redacted] was not "discipline" and was not intended to inflict pain on A[redacted], removing it from the ambit of the Abolition of Corporal Punishment bulletin. (See § 49001, subd. (a) [defining "corporal punishment" as "the willful infliction of, or willfully causing the infliction of, physical pain on a pupil[.]"].)[9]

(c) Respondent's November 21, 2014 conduct toward A[redacted] also did not implicate the Respectful Treatment resolution because it was not intended to harm A[redacted] and it did not involve any slur or other form of prohibited discrimination.

(d) Respondent was not required under the Child Abuse and Neglect Reporting Requirements policy to self-report (ex. 69.11); moreover, the Statement of Charges is concerned with respondent's conduct, not his failure to report it.

(e) Respondent's November 21, 2014 conduct toward A[redacted], although not a model of appropriate behavior, likewise did not constitute bullying because the evidence did not reveal an intent on respondent's part to inflict psychological or physical distress or injury, or to cause physical discomfort, injury, or pain. Rather, respondent acted on impulse to immobilize A[redacted].

(f) Finally, the Discipline Foundation Policy—subtitled "School-Wide Positive Behavior Support" (ex. 69.18)—was new as of November 2014, and had not yet been fully implemented. (Testimony of Carol Ariza.) Hence, respondent did not violate the policy, which in any event is only marginally applicable, if at all, to a sudden occurrence such as the November 21, 2014 incident giving rise to this case.

33. Additional District and school policies included in complainant's evidentiary presentation, but not identified in the Statement of Charges, are not at issue in this case.

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[9] Thus, under section 49001, the actor must deliberately cause physical pain.

Other Circumstances

34. Respondent is originally from New York, but has lived in California since 1962. He has a 12-year-old son who has autistic-like symptoms. Respondent testified his philosophy toward working with children with special needs is to approach them with a patient and nurturing attitude, and to use flexible teaching modalities. In respondent's career at MTMS, he served as the History department chair, chair of a local leadership council, audio-visual equipment manager, and organizer of the school's *Jeopardy!* tournament and field trips.

35. In a 2011-2012 Stull evaluation, respondent's classroom management techniques were judged to "need[ ] improvement[.]" (Ex. 69.19.) The evaluation also noted respondent made "inappropriate comments" in class. (*Id.*) Respondent was advised to undertake Peer Assistance Review (PAR), but PAR was not provided, and respondent was not subsequently re-evaluated. Even into the 2014-2015 school year, however, according to student witnesses and statements, respondent ran a relatively disorganized classroom and did not always specify clear consequences for student behavior.

36. In May 2016, respondent took a two-day course entitled "Nonviolent Crisis Intervention for School Site Teams" (NCI), in which he studied methods of dealing with "situations where students act out." (Respondent's testimony; ex. JJJ.)

37. From taking the NCI course, respondent learned he should respond to a situation in which students are running in the classroom by first yelling, "Stop!" and, if that does not work, then by physically impeding the students' path, but not touching them, and finally by calling for help. Looking back at the November 21, 2014 incident, respondent now believes he could have been more proactive in informing the special education teacher and school administration of A[redacted]'s behavior issues and the need for remedial action.

38. (a) Respondent would like to be able to return to teaching because he enjoys sharing his enthusiasm for history and the joy of learning. Given all that has occurred, respondent cannot imagine himself ever again physically engaging a student as he did A[redacted] Respondent appeared sincere in this belief. Nevertheless, several circumstances suggested it was overly optimistic.

(b) Respondent's classroom-management difficulties and his exercise of poor judgment—not only on November 21, 2014, but before and after as well—in making inappropriate comments, both while being observed in class and toward A[redacted], in failing to be entirely truthful about his conduct toward A[redacted], and in failing to seek NCI or similar training until well after the hearing in this case had begun (ex. JJJ)—all pointed to an individual who has not fully acknowledged or accepted responsibility for his actions. This failure makes future lapses in judgment and/or in impulse control more likely, and such lapses could again endanger or harm a student.

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LEGAL CONCLUSIONS

Introduction

1. Jurisdiction exists. (Factual Finding 1.)

2. Complainant had the burden to establish the matters alleged in the Statement of Charges by a preponderance of the evidence. (*Gardner v. Com. on Prof. Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.)

3. Complainant established some, though not all, of the causes for dismissal asserted in the Statement of Charges, and further established that respondent should be dismissed from his teaching position with LAUSD.

Causes for Discipline Not Established

UNPROFESSIONAL CONDUCT

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

5. "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 [overruled on other grounds, *Bekiaris v. Bd. of Education* (1972) 6 Cal.3d 575, 587, fn. 7]), 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).)

6. Respondent's conduct toward A[redacted]on November 21, 2014 was unprofessional. (Factual Findings 10-20 and 30.) Moreover, respondent was given written notice of his objectionable conduct, in the form of the Notice. (Factual Finding 27.) But because respondent was not allowed to return to teaching after November 21, 2014, he was not given "an opportunity to correct his . . . faults and overcome the grounds for the charge[,]" as mandated by section 44938, subdivision (a). (Factual Finding 28.) Accordingly Cause 3 was not established.

UNSATISFACTORY PERFORMANCE

7. Cause 4 asserts respondent should be dismissed for unsatisfactory performance, under section 44932, subdivision (a)(5). Complainant did not establish this cause for dismissal.

8. Neither the Education Code nor case law defines "unsatisfactory performance," but it is distinct from unprofessional conduct. (§§ 44932, subd. (a)(2) and (5); 44938, subd. (c)). As with unprofessional conduct, a charge of unsatisfactory performance requires the District to give the teacher written notice of the objectionable behavior and "an opportunity to correct his or her faults and overcome the grounds for the charge." (Ed. Code, § 44938, subd. (b)(1).)

9. It is doubtful in this case whether respondent's allegedly-unsatisfactory performance was distinct from his unprofessional conduct, considering that both causes for dismissal rest on the same November 21, 2014 occurrence. (Factual Findings 10-14.) Even if a distinction could be drawn, however, respondent's removal from the classroom after November 21, 2014, without the opportunity to return and "correct his . . . faults" renders this cause for dismissal fatally defective. (Factual Findings 27 and 28.)

PERSISTENT VIOLATION OF SCHOOL LAWS, REGULATIONS, AND/OR POLICIES

10. Cause 6 asserts respondent should be dismissed for persistently violating school rules and regulations: i.e., the District policies enumerated in the Statement of Charges. (§ 44932, subd. (a)(8).) Complainant did not establish this cause for dismissal.

11. As implied by the word "persistent," a single violation is not cause for dismissal. (*Governing Bd. of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 81-84, rehg. den., *id.* at p. 85.)

12. (a) In this case, the Statement of Charges identified only a single instance of conduct as the "persistent violation," and the evidence showed that conduct violated only one District policy. (Factual Findings 29-33.) By definition, a single violation cannot constitute persistent violation of school laws and/or regulations.

(b) Likewise, it would be fallacious to infer "persistent" violation from a single instance of conduct, even if that conduct happened to violate multiple policies, laws, or regulations. Hence, even if respondent's November 21, 2014 conduct toward A[redacted] had violated every LAUSD policy invoked in the Statement of Charges and/or covered by the evidence, which it did not (*id.*), it still would not have demonstrated a "persistent" violation. No cause for dismissal exists based on respondent's persistent violation of District policy, rule, or regulation.

Causes for Dismissal Established

IMMORAL CONDUCT

13. Cause 2 asserts respondent should be dismissed for immoral conduct, under section 44939. Complainant established this cause for dismissal.

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14. "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.)

15. Respondent's November 21, 2014 conduct toward A[redacted] involved poor judgment and unchecked impulsiveness, and was followed by a failure to be entirely truthful, the invention of an after-the-fact justification, and non-acceptance of responsibility. (Factual Findings 10-20.)

16. Poor judgment and insufficient impulse control can be immoral in and of themselves, reflecting willfulness, moral indifference, and an inconsiderate attitude toward good order and public welfare—or, in this case, A[redacted]'s welfare and the welfare of respondent's other fifth-period students. Respondent's subsequent untruthfulness and attempts to justify his initially-immoral impulsive act, rather than own up to it, compounded his wrongdoing and betrayed a tacit consciousness on his part that his action had been improper. (Factual Findings 10-26 and 34-38.)

17. Hence, Cause 2 was established.

IMMORAL CONDUCT INCLUDING EGREGIOUS MISCONDUCT

18. Cause 1 asserts respondent should be dismissed for immoral conduct, including without limitation egregious misconduct, within the meaning of section 44932, subdivision (a)(1). Complainant established this cause for dismissal.

19. 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).)

20. As explained above, respondent's conduct was immoral. (See Legal Conclusions 13-17.)

21. Both parties agree, and the plain language of section 44932, subdivision (a)(1), confirms, that a person's conduct need not result in criminal prosecution or conviction in order to constitute "the basis for an offense described" in one or more of the enumerated statutes.[10] Hence, the fact that respondent was not criminally charged or convicted in connection with his November 21, 2014 conduct toward A[redacted] (Factual Finding 25) does not dispose of this cause for dismissal.

[10] This conclusion makes it unnecessary to examine the legislative history of section 44932, subdivision (a)(1), proffered by complainant.

22. Still, respondent's conduct can be deemed "egregious misconduct" only if it satisfies the elements of one or more of the enumerated statutes. It does. Respondent's November 21, 2014 conduct toward A[redacted] constituted the basis for an offense under Penal Code sections 11165.2, 11165.3, 11165.5, and 11165.6.[11]

23. (a) Penal Code section 11165.2 defines "neglect" of a child to include "negligent treatment" or "maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare."

(b) Penal Code section 11165.2, subdivision (a), further defines "severe neglect" to include "those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by [Penal Code] Section 11165.3[.]"

(c) Penal Code section 11165.3, in turn, defines "the willful harming or injury of a child or the endangering of the person or health of a child" as

> a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care of custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.

(d) (i) Under Penal Code sections 11165.2 and 11165.3, the term "willfully" refers to the volition necessary to accomplish an action. Unlike the manner in which "willfully" is used in section 49001 (see Factual Finding 32 and Legal Conclusion 22), in Penal Code sections 11165.2 and 11165.3, the term "willfully" does not require that the actor intend to inflict pain; it requires only that the actor's conduct be voluntary, as opposed to accidental or inadvertent.

(ii) Moreover, section 49001's requirement that the actor intend to inflict pain cannot be read into Penal Code sections 11165.2 or 11165.3, because the term "corporal punishment," and by extension section 49001's definition of "corporal punishment," is not incorporated by reference into these statutes, as it is into Penal Code section 11165.4. (See Legal Conclusion 22.) The use of the term "corporal punishment" in

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[11] Respondent's conduct did not implicate sections 44010 or 44011, which define "sex offense" and "controlled substance offense," respectively. Likewise, because respondent's conduct was not intended to inflict physical pain on A[redacted] (Factual Findings 13, 19, and 20), it did not form the basis for the offense described in Penal Code section 11165.4, which employs the term "corporal punishment[,]" defined under section 49001 as the willful—i.e., deliberate—infliction of physical pain on a pupil. (See Factual Finding 32.)

one statute, but omission from other, related statutes, denotes that the omission was purposeful, and that it would be inappropriate to read section 49001's definition into the other statutes.

24. (a) Respondent's November 21, 2014 conduct toward A[redacted] constituted both general and severe neglect under Penal Code sections 11165.2 and 11165.3. As A[redacted]'s teacher, respondent had A[redacted] in his care or custody and was responsible for A[redacted]'s welfare. (Factual Findings 10 and 15.) Respondent willfully—that is to say, volitionally—engaged in an act that could reasonably be expected to, and did cause or permit A[redacted] to suffer physical pain, physical injury, and mental suffering, and endangered A[redacted]'s health and person. (Factual Findings 10-20 and 22.) Neither respondent's conduct nor the infliction of physical pain on A[redacted] was justified. (Factual Findings 10-20 and 30.)

(b) The absence of justification for respondent's conduct dispenses with respondent's argument that his action was privileged under sections 44807 and/or 49001, subdivision (a), both of which allow teachers to intervene physically with students to the extent reasonable and necessary to prevent injury or maintain order. In particular, section 44807 exempts teachers from criminal sanction for exercising "the same degree of physical control over a pupil that a parent would be legally privileged to exercise[.]"

(c) But a parent's privilege depends on the existence of "(1) a genuine disciplinary motive; (2) a reasonable occasion for discipline; and (3) a disciplinary measure reasonable in kind and degree." (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 91.) In this instance, although A[redacted]'s and E[redacted]'s running presented a reasonable occasion for discipline, respondent acted impulsively, without a genuine disciplinary motive, and his physical interaction with A[redacted] was not reasonable in kind or degree. (Factual Findings 10-20, 30, and 38.) It was not privileged.

25. Accordingly, respondent's November 21, 2014 conduct toward A[redacted] constituted the basis for an offense under Penal Code sections 11165.2 and 11165.3.

26. (a) Likewise, respondent's conduct constituted the basis for an offense under Penal Code sections 11165.5 and 11165.6. Both of these statutes define "abuse or neglect" of a child. Penal Code section 11165.5 applies to situations involving "out-of-home" care, and encompasses abuse or neglect perpetrated by an "employee of a public or private school" who is "responsible for the child's welfare[.]" Penal Code section 11165.6 applies generally. Since respondent was A[redacted]'s schoolteacher, both Penal Code sections 11165.5 and 11165.6 apply to him. (Factual Findings 10 and 15.)

(b) Both statutes define "abuse or neglect" to include a violation of Penal Code section 11165.2 and/or 11165.3. Because respondent's conduct violated Penal Code sections 11165.2 and 11165.3, it also violated Penal Code sections 11165.5 and 11165.6. (See Legal Conclusions 22-25.)

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(c) Penal Code sections 11165.5 and 11165.6 also define "abuse or neglect" to include "physical injury . . . inflicted upon a child" "by other than accidental means[.]" Respondent inflicted physical injury on A[redacted] by other than accidental means. (Factual Findings 10-20 and 22.) Accordingly, respondent's November 21, 2014 conduct toward A[redacted] violated Penal Code sections 11165.5 and 11165.6 under this provision as well.

27. Because respondent's November 21, 2014 immoral conduct toward A[redacted] constituted the basis for an offense under Penal Code sections 11165.2, 11165.3, 11165.5, and/or 11165.6, respondent engaged in egregious misconduct within the meaning of section 44932, subdivision (a)(1). Cause 1 for dismissal was established.

EVIDENT UNFITNESS FOR SERVICE

28. Cause 5 asserts respondent should be dismissed on grounds of evident unfitness for service, under section 44932, subdivision (a)(6). Complainant established this cause for dismissal.

29. 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].)

30. Respondent's conduct toward A[redacted] on November 21, 2014 revealed a temperamental defect or inadequacy unlikely to be remediable at this point. Respondent's conduct reflected not only insufficient impulse control and poor judgment—both of which are difficult to remedy—but also a failure of insight and character, as shown by his subsequent untruthfulness and reluctance to accept responsibility for his conduct. (Factual Findings 10-20, 26, and 27.)

31. While respondent's taking the NCI course is worthy of acknowledgment, his delay in doing so until well into the hearing of this matter illustrates a person not so much committed to real reform as to making a showing of reform. (Factual Findings 36 and 37.) The showing was unconvincing. Particularly in light of respondent's lengthy experience with difficult-to-manage children (Factual Findings 3-6), his conduct toward A[redacted] appeared to reflect a compulsion, impulse, and failure of self-control and judgment he is unlikely to be able to change. Accordingly, Cause 5 was established.

Dismissal Is Appropriate

32. Even where cause for dismissal appears, the Commission has broad latitude in determining whether dismissal is appropriate. (*California Teachers Assn. v. State of Cal.* (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 where, as here, dismissal is the remedy requested. (§ 44944, subd. (d)(1) & (3).) 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.*))

33. 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 have some discretion to regulate the 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.)

34. In this case, the *Morrison* factors weigh in favor of dismissal.

35. Respondent's November 21, 2014 conduct adversely affected the school community. Students who saw the incident found it frightening, and students generally took a lurid interest in it and visited teasing and humiliation on A[redacted]. (Factual Finding 24.) In addition, respondent's students lost their teacher when respondent was pulled from the classroom in the wake of the incident, and other teachers would have been left to wonder what had happened. (Factual Findings 7 and 28.) Furthermore, although the school community's interest in the story died down after about a week (Factual Finding 24), the degree of adversity the incident occasioned was very high.

36. The incident occurred less than two years ago: i.e., recently. (Factual Findings 7 and 10.) Respondent's type of certificate, a single subject credential (Factual Finding 2), does not make dismissal less appropriate, since his character and teaching traits would dispose him to fare similarly with high school students as he did with middle-schoolers. (Factual Findings 10-21 and 38; see Legal Conclusions 28-31.)

37. Respondent's motive in restraining A[redacted] cannot be said to have been either praiseworthy or blameworthy. While preserving student safety might have been a laudable aim, respondent did not act, in the moment, out of a concern for student safety; rather, he acted impulsively, then offered "safety" as an after-the-fact justification for his conduct. (Factual Findings 10-20.) On the other hand, respondent did not intend to harm A[redacted] (*id.*; Factual Findings 26 and 32), such that his motive was not blameworthy, either.

38. Given respondent's lack of insight into his conduct and reluctance to accept responsibility for it (Factual Findings 12-14, 20, 26, and 35-38), instances of poor judgment and impulsivity are likely to recur. Indeed, even on the date of the incident, respondent displayed further failure to control his impulse to yell back at A[redacted] when A[redacted] cursed at him at the end of the day. (Factual Finding 21.)

39. Finally, respondent's dismissal as a result of the November 21, 2014 incident is not likely to chill respondent's or other teachers' exercise of their Constitutional rights, because no Constitutional right was implicated by respondent's November 21, 2014 conduct.

40. In sum, despite respondent's lengthy career, positive contributions to his school and other virtuous attributes (Factual Findings 3-7 and 34-38), his actions of November 21, 2014—however brief—betrayed character deficiencies, which were made even more plain by his subsequent attempts to justify and minimize the incident. These deficiencies render respondent too great a risk to return to his teaching position at LAUSD. Accordingly, dismissal is appropriate.

41. Except as set forth in this decision, all other allegations and contentions lack merit or constitute surplusage.

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ORDER

Respondent Richard Houston shall forthwith be terminated as a certificated employee of the Los Angeles Unified School District.

Dated: July 18, 2016

DocuSigned by:
Angela Villegas
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ANGELA VILLEGAS
Administrative Law Judge
Office of Administrative Hearings
Chair, Commission on Professional Competence

Dated: July 18, 2016

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Ryan Hickman
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RYAN HICKMAN, Member
Commission on Professional Competence

Dated: July 18, 2016

DocuSigned by:
Henry D. Montelongo
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HENRY D. MONTELONGO, Member
Commission on Professional Competence