Case No. A17-0033

STATE OF MINNESOTA
IN COURT OF APPEALS

TIFFINI FLYNN FORSLUND, et al.,
Appellants,

v.

STATE OF MINNESOTA, et al.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

FISHMAN HAYGOOD, L.L.P.
James R. Swanson (LA #18455)
Alysson L. Mills (LA #32904)
Jesse C. Stewart (LA #36282, PHV)
201 St. Charles Ave., Suite 4600
New Orleans, Louisiana 70170-4600
(504) 586-5252

BASSFORD REMELE
A Professional Association
Lewis A. Remele, Jr. (MN #90724)
Frederick E. Finch (MN #29191)
Kate L. Homolka (MN #395229)
100 South Fifth Street, Suite 1500
Minneapolis, Minnesota 55402-1254
(612) 333-3000

NEKIMA LEVY-POUNDS (#335101)
2901 Lyndale Avenue North
Minneapolis, Minnesota 55411
(612) 210-3731

Attorneys for Plaintiffs/Appellants

OFFICE OF THE ATTORNEY GENERAL
Alethea M. Huyser (No. 0389270)
Assistant Solicitor General
Andrew Tweeten (No. 0395190)
Jason Marisam (No. 0398187)
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 292-5832 (Fax)
alethea.huyser@ag.state.mn.us
andrew.tweeten@ag.mn.us
jason.marisam@ag.mn.us

Attorneys for Defendants/Respondents

(Counsel for Amici are listed on the following page)

NATIONAL EDUCATION ASSOCIATION
Alice O'Brien
Emma Leheny
Kristen L. Hollar
Amanda L. Shapiro
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035
aobrien@nea.org
eleheny@nea.org
khollar@nea.org
ashapiro@nea.org

Attorneys for Amicus Curiae
National Education Association

AMERICAN FEDERATION OF TEACHERS, AFL-CIO
David J. Strom
Samuel J. Lieberman (#0398700)
555 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 393-7472
dstrom@aft.org
sam.lieberman@aft.org

Attorneys for Amicus Curiae
American Federation of Teachers,
AFL-CIO

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AMICI IDENTITIES AND INTEREST[1]

A. Identities of *Amici*

The National Education Association ("NEA") is a national labor organization that represents some three million public school teachers, education support professionals, and other education employees, the vast majority of whom serve in our public schools. NEA believes that public education is the cornerstone of our social, economic, and political structure; and that students of all backgrounds have the right to quality public schools.

The American Federation of Teachers ("AFT") is a labor union that represents 1.6 million members, most of whom are pre-K through 12th-grade teachers and other school-related personnel. The AFT is 100 years old and is dedicated to fairness; democracy; economic opportunity; and high-quality public education, healthcare, and public services for our students, their families, and our communities. It is committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.

B. Interests of *Amici*

Amici advocate for the tools and conditions necessary to provide the best education for students. Statutes like Minnesota's tenure law are based on the sound

[1] Pursuant to Rule 129.03, counsel for *amici* NEA and AFT certify that they authored this brief, and no other person made any contribution to the preparation or submission thereof.

policy goal of professionalizing teaching by ensuring that employment decisions are based on legitimate grounds rather than arbitrary or political considerations. Particularly in high-need schools, students benefit from the more stable teaching forces maintained by such laws. And although educational disparities persist between high- and low-poverty schools, such inequities are not traceable to the challenged policies. On the contrary, *amici*'s experience across the country shows that eliminating teacher due process would do much more harm than good—especially for the neediest students.

ARGUMENT

Amici NEA and AFT submit this brief to provide a national overview of the history and purposes of teacher tenure laws, to clarify how those laws function, and to describe the important role that tenure laws have and continue to play in professionalizing teaching.

Far from being anomalous, Minnesota's teacher employment laws reflect longstanding state policy choices, dating back over a century, that extend basic procedural and substantive employment protections to teachers in almost every state. These laws share certain common features but vary substantially in their particulars, reflecting differing state legislative judgments over the decades as to how best ensure that students have access to a stable, competent teaching force that is free to perform the critical duty of educating children without being subject to bad faith on the part of administrators or the vagaries of local politics. At the same time, tenure laws provide ample means for discharging ineffective teachers. The particular policy choices that Appellants challenge in this case were well within the discretion of the Minnesota Legislature to make.

Moreover, even if determining the finer points of teacher employment policy were the proper province of the judiciary, the changes Appellants and their *amici* urge are ill-considered policies that will harm, not help, children. Tenure and seniority-based layoff systems were enacted first and foremost to ensure competence and stability in school communities by preventing good teachers from

being fired for bad reasons. Tenure allows teachers to act as advocates for their students and schools without fear of reprisal. It ensures that teachers are not fired for personal or political reasons. And it can help recruit and retain qualified individuals to the teaching profession by compensating for salaries that are generally far lower than those offered to professionals with comparable training. These purposes have lost none of their salience over time. Indeed, particularly today when teachers are in short supply, removing tenure would be detrimental both to the education system and to students.

Nor is it the case that the challenges facing high-poverty schools, which *amici* in no way dispute, justify judicial override of these legislative policy choices. A wide array of recent academic research on the best options for meeting these challenges, far from supporting the policies Appellants and their *amici* espouse, suggests that improvements are best attained with due process systems like tenure in place.

I. Almost Every State Has Chosen to Enact Tenure Laws, Reflecting a Widespread and Longstanding Legislative Consensus That Professionalizing the Teaching Force Is Essential to Quality Public Education

Teacher tenure in primary and secondary schools is a carefully considered legislative policy choice states have made dating back over 100 years. New Jersey was the first state to pass comprehensive statewide tenure legislation in 1909,[2] and

[2] Todd A. DeMitchell & Joseph J. Onosko, *Vergara v. State of California: The End of Teacher Tenure or A Flawed Ruling?*, 25 S. Cal. Interdisc. L.J. 589, 597 (2016).

today the overwhelming majority of states—forty-five—offer some form of teacher tenure in their public schools.[3]

The central aim of the first tenure laws was to guard against the politically-motivated job actions that were endemic in the spoils system. This was no abstract concern. State education systems had experienced "decades of politically influenced teacher appointments, in which schools were part of the patronage machine."[4] For example, the City of Chicago adopted one of the first tenure policies in 1917 "[a]fter a series of perceived arbitrary teacher dismissals tied to an authoritarian district administration."[5] In Pennsylvania school boards were the "first step in political preferment," and the incidence of poor teachers being appointed and promoted for political reasons caused "demoralization in some schools."[6]

Tenure laws were enacted for similar purposes throughout the country. The Oregon Legislature sought to "avoid the evils of a fluctuating personnel so frequently incident to manifestations of prejudice, favoritism or arrogance on the

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[3] *50-State Comparison: Teacher Tenure/Continuing Contract Policies*, Educ. Comm'n of the States (May 2014), goo.gl/DyWoQP; *50-State Comparison: Teacher Tenure – Other Continuing Contract Provisions*, Educ. Comm'n of the States (May 2014), goo.gl/Lx8mCR. These summaries reflect that the District of Columbia, Florida, Kansas, North Carolina, and North Dakota do not have tenure laws. *Id.* Wisconsin's tenure law applies only to teachers in large cities who obtained that status before December 21, 1995. Wis. Stat. Ann. § 119.42 (2017).

[4] Dana Goldstein, *The Teacher Wars: A History of America's Most Embattled Profession* 85 (2014).

[5] Thomas A. Kersten, *Teacher Tenure: Illinois School Board Presidents' Perspectives and Suggestions for Improvement*, 37 Planning & Change 234, 237 (2006), goo.gl/iNTX24.

[6] *Politics in Philadelphia Schools*, 66 The Sch. J. 415, 424–26 (Apr. 1903).

part of school administrators." *Lommasson v. Sch. Dist. No. 1, Multnomah Cty.*, 261 P.2d 860, 863 (Or. 1953). The Indiana General Assembly sought to create "a competent cadre of teachers in the state." *Stewart v. Fort Wayne Cmty. Sch.*, 564 N.E.2d 274, 278 (Ind. 1990). And in Minnesota the Legislature granted tenure to teachers in order to ensure "stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession," *McSherry v. City of St. Paul*, 202 Minn. 102, 108 (1938), and to "assure [teachers'] academic freedom." *Frye v. Indep. Sch. Dist. No. 625*, 494 N.W.2d 466, 467 (Minn. 1992). The purpose served by these laws writ large, as one federal district court recently summed up, is to "enshrine merit as the basis for [job] stability and to protect teachers from being fired due to malice or political differences." *Kelley v. Shelby Cty. Bd. of Educ.*, 198 F. Supp. 3d 842, 852 (W.D. Tenn. 2016) (citing *State v. Yoakum*, 297 S.W.2d 635, 638 (Tenn. 1956)).[7]

Protecting more senior teachers during reductions in force was seen in many states as an essential adjunct to the protections provided by tenure. Without seniority provisions, tenure protections would be effectively eliminated in any layoff

[7] *Accord Evans v. Benjamin Sch. Dist. No. 25*, 480 N.E.2d 1380, 1383–84 (Ill. App. Ct. 1985) ("The purpose of the tenure system is to afford tenured teachers procedural safeguards, guarantee continuous service on the basis of merit for able, experienced teachers and prevent dismissal for political, partisan or capricious reasons."); *Bryan v. Ala. State Tenure Comm'n*, 472 So. 2d 1052, 1055 (Ala. Ct. App. 1985) ("[T]he purpose of the Teacher Tenure Act is to protect 'teachers' from cancellation of their contracts or transfers for political, personal, or arbitrary reasons").

situation. Accordingly, the Minnesota Supreme Court has noted that seniority provisions are essential to ensuring that school districts only discharge tenured teachers for reasons that are specified in the tenure law. *See, e.g*., *Harms v. Indep. Sch. Dist. No. 300, LaCrescent*, 450 N.W.2d 571, 575–76 (Minn. 1990). Other states' high courts have concurred with this view. For example the Indiana Supreme Court has explained that without seniority protections, school administrators would have the power to "do indirectly that which the law expressly forbids [them] to do directly" and "discharge without cause a teacher who has . . . secured a tenure status and an indefinite permanent contract*." Watson v. Burnett,* 23 N.E.2d 420, 423 (Ind. 1939). The Oklahoma Supreme Court has said that because "tenure status cannot be lost except on the grounds sanctioned by law," using policies other than seniority to determine the order of layoffs "would emasculate the statutory tenure policy." *Babb v. Indep. Sch. Dist. No. I-5 of Rogers Cty.*, 829 P.2d 973, 976 (Okla. 1992). And the Alabama Supreme Court has found that although its tenure law, like others around the country, recognizes that "a justifiable decrease in the number of teaching positions is . . . [a] ground for the cancelation of a permanent tenure contract, the . . . dismissal of a permanent employee qualified to teach in the position of the non-tenure teacher is not authorized by such a statutory provision." *Pickens Cty. Bd. of Educ. v. Keasler*, 82 So. 2d 197, 199 (Ala. 1955) (quoting 47 Am. Jur., Schools, § 139, pp. 397–398).

Tenure laws throughout the country operate similarly in their basic features. All tenure laws require new teachers to serve a probationary period after which, if they have demonstrated sufficient "ability and efficiency," *State ex rel. Marolt v. Indep. Sch. Dist. No. 695*, 299 Minn. 134, 142 (1974), they may be offered continuing employment. However, far from offering the kind of job security afforded to university professors, this "continuing employment" status only permits K-12 teachers to remain employed absent cause for their dismissal. K-12 tenure has never meant a "job for life." As the cases in Part II highlight, tenure enables teachers to fulfill all aspects of their job, including student advocacy. The specific causes for which teachers may be dismissed vary somewhat from state to state, but universally include incompetence or poor performance, as well as insubordination and "immoral" conduct. These lists generally encompass "every conceivable basis for such action growing out of a deficient performance of the obligations undertaken by the teacher," *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 108 (1938), but vary in the specific manner in which such causes are defined.[8]

Tenure laws further provide that the cause for dismissal must be proven up in a hearing if the teacher challenges the termination. The forum, procedures, and

[8] *See 50-State Comparison: Teacher Tenure – Reasons for Dismissal*, Educ. Comm'n of the States (May 2014), goo.gl/lUkGn1. For example, some states specifically identify drug use or alcoholism as a proper cause for dismissal of a tenured teacher, whereas in other states such conduct may fall under "immorality" or "conviction of a crime involving moral turpitude." *Id*. In addition, most state tenure statutes—including Minnesota's—contain catchall provisions allowing termination for any just cause. *Id*.

timeline for such hearings vary among states, but in most cases they are held before the school board or an impartial hearing officer or arbitrator[9] and require the district to provide some evidence that its decision was not based on impermissible considerations. A school board's decision to terminate the teacher is usually reviewable by a court.[10]

The broad consensus these laws reflect has been reached in spite of the fact that tenure laws have always been a subject of debate—both in terms of whether granting due process protections to teachers is good educational policy in the first instance, and the precise form any protections should take. In the 1920's and 1930's, in particular, challenges were brought to the validity of new tenure laws. Such challenges were uniformly rejected, leaving the laws in place. *See, e.g., Kostanzer v. State ex rel. Ramsey*, 187 N.E. 337, 342 (Ind. 1933), *Grigsby v. King*, 260 P. 789, 791 (Cal. 1927). In Indiana, the General Assembly enacted a tenure law in 1927, repealed it five years later as applied to "township" schools in more rural areas, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), and then reinstated those protections in full decades later. Ind. Acts of 1965, ch. 93, § 1.

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[9] *See 50-State Comparison: Teacher Tenure –Notification of Nonrenewal and Hearing*, Educ. Comm'n of the States (May 2014), goo.gl/tqdjiE.

[10] *See 50-State Comparison: Teacher Tenure – Appeal Forum*, Educ. Comm'n of the States (May 2014), goo.gl/TorrY0 (reflecting that in some states appeals are heard by courts, in others by the state board of education, and in some cases no appeal of the local school board's decision is permitted at all).

The debate continues to this day, and tenure laws are constantly honed to balance the need for teachers to trust that they will be discharged only for legitimate performance-related reasons against the need for districts to effectuate dismissals when they are warranted. In the past decade alone, legislatures across the country have made scores of changes to their tenure laws to adjust this balance—including changing the length of probationary periods, changing seniority rules for layoffs, and altering the appeals process for dismissals.[11]

Notwithstanding these adjustments, legislatures have largely retained the defining features of tenure laws in similar form during the past 100 years. These laws, in both their broad contours and their specific pronouncements, "represent important expressions of legislative policy" in each state. *Viemeister v. Bd. of Educ. of Borough of Prospect Park*, 68 A.2d 768, 770. (N.J. App. Div. 1949). *See also Ricca v. Bd. of Educ. of City of N.Y.*, 391 N.E.2d 1322, 1325–26 (N.Y. 1979) ("The tenure system is . . . a legislative expression of a firm public policy determination"). That is as true in Minnesota as elsewhere. As the Minnesota Supreme Court has repeatedly recognized, Minnesota tenure law is "wise legislation" that reflects legislative policy

[11] *See, e.g.*, H.B. 1263, 2010 Leg., Reg. Sess. (Md. 2010) (extending probationary period from two to three years); H.B. 2011, 49th Leg., 3d Spec. Sess. (Ariz. 2009) (prohibiting districts from basing retention decisions on seniority); H.B. 1010, 1st Extraordinary Sess. (Okla. 2013) (prohibiting school board designees from serving as hearing officers in due process hearings); S.B. 7, 97th Gen. Assemb. (Ill. 2011) (establishing deadlines for each element of the hearing process). The Education Commission of the States also maintains a comprehensive database of alterations to tenure and related laws. *State Legislation: Teaching Quality*, Educ. Comm'n of the States (Oct. 2015), goo.gl/jRXsfp.

judgments on these key policy questions spanning nearly 100 years. *See, e.g., Oxman v. Indep. Sch. Dist. of Duluth*, 227 N.W. 351, 352 (Minn. 1929); *Frisk v. Bd. of Educ. of City of Duluth*, 75 N.W.2d 504, 513 (Minn. 1956); *see also* 1927 Minn. Laws 42.

Neither Appellants nor their *amici* recognize this enduring history in their briefs. Instead, they have asked this Court to constitutionalize tenure policy—based on their idiosyncratic views of ongoing policy debates among legislators, educational researchers, and the public—and to precisely define the contours of any due process protections that can be provided to teachers, if not prohibit them entirely. The Court should reject the invitation to intrude on these essential legislative policy judgments.

II. Tenure Laws Are Sound Educational Policies That Provide Valuable Benefits to Public Schools and Their Students

We add, in an abundance of caution, that if the Court were to view it appropriate to assess essential legislative policy judgments about teacher employment policy, both empirical research and teacher dismissal cases from across the country demonstrate that the basic balance struck by tenure laws is well considered. Teachers with tenure have the freedom to do their jobs, cultivate their professional practice, and speak up for the needs of children and against injustices occurring in their schools without fear of reprisal—whereas non-tenured teachers can easily be silenced in the absence of due process protections. The benefits of tenure, in turn, pay dividends to students and school communities.

1. Tenure allows teachers to advocate for students and schools

Tenure protections ensure that teachers are not targeted and dismissed for merely doing their jobs. In *Kramer v. New York City Board of Education*, for example, a tenured middle-school teacher with exemplary performance reviews, and over 20 years of teaching experience taught a curriculum-approved HIV/AIDS awareness class. *See* 715 F. Supp. 2d 335, 342–43 (E.D.N.Y. 2010). Parents objected to the lesson as "vulgar," and the school board initially removed her from the classroom. *See id.* at 346–47, 349. But due to her tenure protections, the teacher retained her position. *Id.* at 341.

Similarly, in the case of *In re Glaviano*, tenure saved the job of a high school gym teacher after he physically intervened in a fight between two students. OAH No. 2013030338, at 5 (Comm'n on Prof. Competence, Sacramento City Unified Sch. Dist., Aug. 13, 2013) (available in Addendum). The larger student, who was five inches taller and 80 pounds heavier than the teacher, turned on the teacher and caused significant injuries. *Id*. at 6–7. The school district dismissed the teacher, but a hearing panel found that he had used reasonable force and reversed the dismissal. *Id*. at 2. Likewise in Colorado, tenure saved the job of a high school mathematics teacher who refused to cave to pressure to inflate student grades.[12]

[12] *Board Votes to Keep GJHS Math Teacher*, The Daily Sentinel (May 22, 2014), goo.gl/2XAHb9.

By contrast, non-tenured teachers who lack such protections are still targeted for termination for reasons that have nothing to do with their merit as a teacher. For example, non-tenured teachers may be terminated for advocating for students with disabilities. In *Settlegoode v. Portland Public Schools*, a non-tenured special needs teacher was fired after she wrote a letter to the administration stating that "material and equipment were often lacking, inadequate or unsafe" for students with disabilities. 371 F.3d 503, 507 (9th Cir. 2004). In *Corrales v. Moreno Valley Unified School District*, a non-tenured special education teacher was fired after she complained repeatedly that some of her neediest students were not being properly assessed by the district. No. 08-00040, 2010 WL 2384599 (C.D. Cal. June 10, 2010). And in *Rodriguez v. International Leadership Charter School*, a non-tenured teacher was fired after she wrote a letter to the Department of Education noting that her school was failing to provide special education and English Language Learner students with services to which they were legally entitled. No. 08 Civ. 1012, 2009 WL 860622 (S.D.N.Y. Mar. 30, 2009).

Non-tenured teachers have been terminated for whistleblowing on behalf of students and schools. In *Mpoy v. Rhee*, a non-tenured teacher was dismissed after complaining that his classroom was "dirty and lacked books and other necessary materials." 758 F.3d 285, 288 (D.C. Cir. 2014). In *Leonard v. Converse County School District No. 2*, a non-tenured guidance counselor with excellent evaluations was fired for spending "too much time" fulfilling her mandatory reporter obligations when

she alerted authorities of reports that her students had been victims of incest. 788 P.2d 1119, 1124 (Wyo. 1990).

Non-tenured teachers have also been terminated for raising the alarm over corrupt practices. The teacher in *Mpoy* was fired not only for bringing up the sanitary issues in his classroom, but also for refusing to falsify test scores in order to "demonstrate[] acceptable progress." 758 F.3d at 288–89. And in a recent Florida case, a reading coach was fired for criticizing the administration's failure to follow the legal requirements of her job, such as asking her to "provide tutoring services to private citizens not enrolled at" the school. *McShea v. School Board of Collier County,* 58 F. Supp. 3d 1325, 1330 (M.D. Fl. 2014).

These cases from across the country demonstrate that safeguards against discharge without cause provide critical and necessary protections for teachers so that they can do their jobs and advocate for their students and schools without fear of reprisal.

2. Tenure can aid in the recruitment and retention of qualified teachers at a time when the profession is suffering from staffing shortages

At a time when much of the country is experiencing significant teacher shortages, it would be especially detrimental for states to strip valued benefits like tenure from teachers. In 2016, researchers conducted a national survey and concluded that multiple states are experiencing a significant teacher shortage the likes of which

they have not seen in decades.[13] Minnesota is one such state reeling from a teacher shortage—a crisis that is particularly acute in the area of special education.[14] The national survey further found that attrition—teachers leaving the profession—was the single greatest contributor to the shortage,[15] and that it has been compounded by a significant drop in enrollments in teacher training programs.[16] And the teacher shortage is projected to get worse, not better, if school districts do not boost retention efforts.[17]

Significantly, educators and prospective candidates view tenure, meaning protections against unpredictable and arbitrary termination, as a valuable job benefit.[18] For example, numerous educators declined when their districts offered bonus payments in exchange for the teachers surrendering their tenure or seniority

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[13] Leib Sutcher et al., *A Coming Crisis in Teaching?: Teacher Supply, Demand, and Shortages in the U.S., Learning Pol'y Inst.* 1 (Sept. 2016), goo.gl/pYhSCX; Joe Heim, *America Has a Teacher Shortage, and a New Study Says It's Getting Worse*, Wash. Post (Sept. 14, 2016), goo.gl/PwK6d1.

[14] *See, e.g.*, Solvejg Wastvedt & John Enger, *Minnesota's Teacher Shortage: Real, Complicated*, MPR News (Mar. 27, 2017), goo.gl/d1VqH.

[15] Sutcher et al., *supra* note 13, at 4, 11, 20.

[16] *Id*. at 3 (noting that enrollments dropped by 35%).

[17] *Id*. at 1, 6. Even taking into account benefits like tenure, teachers' wages remain considerably lower than those of comparable workers. *See* Sylvia A. Allegretto & Lawrence Mishel, *The Teacher Pay Gap Is Wider Than Ever*, Econ. Pol'y Inst. (Aug. 9, 2015), goo.gl/pfF8p8.

[18] *See* Jesse Rothstein, *Teacher Quality Policy When Supply Matters*, 105(1) Am. Econ. Rev. 100, 126 (Jan. 2015) (showing that compensation and retention policies without tenure would require "substantial increases in teacher salaries").

protections.[19] And while increased pay alone can be inadequate to attract and retain teachers to high-need schools,[20] tenure protections have stabilized the teaching staff in such schools.

The consequences of eliminating tenure are illustrated by a landmark study that was just released chronicling teachers' responses to tenure changes in Louisiana. The study documented that the tenure changes resulted in a marked exit of teachers from the school system.[21] Exiting teachers in the study largely consisted of those with the most experience.[22] And, for low-performing schools that already struggle with teacher recruitment and retention, "[t]he increase in teacher exits was highest."[23] Those findings mirror the retention problems of other school districts in states that have substantially altered tenure.[24]

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[19] *See* Ass'd Press, *Teachers Give Up Money for Seniority Protection*, Educ. Week (Sept. 29, 2015), goo.gl/hkIAq2; Arika Herron, *Pay Plan Offers Raise in Exchange for Tenure*, Winston-Salem J. (May 28, 2014), goo.gl/yd5RfA (more than 90% of teachers declined).

[20] *Review of Teacher Incentive Programs*, Hanover Res. 10 (Aug. 2014), goo.gl/wpjxxT (finding disappointing results in pay-incentive programs to transfer great teachers to high-need schools).

[21] Katharine O. Strunk et al., *When Tenure Ends: Teacher Turnover in Response to Policy Changes in Louisiana: Policy Brief*, Educ. Res. Alliance for New Orleans (Feb. 22, 2017), goo.gl/asvpNo.

[22] *Id*. at 1. As discussed *infra* at 18-21, teachers' experience levels have dramatic, positive impacts on students and the school community as a whole.

[23] *Id*. at 1.

[24] *See, e.g.*, Emma Strauss, *Why Teachers Can't Hotfoot It out of Kansas Fast Enough*, Wash. Post (Aug. 2, 2015), goo.gl/r6kh0p (citing loss of job protections as one reason for Kansas' retention and recruitment problems).

Amici's examples are not to the contrary. Far from supporting Appellants' view that tenure changes have been inconsequential to teachers, their examples prove the opposite. For example, *amici* assert that, after Colorado altered tenure, "the number of certified teachers in Colorado . . . has not dropped significantly . . . and in some cases has increased . . . ." Brief of Amici Curiae Nat'l Council on Teacher Quality & TNTP, Inc. (NCTQ & TNTP Br.) at 16. But in fact problems with teacher attrition and recruitment increased in Colorado after the 2010 tenure amendments. One analysis using data from the Colorado Department of Education found that more teachers left Colorado schools in 2015 than at any point in the past 15 years.[25] The resulting teacher shortage has been described as at a "crisis level,"[26] particularly in rural districts that already face recruitment challenges.[27]

Appellants' *amici* similarly misrepresent data about teacher recruitment when discussing the example of Shelby County Schools in Tennessee. In a paragraph with no citation, *amici* NCTQ and TNTP assert that from 2011 to 2015, after the county altered tenure and seniority, the number of teacher candidates in the county "nearly doubled or tripled." NCTQ & TNTP Br. at 16. *Amici* fail to mention, however, that

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[25] *See* Jaclyn Zubryzcki, *More Colorado Teachers Left Their School Districts Last Year*, Chalkbeat (May 28, 2015), goo.gl/DzHCKu.

[26] Jaclyn Zubryzcki, *DPS Moves to Address 'Crisis Level' Teacher Turnover*, Chalkbeat (Feb. 3, 2015), goo.gl/5o5jyp.

[27] *See also* Jenny Brundin, *A Colorado Teacher Shortage Puts Rural Schools on the Brink of Crisis*, Colo. Pub. Radio (Sept. 29, 2015), goo.gl/MAKORX; Jackie Mader, *Colorado Teacher Turnover Rate Highest in Rural Districts*, Educ. Week (Apr. 25, 2017), goo.gl/DyLP7S.

during that very same four-year span, the county merged with its neighboring district, Memphis City, which was more than double Shelby's size in student population.[28]

Despite *amici*'s assertions to the contrary, the stability offered by due process is a valuable job benefit that helps recruit and retain teachers—a policy objective that is particularly pressing today given teacher shortages nationwide.

3. Robust tenure systems are correlated with higher student achievement

Teacher experience matters both for academic and other student learning. As a consequence it is not surprising that states with robust tenure protections have consistently posted high levels of student achievement and learning. A teacher's effectiveness positively correlates with the number of years she has taught.[29] The beneficial effect of experience on students manifests in two ways.

First, as with any profession, the quality of one's teaching tends to improve with practice. As one recent review of the evidence explained, "[t]hese seasoned [teaching] veterans, hundreds of thousands of whom are among our most

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[28] *See* Christine Campbell & Libuse Binder, *Shelby County Schools, Memphis, TN: In-Depth Portfolio Assessment*, Ctr. on Reinventing Pub. Educ. 1 (June 2014), goo.gl/GMGwEn (describing the merger, and noting that Shelby had 47,000 students, while Memphis had 103,000 students). *See also* Sam Dillon, *Merger of Memphis and County School Districts Revives Race and Class Challenges*, N.Y. Times (Nov. 5, 2011), goo.gl/MUZb6X.

[29] *See* Charles T. Clotfelter et al., *How and Why Do Teacher Credentials Matter for Student Achievement?*, Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Res., Working Paper 2, at 27 (Jan. 2007), goo.gl/fGCeEC ("Consistent with other studies . . . , we find clear evidence that teachers with more experience are more effective than those with less experience.").

accomplished educators, have had decades to develop effective teaching practices . . . ."[30] Although this improvement is the most dramatic in the first few years as novices learn the profession,[31] "teachers continue to improve over the course of their careers,"[32] contrary to *amici* claims. Ed Allies Br. at 4. And rather than "flattening out" after the first few years, "returns [on achievement] continue to rise" with the experience of a teacher for years, even 30 years into her career.[33]

Second, aside from academic effectiveness, more experienced teachers positively affect students' non-cognitive skills, contributing to lifelong advantages in employment and earnings. "[A]s individual teachers gain experience, they become more effective not only in raising test scores, but also in contributing to other valued behaviors, such as attending school or reading outside of school."[34] Non-cognitive skills such as decreased absenteeism and an interest in reading are associated with

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[30] Thomas G. Carroll & Elizabeth Foster, *Who Will Teach? Experience Matters*, Nat'l Comm'n on Teaching & America's Future 12 (2010), goo.gl/xxuzN8.

[31] John P. Papay & Matthew A. Kraft, *Productivity Returns to Experience in the Teacher Labor Market: Methodological Challenges and New Evidence on Long-Term Career Improvement*, 130 J. Pub. Econ. 105, 106 (Dec. 2015); *see also* John P. Papay & Matthew A. Kraft, *The Myth of the Performance Plateau*, 73(8) Educ. Leadership 36 (May 2016).

[32] Papay & Kraft, *supra* note 31, at 105 (summarizing recent research findings).

[33] Clotfelter et al., *supra* note 29, at 27, 38. *See also* Tara Kini & Anne Podolsky, *Does Teaching Experience Increase Teacher Effectiveness?: A Review of the Research*, Learning Pol'y Inst., at 15 (June 2016), goo.gl/jbOfkG (reviewing rigorous research to find the same); Helen F. Ladd & Lucy C. Sorensen, *Returns to Teacher Experience: Student Achievement and Motivation in Middle School*, Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Res., Working Paper 112, at 30 (Dec. 2015), goo.gl/LRBimY (same).

[34] Ladd & Sorensen, *supra* note 33, at 4–5; *see also* Kini & Podolsky, *supra* note 33, at 22–23 (same).

gains in educational attainment, employment, and earnings; and decreases in antisocial behavior and substance abuse; that carry into adulthood.[35]

Furthermore, teachers' longevity in their schools promotes stability in the school community—for students, parents, and peers alike. For instance, all teachers benefit from working in a school community that includes peers with teaching experience.[36] The positive influence of teachers' experience on their own peers is especially pronounced for novice teachers[37] who, applying their often "truncated" training, can struggle with how to plan lessons and master classroom management.[38] The mentorship and support of experienced teachers is valuable to these novice teachers, who benefit from an atmosphere of collegiality.[39] Weakening tenure would undermine these benefits. Whereas an experienced teaching force can lead to "school-wide benefits" by maintaining "a collegial culture rooted in teachers' shared knowledge and practice, "[40] schools staffed by many inexperienced teachers can

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[35] Ladd & Sorensen, *supra* note 33, at 3 (summarizing multiple studies); *see also* Kini & Podolsky, *supra* note 33, at 23 (same).

[36] *See* Kini & Podolsky, *supra* note 33, at 27 ("[T]eachers whose peer teachers had more experience tended to have improved student outcomes.").

[37] *See id.*

[38] Goldstein, *supra* note 4, at 194, 197, 199 (2014). *See also* Richard Ingersoll et al., *Seven Trends: The Transformation of the Teaching Force*, Consortium for Pol'y Res. in Educ. 13 (2014), goo.gl/gk31cZ.

[39] Papay & Kraft, *supra* note 31, at 106 ("Many factors contribute to the extent of early-career productivity growth, including the availability of effective colleagues.").

[40] Kini & Podolsky, *supra* note 33, at 27; *see also* Matthew Ronfeldt et al., *Teacher Collaboration in Instructional Teams and Student Achievement*, 52 Am. Educ. Res. J. 475 (June 2015), goo.gl/SZWqYU (discussing the benefits to new teachers of collaboration).

suffer "because there simply are not enough expert, experienced teachers to mentor and support novices."[41]

It is unsurprising, then, that public education systems that encourage longevity of service via robust teacher tenure laws tend to see above-average student achievement. Massachusetts, for example, has one of the strongest tenure systems in the country. *See* Mass. Gen. Laws ch. 71, §§ 41, 42 (2017) (entitling teachers to "professional teacher status" after three consecutive years; outlining dismissal only for "just cause"; and mandating reductions in force based on seniority). The Education Week Research Center has released a ranking of states' public education systems for 20 years; Massachusetts has consistently ranked both first overall, and first in addressing the achievement gap.[42] The same report found that other states with robust tenure systems—including Minnesota—also rank in the top ten for student achievement.[43] Other research groups have echoed these findings.[44]

In contrast, school systems that do not offer due process protections to teachers often struggle academically. This reality is aptly illustrated by the experience of

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[41] Kini & Podolsky, *supra* note 33, at 27.

[42] *Quality Counts Report Examines State Scramble to Put Federal ESSA Law into Effect*, Educ. Week (Jan. 4, 2017), goo.gl/kfDJjW (ranking Massachusetts first in "current achievement levels, improvements over time, and poverty-based gaps").

[43] *Compare id.* (ranking Vermont, New Hampshire, Maryland, Connecticut, and Pennsylvania among the top ten) *with 50-State Comparison: Teacher Tenure – Requirements for earning nonprobationary status*, Educ. Comm'n of the States (May 2014) (showing less stringent requirements to receive tenure in the same states).

[44] *See 2016 Kids Count Data Book: State Trends in Child Wellbeing*, Annie E. Casey Found., at 25 (June 21, 2016), goo.gl/uhb2h9 (ranking Massachusetts first, and Connecticut, New Hampshire, Vermont, Minnesota, and Pennsylvania in the top ten).

Minnesota charter schools—which, while they are publicly funded, tuition-free schools governed by Minnesota statutes, are operated independently[45] and do not offer teachers tenure or seniority protections. *See* Minn. Stat. § 124E.03(1) (2017) (exempting charter schools from relevant education laws unless explicitly stated). And consistent with the research recounted above, the absence of due process for teachers in Minnesota charter schools has not led to achievement gains. Instead, traditional public schools in Minnesota have consistently outperformed charter schools academically among comparable student populations.[46]

Appellants' *amici* argue that school districts in states that have eliminated tenure for teachers have made sizeable academic gains, but there are strong grounds for skepticism about their assertions. *See* NCTQ & TNTP Br. at 30–38 (discussing Shelby County Schools, Tennessee, and Washington, D.C. Public Schools). *Amici* claim that academic growth in Shelby County and Washington, D.C. can be attributed to tenure rollbacks. But the "gains" of Shelby County were precipitated by an unprecedented merger with the Memphis City Schools—a district twice its size—that dramatically

[45] *See Charter Schools*, Minn. Dep't of Educ., goo.gl/eM3j6G (last accessed Apr. 24, 2017).

[46] *See* Inst. on Metro. Opportunity, *The Minnesota School Choice Project: Part I: Segregation and Performance*, U. Minn. L. Sch. (Feb. 2017), goo.gl/DsErvg ("Charter schools continue to underperform traditional public schools, after controlling for student demographics and other characteristics."); *see also* Kim McGuire, *Charter Schools Struggling to Meet Academic Growth*, Star Tribune (Feb. 17, 2015), goo.gl/4JgOG1 (showing similar results from independent statewide analysis).

altered the district's demographics.[47] And in Washington, D.C., the positive test results that followed the city's tenure reforms were plagued by a cheating scandal that was never fully investigated.[48] At the same time, other measures like reading proficiency indicated that students in the district performed no better than they had before tenure changes were implemented,[49] and that any gains essentially had stalled thereafter.[50] Furthermore, the results trailed rapid gentrification in the district, which, as in Shelby County, significantly altered its demographic makeup.[51]

4. Eliminating tenure would not improve public schools, and could do real harm

Researchers who have measured the impact of tenure policies have concluded that eliminating tenure would have more costs than benefits to student achievement. For instance, lengthy probationary periods may have a significant

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[47] *See generally* Daniel Kiel, *A Memphis Dilemma: A Half-Century of Public Education Reform in Memphis and Shelby County from Desegregation to Consolidation*, 41 U. Mem. L. Rev. 787 (2011) (describing factors, like segregation, leading to the merger); Bill Dries, *Shelby County Wraps Up a Calmer, But Still Eventful, Year*, Mem. Daily News (May 27, 2016), goo.gl/f74Epw.

[48] *See* Greg Toppo, *Memo Warns of Rampant Cheating in D.C. Public Schools*, USA Today (Apr. 11, 2013), goo.gl/kPzkI2.

[49] Tim Vance, *Trends in Third Grade Reading Proficiency: An Analysis of DC CAS Results (2007-2014)*, D.C. Action for Children 2 (Feb. 2016), goo.gl/smQqqq ("Our update confirms . . . [that] the reading proficiency of third graders citywide has not improved since the passage of PERAA [the act that reformed teacher tenure]."); Emma Brown, *D.C. Officials' Choice Allowed Student Tests to Show Gains*, Wash. Post (Sept. 21, 2013), goo.gl/8Ae5aW; Emma Brown, *D.C. Officials Release Recalculated Test Scores*, Wash. Post (Sept. 30, 2013), goo.gl/kiqpu3.

[50] Michael Alison Chandler, *A Quarter of D.C. Students 'On Track' for College, PARCC Test Results Show*, Wash. Post (Nov. 30, 2015), https://goo.gl/BRpsh1.

[51] Kristin Blagg & Matthew Chingos, *Does Gentrification Explain Rising Student Scores in Washington, DC?*, Urban Inst. (May 24, 2016), goo.gl/PB0YBn.

downside for students because school administrators generally wait until the end of a teacher's probationary period to make tenure decisions, meaning that students taught in districts with longer probationary periods may be exposed to ineffective teaching for a longer period.[52]

Furthermore, problems that Appellants and their *amici* have alleged as flaws of Minnesota's tenure system, if they in fact exist, often reflect flaws of administrative discretion rather than shortcomings in the statutory scheme. For example, Appellants allege that "tenure is granted without regard for classroom performance," Appellants Br. at 8 n.2, and their *amici* claim that "tenure in Minnesota is awarded virtually automatically—without regard to individual teacher effectiveness." NCTQ & TNTP Br. at 14. But in fact Minnesota's tenure statute, like those in its sister states, was specifically designed to allow districts ample time to assess new teachers, determine whether their performance merits granting of tenure, and non-renew probationary teachers whose skills are found wanting. *See State ex rel. Marolt v. Indep. Sch. Dist. No. 695*, 299 Minn. 134, 142 (1974) (defining probationary period as "ability and efficiency . . . proved by satisfactory service" in order to receive tenure); *Emanuel v. Indep. Sch. Dist. No. 273*, 615 N.W.2d 415, 418 (Minn. Ct. App. 2000) (describing probationary period as an "opportunity to

[52] *See* Rothstein, *supra* note 18, at 120–21; Dan Goldhaber & Joe Walch, *Teacher Tenure: Fog Warning*, 97 Phi Delta Kappan 8, 13 (Mar. 2016), goo.gl/DdFWZL ("[T]he benefits of using a longer probationary period to make better decisions about teacher effectiveness are largely offset by having ineffective teachers in schools for a longer time.").

evaluate the skills of the teacher before committing . . . to a continuing contract"). To the extent that administrators are failing to exercise this discretion, repealing tenure would not address the problem.[53]

As tenure is a benefit teachers value, eliminating it carries substantial risks to recruitment, retention, and the overall quality of the teacher workforce.[54] The retention of effective teachers remains a challenge, particularly in high-poverty schools where the consequences of teacher turnover are more pronounced.[55] When schools do not retain experienced teachers at high-need schools, the immediate

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[53] *See* Goldhaber & Walch, *supra* note 52, at 14 ("The potential for tenure policies to affect the teacher workforce and student achievement is based on the level of discretion that is exercised . . . ."); Matthew M. Chingos, *Ending Teacher Tenure Would Have Little Impact on Its Own*, Brookings Inst. (Sept. 18, 2014), goo.gl/w4PxeP ("[A]dministrators do not appear to be making significant use of their freedom to make pre-tenure personnel decisions . . . .").

[54] *See* Chingos, *supra* note 53 ("Replacing a teacher judged to be ineffective with a replacement of unknown quality will likely have a smaller positive impact than retaining a teacher who has already demonstrated effectiveness in the classroom."); Jesse Rothstein, *Taking on Teacher Tenure Backfires*, N.Y. Times (June 12, 2014), goo.gl/DqFSQy ("Attacking tenure . . . does little to close the achievement gap, and risks compounding the problem.").

[55] *See* Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement*, 50(1) Am. Educ. Res. J. 4, 30 (2013) ("[T]eacher turnover is particularly harmful to the achievement of students in schools with large populations of low-performing and Black students"); Geoffrey D. Borman & N. Maritza Dowling, *Teacher Attrition and Retention: A Meta-Analytic and Narrative Review of the Research*, 78 Rev. of Educ. Res. 367, 398 (2008) (finding greatest attrition rates in schools "serving low-achieving, poor, and minority students").

harm is that students are taught primarily by novice teachers, who will be less effective on average than experienced teachers.[56]

Eliminating tenure would not close gaps in achievement between high-poverty and low-poverty schools, but changes to in-school policies can. Increasing opportunities for mentorship, coaching, and collaboration, for example, helps teachers at all levels of experience improve their practice, and subsequently benefits their students.[57] Maintaining strong leadership in schools has also been shown to effectively retain excellent teachers and increase student achievement.[58]

These represent only a sampling of the policy choices districts consider to remedy student achievement in high-poverty schools. Eliminating tenure and seniority protections for teachers, however, has not been shown to be an effective remedy. These protections encourage an experienced workforce that can focus on

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[56] Douglas O. Staiger & Jonah E. Rockoff, *Searching for Effective Teachers with Imperfect Information*, 24 J. Econ. Perspectives 97, 98 (2010).

[57] *See, e.g.*, Susan Moore Johnson, *Having It Both Ways: Building the Capacity of Individual Teachers and Their Schools*, 82 Harv. Educ. Rev. 107, 108 (2012) ("[R]esearch suggests that even an ineffective teacher's chances for success would be enhanced by a supportive school context."); Borman & Dowling, *supra* note 55, at 396 (schools with more collaboration experience less attrition); Anthony S. Bryk, *Organizing Schools for Improvement*, 91 Phi Delta Kappan 23, 26 (Apr. 2010), goo.gl/BEuTgC (emphasizing collaboration as a key component of school improvements).

[58] *See* Bryk, *supra* note 57, at 27–28; Kenneth Leithwood et al., *Executive Summary: How Leadership Influences Student Learning*, Univ. of Minn., Ctr. for Applied Res. and Educ. Improvement 3 (2004), goo.gl/wliHRw ("Leadership is second only to classroom instruction among all school-related factors that contribute to what students learn in school."); Moore Johnson, *supra* note 57, at 115 (finding that teachers stay in schools with supportive leadership).

honing professional practice, create stability in the school environment, and in the aggregate enhance student achievement. Taking away that structure would not only fail to spur academic gains for students in high-poverty schools, it would be to their detriment.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: May 1, 2017

/s/ Samuel J. Lieberman
SAMUEL J. LIEBERMAN
David J. Strom
Samuel J. Lieberman (#0398700)
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Avenue NW
Washington, DC 20001
(202) 393-7472
dstrom@aft.org
sam.lieberman@aft.org

Attorneys for Amicus American Federation of Teachers, AFL-CIO

Alice O'Brien
Emma Leheny
Kristen L. Hollar
Amanda L. Shapiro
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035

Counsel for Amicus National Education Association

CERTIFICATE OF COMPLIANCE

Pursuant to Minn. R. Civ. App. P. 132.01(3), I hereby certify the foregoing Brief of Amicus Curiae National Education Association and American Federation of Teachers, AFL-CIO complies with the typeface requirements of Minn. R. Civ. App. P. 132.01(1), because it is in 13-point, proportionally-spaced Cambria typeface and was prepared using Microsoft Office Word 2010. I further certify that the Brief complies with the length limitation of Rule 132.01(3)(c), because it contains 6,980 words, as counted by the word-count function of Microsoft Office Word 2010, except for those portions exempted by Rule 132.01(3).

/s/ Samuel J. Lieberman
SAMUEL J. LIEBERMAN

ADDENDUM:

In re Glaviano, OAH No. 2013030338
(Comm'n on Prof. Competence, Sacramento City Unified Sch. Dist., Aug. 13, 2013)

BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of: JERALD GLAVIANO, Respondent.	OAH No. 2013030338

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Sacramento City Unified School District in Sacramento, California, on May 7, 8 and 22, 2013. The Commission members are James Smrekar, Bridget Bokides, and Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings and Commission Chairperson.

Gregory A. Wedner and Gabriela D. Flowers, Attorneys at Law, Lozano Smith, appeared on behalf of the Sacramento City Unified School District (District). Also present on the District's behalf was its Human Resources Director Roxanne Findlay.

Ted Lindstrom, Andrea Price, and Leslie Beth Curtis, Attorneys at Law, Langencamp, Curtis & Price, appeared on behalf of Jerald Glaviano (respondent) who was present.

The Commission met in executive session on June 10, 2013. By stipulation of the parties, the matter was submitted for decision on that date, at the conclusion of deliberations.

ISSUE

Did the District prove by a preponderance of the evidence that respondent should be dismissed or suspended without pay from his position as a high school physical education (P.E.) teacher for "immoral conduct," "evident unfitness for service," and/or "persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him," based upon: (1) his conduct during the January 29, 2013 altercation (hereafter, the incident) with Student AA after he

tried to break up a fight between AA and Student S, and/or (2) his alleged conduct of subsequently failing to attend a mandatory investigatory meeting with the District? [1]

SUMMARY

The District failed to prove that respondent is subject to dismissal or suspension without pay for immoral conduct, evident unfitness for service, and/or persistent violation of or refusal to obey laws or regulations within the meaning of Education Code section 44932, subdivisions (a)(1), (a)(5), and/or (a)(7). The weight of the evidence established that during the January 29, 2013 incident, respondent acted reasonably to defend S from a fight initiated by AA, and that respondent then used reasonable force to defend himself from AA, after AA repeatedly pushed and hit him. Respondent cooperated with the investigation and his conduct following the incident was not insubordinate. Respondent must be reinstated and provided full back pay from February 7, 2013, the date on which he was placed on unpaid leave, and any benefits (e.g., sick leave, annual leave) that he would have accrued had he not been placed on unpaid leave must be restored.

FACTUAL FINDINGS

1. Respondent holds a single subject credential in P.E. He is a permanent certificated employee of the District, where he has been employed as a P.E. teacher for the past 28 years. With the exception of one semester, respondent has taught at C. K. McClatchy High School (McClatchy) throughout this time. Respondent's professional performance was most recently evaluated for the 2011-2012 school year by McClatchy Assistant Principal Dr. Gema Godina, on March 22, 2012. Respondent was rated as either exceeding performance standards or as performing consistent with performance standards in all assessed areas.

2. *The January 29, 2013 Incident*: Respondent's P.E. classes are comprised of general and special education boys and girls. On January 29, 2013, respondent was teaching his sixth-period P.E. class a lesson on paddle tennis. This was the last class of the day. The students first assembled on the blacktop by McClatchy's basketball courts. After respondent took roll call, he and the students walked to McClatchy's tennis courts, which are located across a field from the basketball courts and school administrative offices. Once at the tennis courts, respondent began handing out equipment. Respondent noticed a confrontation between students AA and S that was escalating into a fight. He yelled at both students to stop, quickly ran over and stepped between the students. With his arms extended toward each student, respondent continued to yell at them to stop. Shortly after this, S stepped away.

[1] To protect students' privacy, designated initials will be used instead of students' names.

Over the next four to five minutes, a violent altercation occurred between respondent and AA, during which respondent admittedly hit and bit AA. Various school officials were notified that a code "415" fight was in progress and rushed to the site. After several minutes, some of respondent's P.E. students separated AA and respondent. After the incident was over, AA had a loose front tooth and a bite on his arm. Respondent had a bloody swollen face near his left forehead, temple and eye, and a bloody left hand near the knuckles.

3. Within minutes after the fight, respondent allegedly made several verbal statements to Assistant Principal Eracleo Guevara about what had occurred, while walking from the tennis courts back toward Mr. Guevara's office. Once in Mr. Guevara's office and at Mr. Guevara's request, respondent wrote a short Incident Report describing what had occurred, which he signed under penalty of perjury. Mr. Guevara took several photographs of respondent's injuries. Respondent was briefly checked by paramedics and he declined further medical attention. Respondent's California Teachers' Association (CTA) union representatives, Lori Jablonski and Tim Douglas, arrived and spoke to him privately. Respondent refused several offers of a ride home, and then drove himself home. Later that afternoon, respondent was informed by Sacramento Police Officer/School Resources Officer Joe Brown that he had been placed on paid leave pending further investigation.

4. Shortly after the incident, AA was interviewed by Dr. Godina, who prepared a written Incident Report purporting to be a transcription of AA's statements about the fight. AA's statements were also heard by McClatchy Principal Peter Lambert, by Mr. Guevara, and by Officer Brown. Mr. Guevara took several photographs of AA's injuries.

5. Shortly after the incident, Campus Security Officer Ben Arthur gathered respondent's students who had witnessed the fight on the blacktop next to the basketball courts. Mr. Arthur then escorted these students to an empty classroom where they were instructed to prepare written Incident Reports describing what they had seen. Students estimated that these reports were completed approximately 20 minutes after the incident was over. The Incident Reports were collected by Mr. Guevara and forwarded to the office of the District's Human Resources Director, Roxanne Findlay. The District did not interview any of the student witnesses.

6. *Statement of Charges/Unpaid Leave*: On February 7, 2013, the District's Governing Board (Board) approved a Statement of Charges against respondent based upon his alleged conduct during the January 29, 2013 incident, his subsequent oral and written statements, and his alleged failure to attend a scheduled February 6, 2013 *Spielbauer* investigatory interview and to answer questions about the incident.[2] The Board asked the

[2] In *Spielbauer v. County of Santa Clara* (2009) 45 Cal. 4th 704, 710 (*Spielbauer*), the California Supreme Court held that a public employee may be compelled by threat of job discipline to answer questions about his job performance, so long as the employee is not required, on pain of dismissal, to waive constitutional protections against criminal use of those answers. Further, in a noncriminal public employment investigation, the employer is

District to seek respondent's dismissal or suspension without pay, and to place him on unpaid leave pending the outcome of disciplinary proceedings.

On February 8, 2013, the District prepared and served its Notice of Intent to Dismiss or Suspend Without Pay; Placement on Unpaid Suspension Pending Outcome of Disciplinary Proceedings; and Statement of Charges on respondent. Respondent was notified that he was immediately suspended without pay pursuant to Education Code section 44939.

7. *Accusation*: On February 27, 2013, the District signed and served its Accusation, which incorporated the Statement of Charges, on respondent. The Accusation alleged that respondent's January 29, 2013 conduct violated Education Code section 44932, subdivisions (a)(1) (immoral conduct), (a)(5) (evident unfitness for service), and (a)(7) (persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him). The District alleged that respondent had not acted in self-defense; that his behavior instigated further confrontation and provoked AA to escalate the fight; and that his conduct had violated Education Code sections 49000 and 49001, prohibiting corporal punishment, as well as Board Policy 5144 and Administrative Regulation 5144, providing guidelines regarding disciplinary practices. The District further alleged that respondent's failure to appear at the February 6, 2013 *Spielbauer* interview and to answer all questions posed, constituted insubordination.

The Accusation alleged that these facts provided a sufficient basis for either respondent's dismissal from employment or, in the alternative, for his suspension without pay. If dismissal is not granted, the District requested that respondent be suspended from his duties without pay for a period of 180 calendar days or for such other time as may be requested at hearing or as determined by the Commission.

8. *Demand for Hearing*: Respondent filed his demand for hearing on February 21, 2013, and an Amended Notice of Defense on March 15, 2013.

9. *Hearing*: At the hearing before the Commission, Student AA did not appear or testify. Respondent made a standing objection to the use of hearsay statements under Government Code section 11513, subdivision (d).[3]

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not required to seek, obtain, and confer a formal guarantee of immunity before requiring the employee to answer questions related to the investigation.

[3] In pertinent part, Government Code section 11513, subdivision (d), provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions..."

The District called the following witnesses: Human Resources Director Findlay; McClatchy Principal Lambert; McClatchy Assistant Principals Godina and Guevara; and Officer Brown. Respondent testified on his own behalf and called the following witnesses: Campus Security Officer Arthur; CTA Regional Staff Richard Mullins; and Students F, H, G, C, R, D, K, and M. The testimony of these witnesses is paraphrased as relevant below.

10. *Contentions*: The District contends that this was not a case where respondent was legitimately required to defend a student or himself from the violent acts of another. In its view, respondent was not required to defend S, and should have called for help rather than intervene in a verbal disagreement between two students. Instead, respondent inserted himself between AA and S, and then initiated the fight by hitting AA in the mouth, causing AA to escalate violently. The District argues that respondent's verbal and written statements immediately following the incident demonstrate that he was the initial aggressor, and that Dr. Godina's transcribed statement of AA's version of the fight, admitted as administrative hearsay, corroborates respondent's admissions. In the District's view, respondent's subsequent statements and testimony about who was the initial aggressor were self-serving and not credible. The District argues that the student witnesses were biased in respondent's favor and did not want him to get into trouble. Finally, the District asserts that respondent's failure to appear for the *Spielbauer* interview following the incident was insubordinate. In its view, the only appropriate remedy is dismissal.

Respondent contends that he intervened in an imminent fight between students AA and S, to protect the smaller and more passive S from AA's physical aggression, and that he was then forced to defend himself when AA anger's shifted from S to him. In doing so, respondent bit AA to escape from a chokehold and reflexively hit AA in the mouth to escape further harm. Respondent never denied that he hit and bit AA during the incident, but he denies that he was the aggressor. Respondent testified that his memory of the incident, and specifically of the sequence of events, changed over time due to the head injuries he incurred immediately before he made those statements. Respondent argued that his initial statements in the Incident Report quoted in Factual Finding 21 were not complete and were not in the correct sequence, and that more complete memories of the incident returned in "snap shots" over time. Respondent contends that he cooperated with the District's investigation and was not insubordinate.

Corporal Punishment and Defense of Self and Others

11. Corporal punishment is defined and circumscribed by the Education Code and by the Board's policy and administrative regulations. Education Code sections 49000 and 49001 prohibit the use of "corporal punishment" on children of school age. In pertinent part, Education Code section 49001 provides:

> (a) . . . "Corporal punishment" means the willful infliction of, or willfully causing the infliction of, physical pain on a pupil. An amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance

> threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, is not and shall not be construed to be corporal punishment within the meaning and intent of this section. . .
>
> (b) No person employed by or engaged in a public school shall inflict, or cause to be inflicted corporal punishment upon a pupil. ..

12. Board Policy 5144 provides, in pertinent part, that "teachers shall use positive conflict resolution techniques and avoid unnecessary confrontations. When misconduct occurs, staff shall make every effort to identify and correct the causes of the student's behavior." District staff "shall enforce disciplinary rules fairly and consistently, without regard to race, creed, color or sex." Further, to "maintain safe and orderly environments, the Board shall give employees all reasonable support with respect to student discipline. If a disciplinary strategy is ineffective, another strategy shall be employed. Continually disruptive students may be assigned to alternative programs or removed from school."

13. Board Administrative Regulation 5144, discussing discipline, provides, in part, that:

> Corporal punishment shall not be used as a disciplinary measure against any student. Corporal punishment includes the willful infliction of, or willfully causing the infliction of, physical pain on a student. (Educ. Code, §§ 49000, 49001.)
>
> For purposes of this policy, corporal punishment does not include an employee's use of force that is reasonable and necessary to protect the employee, students, staff or other persons or to prevent damage to district property. (Educ. Code, § 49001.)

14. Board Administrative Regulation 4538, pertaining to "Employee Security," provides in that:

> An employee may use reasonable force when necessary to protect himself/herself from attack, to protect another person or property, to quell a disturbance threatening physical injury to others, or to obtain possession of weapons or other dangerous objects on or within the control of a student.

Participants in the Incident

15. Student S did not testify. S was described by respondent as being "a very passive kid," who was approximately five feet, eight inches tall and weighed 180 pounds in January 2013.

16. As previously indicated, AA did not testify. AA is a special education student with a hearing disability who had been in respondent's P.E. class since the beginning of the 2012-2013 school year. AA had a hearing device implanted on his ear and the back of his head. Respondent was aware of AA's hearing problem, but noted that AA responded to verbal instructions. Mr. Lambert described AA as being "more childlike" than other students. Officer Brown testified that AA had "a hard time describing or saying what he was saying," and he was more physically than verbally expressive. AA frequently did not "dress out" in appropriate clothes for P.E. and he was not dressed out on January 29, 2013. Shortly before the incident, respondent saw AA playing basketball. Respondent told AA that he needed to come to the tennis court area for class or he would be referred to the principal. AA came to the tennis court area and sat on the bleachers.

AA's stature at the time of the incident was described by multiple witnesses. According to respondent, AA is between six feet and six feet-two inches tall, and weighs approximately 200 pounds. Officer Brown, who is a trained police officer, credibly described AA as six feet, two inches tall and weighing 200 to 210 pounds.

17. Respondent is five feet, seven inches tall. He weighs approximately 120 pounds.

Photographic Evidence

18. Following the incident, Mr. Guevara photographed AA's and respondent's injuries.

In a close-up picture, respondent's left hand has a bloody area around a gash below the knuckle of his middle finger. In a picture of the left side of his face, respondent has a swollen left eye, with red abrasions underneath the eye and eyebrow that extend from the bridge of his nose to the cheekbone, and he has a long abrasion running diagonally across the left side of his forehead. There is red discoloration in the whites of both his right and left eyes.

A close-up of a mouth, identified as AA's, shows a finger pointing to the tooth next to his right front tooth. A close-up of an arm, identified as AA's left forearm, shows a straight gash where the flesh has been broken. There are no visible teeth marks.

Respondent's Statements and Condition after the Incident

19. *Mr. Guevara's Written Statement and Testimony*: On January 29, 2013, at approximately 2:45 p.m., Mr. Guevara heard a "415" alert on his walkie-talkie, and went to the tennis courts where a fight had reportedly broken out. Once at the courts, Mr. Guevara saw respondent and noticed that he was bleeding from his left hand and had a swollen left eye. Mr. Guevara asked respondent to come to his office so he could be examined by the paramedics and to discuss the incident. Respondent did not want to go to the office. As they

continued walking toward the office from the tennis courts, Mr. Guevara heard respondent sigh and state "I shouldn't have hit him." At this point, Mr. Guevara insisted that respondent come to his office. As they continued to walk, Mr. Guevara again heard respondent say "under his breath, 'I shouldn't have hit him.'" Mr. Guevara testified that respondent's verbal statements to him were made approximately five to seven minutes after the incident, and that respondent did not say that he hit AA first, just that he should not have hit AA.

In his January 29, 2013, written statement summarizing what respondent said to him immediately after the incident, Mr. Guevara continued:

> Once in my office, Mr. Glaviano stated that two students were going to fight, so Mr. Glaviano put his elbow/arm on [AA] (one of the two students') [sic], in order to break up the fight. Mr. Glaviano stated, the student ([AA]) pushed Mr. Glaviano's arm off of [AA's] body, Mr. Glaviano said, "I then overreacted and punched him in the face and that's what I guess set the student off." Mr. Glaviano proceeded to mention that the young man then began to hit Mr. Glaviano in his face. Mr. Glaviano said that at that point it was broken up, and then I arrived at the scene.

20. *Respondent's condition after the incident*: Mr. Guevara testified that he called the paramedics after seeing respondent, because respondent's eye was swollen and bloody and he looked like he needed treatment. Respondent kept repeating that he was "okay" and that he just wanted to go home. Principal Lambert and Officer Brown saw respondent in Mr. Guevara's office. Mr. Lambert noted that respondent was agitated and upset. Respondent told Mr. Lambert that he needed "to take some medicine," that he "needed to just leave and go home," and that he was "fine" and "okay." Respondent said multiple times that he did not need medical attention. Officer Brown noted that respondent "looked a little shaken up," but said he did not need medical attention. Both Mr. Guevara and respondent's union representatives were concerned about respondent's ability to drive home. Mr. Guevara and Ms. Jablonski made repeated offers to drive respondent home, but respondent declined.

21. *Respondent's Incident Report*: At Mr. Guevara's request, within a short time after the fight, respondent prepared an Incident Report, describing what had occurred. Respondent initially wrote a draft statement on plain paper. He then completed a McClatchy Incident Report form, as follows:

> Student ([AA]) was challenging another student to a fight – when I stepped in to break it up—the student came at me, fists clenched, I hit him with a reflex jab to keep him away. He then grabbed me and attacked me with reclass [sic] abandon. I held on to the fence as he tried to smash my head and body.

Respondent signed the Incident Report under penalty of perjury.

22. When Officer Brown asked respondent what had happened, respondent "pointed that he wrote down what occurred on paper already." Respondent did not say anything. When Officer Brown asked respondent if he wanted to elaborate, respondent told him that basically what happened was what he had written. Respondent did not provide any supplemental response. When the paramedics arrived, Officer Brown heard respondent decline medical attention, and say that he "was okay" and wanted to go home.

AA's Hearsay Statements to District Personnel

23. Immediately after the incident, AA was escorted to Dr. Godina's office, where he spent the next hour. During the first 15 minutes, Dr. Godina read a statement prepared by AA and determined that it did not look grammatically correct. She then interviewed AA and tried to write a statement for him that was more coherent and grammatically correct. AA repeated his story several times before Dr. Godina wrote it down. She wrote the statement on an Incident Report form, read it back to AA and he told her it was right. After completing this Incident Report, the paramedics attended to AA and Dr. Godina waited for AA's mother to arrive.

During this time, various people came in and out of Dr. Godina's office including Principal Lambert, Mr. Guevara and Officer Brown. AA told Principal Lambert to look at his tooth, which he was wiggling. In simple terms, AA kept saying "my tooth, my tooth" and "he hit me, he hit me in the mouth" and "he bit me on the arm." Mr. Guevara overheard AA say that the fight "wasn't [his] fault" and he later heard AA tell his mother that respondent had hit him first.

Officer Brown had AA stand up and act out what had happened with Dr. Godina. Officer Brown testified that: AA said he "was getting ready to fight another student and that the teacher stepped in, and in doing so he put the – the teacher put his elbow or arm in his face. He didn't like it. He pushed it away. Then the teacher punched him. And then he said that he grabbed the teacher and threw him against the fence, pinned him against the fence. The teacher bit him and then he said he threw the teacher on the ground and the students that were there broke it up." AA told Officer Brown that he did not like people "putting hands on him." AA stated that, after the teacher bit him, he "grabbed the teacher in a headlock and kind of pinned him against the wall and he started punching the teacher in the face."

24. *Dr. Godina's Transcribed Incident Report*: The Incident Report Dr. Godina prepared as a transcribed statement for AA, provided:

> [AA] (I) was going to fight a student who was talking trash, then Mr. Glaviano stepped in to push us apart. The teacher put his elbow on on [sic] his face and [AA] pushed it away. Then teacher punched me in the mouth and I slammed him up against the fence then he bit me. I grabbed him and punched him from under.

Dr. Godina then signed AA's name on the signature block under the statement: "I have read the foregoing statement and declare under penalty of perjury that it is true and correct." She also initialed the form as a witness, along with SRO Brown and Mr. Guevara.

This Incident Report was admitted as administrative hearsay. As discussed in Factual Finding 35, little weight is given to this hearsay statement.

25. *AA's Suspension*: Based upon this incident, the District suspended AA for five days, beginning on January 30, 2013. In its Notice of Suspension, the District indicated AA was suspended under Education Code section 48900, subdivision (a)(1), for fighting. The "Summary of Incident" provided: "During PE, [AA] was fighting with another student and when the teacher tried to break up the fight, he fought with the teacher." AA is still a student within the District but he no longer attends McClatchy.

26. *Police Report*: Officer Brown testified that he wrote down AA's comments in a police report that he sent to his supervisor along with respondent's statements and 15 to 20 Incident Reports prepared by the student witnesses.[4] His police report was then forwarded to the District Attorney. In his police report, which was not offered in evidence, Officer Brown summarized the statements of the participants and the witnesses to the incident, but he made no recommendation or finding regarding who initiated the fight. Criminal charges against respondent from the incident were never filed.

Respondent's Testimony

27. *Respondent's Testimony about the Incident*: Respondent testified as follows about the incident:

Prior to the incident, students AA and S were on the bleachers in front of the tennis courts, where student who did not dress out for P.E. were seated. Respondent noticed that S and AA were facing each other and seemed about to fight. AA was the aggressor and he appeared to be almost on top of S, looking down at S in a confrontational manner. Respondent watched them for a second to see if anything was going to develop. Within a few seconds, respondent yelled at them. He then saw AA take off his jacket, put down his basketball, and give S a "hit-shove." Respondent went quickly over to where AA and S were, about 20 feet away. At this point, respondent knew he had to intervene and he saw AA push or shove S a second time. AA had his back to respondent and S was facing AA and respondent.

Respondent got between these students, by pushing AA's right arm or shoulder with one hand and pushing S away from AA with his other hand, while continually yelling for them to stop. Respondent was then between these students with his arms extended. At this point, AA continued to try to get to S through respondent, and he was pushing, hitting, and

[4] In his February 7, 2013 letter to Ms. Flowers, Mr. Lindstrom reported he was provided 23 witness statements.

shoving respondent to do so. Respondent was trying to protect S, who he knew to be "a very passive kid." While he continued to scream at AA to stop, respondent lowered his center of gravity to keep AA from pushing him forward. AA continued to try to get to S. As respondent kept trying to keep AA from S, he became aware that the focus of AA's anger shifted to him. At this point, S had moved somewhere further away. Respondent was being hit by AA, when AA suddenly grabbed respondent by the throat with the crook of his right arm, under his chin. AA then lifted respondent up and moved him into the tennis court's chain-link fence, which was bordered by asphalt. Respondent could not feel his feet on the ground.

Respondent began to feel fear, and knew he had to get away from AA. Respondent bit AA on the arm and this caused AA to release his chokehold. Respondent felt resistance behind him at his right shoulder area, which he later assumed was the fence, and AA was close behind him. He wanted to distance himself from AA, but felt something grab the left arm of his jacket. Respondent tried to release his left arm by straightening it. When he straightened his arm, respondent's unclenched fist hit AA. After he hit AA, AA hit respondent with a blow to the left side of his head that rendered him "either semi-unconscious or unconscious." Respondent next felt the sensation of being lifted up off the ground and being turned upside down. He felt the fence and grabbed on to it with his right hand. As he was held upside down, respondent then asked if anyone could help him. His next sensation was of being on the ground, on his left side, hearing AA say "I should give you some more because you loosened my tooth." Respondent then noticed that Student G was standing between him and AA, blocking AA from further attack.

Respondent estimated that the total time that elapsed between when he got between AA and S to when Student G helped stop the fight was "less than 4 or 5 minutes."

28. *Respondent's Testimony about his Condition and Statements after the Incident:* After being separated from AA, respondent recalled seeing various school personnel come to the scene, and being repeatedly asked "what happened?" Respondent "took an inventory of all the important parts" of his body and concluded that his injuries were "nothing that could not be repaired." He did not recall talking to anyone at the scene. Respondent recalled that he was concerned about his students and his P.E. equipment, and that he asked some students to put the equipment away. He recalled that Mr. Guevara asked him to come with him and that he walked back toward the basketball court area with Mr. Guevara leading him to his office. Respondent did not recall having any conversation with Mr. Guevara on the way to his office.

29. Once in Mr. Guevara's office, respondent told Mr. Guevara "what [he] knew."

> And all I knew—I didn't know any details. I knew that two students were squaring off to fight and I broke it up and I hit a student and he hit me a lot of times. That's all I knew. I didn't know any details, I didn't know the sequence of events, I didn't know anything. At least my mind – it was there but I couldn't

retrieve it.

30. *Respondent's Testimony about Writing the Incident Report*: When asked to prepare a written statement, respondent asked for scratch paper and wrote out a rough draft, then the final Incident Report. At the time many people were coming in and out of Mr. Guevara's office asking him what had happened. Respondent remembered the individuals but could not recall the order or frequency in which they came in and out of the office.

Respondent acknowledged his written Incident Report (quoted in Factual Finding 21), but testified that, based upon his later increased recollection of the incident's events, it was not a true and complete accounting of what had transpired. Specifically, the Incident Report lacked detail and did not have the accurate sequence in which the events took place. For example, the Incident Report suggests that AA initially came at respondent with his fists clenched. Respondent testified that this was not accurate because, when he first saw AA, AA's back was toward him. It was not until after the fight was broken up that respondent recalled seeing AA walking away with his fists clenched. Respondent clarified his Incident Report statement that he hit AA "with a reflex jab to keep him away." This occurred at the point where respondent was backed up against the chain-link fence, with AA grabbing his jacketed left arm. Respondent straightened the elbow of his left arm to create distance from AA. This is when he hit AA: "...when he is grabbing my left arm –my jacket of my left arm, my brain sees this motion (indicating [straightening]) as being a jab because it is a left arm. That is all that I can understand with that."

31. *Draft Incident Report*: Respondent's rough draft of the Incident Report was substantially similar and provided:

> Student was challenging another student to a fight – Looked like he was ready to hit him anytime – I yelled to stop as I was moving toward them –when I stepped in to break it up [**]- the student came at me, fists, clenched, I hit him with a left jab to keep him away. He then began to attack me with reclass (sic) abandon. I held on to the fence as he tried (sic) smash my body. (*Asterisks added.*)

Officer Brown came into Mr. Guevara's office after respondent finished the Incident Report. In response to Officer Brown's questions about what had happened and if there was anything else that he remembered, respondent drew an arrow on the rough draft:

> But I do remember telling him, because he is saying, "is that all you remember?" Something to that effect. And I pointed at my rough draft and I said, "There is more detail right there (indicating) but I can't – I don't know what it is."

The arrow was inserted on the draft at the asterisks indicated above. The arrow pointed to a space on the left side of the page below the quoted statement. There was no

additional detail provided; however the words "with me" appeared near the page's right margin to the right of the arrow. Respondent testified that he knew there was more detail to write but, at the time, he could not retrieve the information to write it down.

32. *Memory Retrieval*: Respondent testified that he began to retrieve memories of the incident about 10 hours after the incident when he was sleeping. He woke up around midnight or early morning on January 30, 2013, and began to write these memories down. His memories came back like "fuzzy snapshots, like snapshot pictures." He wrote the following:

> I (Mr. Glaviano) was handing out balls to students when I looked to my right where [AA] was standing face to face with another student. Within a second or two it escalated to an intimidating challenge with the other student—it looked like he was ready to hit him at any time—I yelled to stop as I was moving toward them—when I stepped in to break it up – [AA] pushed me & kept charging toward the other student with me in between. I had my back toward the aggressor ([AA]) – he continued pushing & grabbing me, I told him to stop…with my back toward him, I put my elbow toward his chest to encourage him to stop. He pushed me forward…I assumed to get to the other student, however, it became apparent that his anger was now directed toward me…

After writing this, respondent went back to sleep. When he reviewed this writing on the morning of January 30, 2013, respondent added some additional details he recalled, as follows:

> I knew I needed to get space from him as he came at me – I extended my left arm instinctively to keep him away from me…I hit him with an unclosed fist in the mouth…It was not intentional to make contact with him, I was trying to keep him away from me but (I can only guess) that either he was closer than I thought or he was coming at me quicker than I realized, so contact was made…it was intended to keep him an arm's length away, to slow him down & change his intent…it obviously did neither –He began to attack me with reckless abandon. After slugging me in the head he picked me up to slam me down (I assumed) so I held on to the fence, which is very fortunate as I believe this saved me from more serious injury than I received, some students stepped in to stop the attack…a neighbor was yelling through his fence upset about seeing or hearing the attack…moments or minutes later our security showed up—everything happened so fast, details come

to your mind later upon reflection...I'm sure there is a lot I will remember later.

Respondent continued to have flashes of memory over the next three to four days.

33. *Reason for Declining Medical Treatment*: Respondent testified that he declined the paramedics' request to go to the emergency room (ER), based upon his belief that he would be given an MRI or a CAT scan due to his head injuries. Respondent has a long history of Crohn's disease. In 1999, respondent had surgery for cancer. For health reasons, he declined the recommended follow-up radiation. In lieu of radiation, respondent's doctor recommended five years of annual surveillance by CAT scans or MRIs. Respondent complied with this recommendation for four years, but he noticed that his Crohn's disease would flare up uncomfortably with irritable bowel for about four weeks after these treatments. Respondent assumed he would suffer a similar reaction if he went to the ER following the January 29, 2013 incident. For this reason, he declined further medical attention.

Respondent initially did not feel any pain, but then began feeling pressure in his head and pains in different parts of his body. He wanted to go home quickly. Once at home, he applied ice compresses to the affected areas and used natural anti-inflammatory remedies. He did not take any over-the-counter medications or prescription drugs. Respondent never sought medical treatment.

34. *Respondent's Credibility*: Respondent's testimony about the incident, about his condition after the incident, about his inability to provide the full sequence and details in the Incident Report written immediately after the incident, and his later retrieval of memories was credible. As corroborated by student witnesses described below, the altercation between respondent and AA was extremely violent. AA was much younger, much taller and much heavier that respondent. During this encounter, respondent received multiple blows to his head and body; he was placed in a chokehold around his neck; and he was physically lifted off his feet and thrown upside down against a chain link fence, while continuing to receive blows to his head. Respondent cried for help and was rescued from further harm by the intervention of multiple students. In the photograph taken shortly after the incident, respondent appeared to be in shock, which is consistent with the reports of other witnesses as described in Factual Finding 20. Respondent's refusal to accept medical treatment and his repeated statements that he was "okay" do not establish that he was physically or cognitively intact; rather, this conduct is consistent with respondent being in a state of shock and with his aversion to traditional medical treatment in light of his complex medical history.

35. In light of this persuasive evidence, respondent's verbal statements and Incident Report on January 29, 2013, cannot be considered alone to establish that he was the aggressor who triggered AA's violent behavior. To the contrary, as discussed below, respondent acted reasonably to defend S from AA and he was then reasonably required to defend himself from AA. In defending himself, respondent hit and bit AA—facts which he

has never denied — and he used a reasonable amount of force to do so. Respondent intentionally bit AA in order to have AA release the chokehold. He unintentionally hit AA with a motion or reflex jab of his arm that was designed to create distance between himself and AA, and was not for the purpose of engaging in fisticuffs with a much more powerful adversary. Respondent's conduct, particularly of hitting AA in his mouth and loosening his tooth, did fuel AA's extreme violence; but it was inadvertent and not the cause of AA's initial aggressive conduct against S and respondent. For these reasons, Dr. Godina's transcribed statement of AA's description of the incident does not corroborate respondent's January 29, 2013 admissions. Further, this administrative hearsay document is of little evidentiary value because it was created at a time when AA was clearly "in trouble" for his conduct and was under intense questioning by the District's principal, assistant principal and Officer Brown.

Testimony of Student Witnesses

36. Eight of the students who witnessed the incident and prepared Incident Reports on January 29, 2013, testified at the hearing. These students had generally positive impressions of respondent as a good, reasonable or fair teacher. None of them had seen respondent since January 29, 2013, or discussed the incident with him. Each of the witnesses was at a different vantage point at the tennis courts at the time of the incident, and had full or partial views of what had transpired. As discussed below, many of these witnesses either discussed or were aware of discussions with and between other student witnesses about how to make the facts in the Incident Reports "consistent" with a general goal of not getting respondent into trouble. Their potential bias is addressed below.

37. All of the student witnesses except Student M testified that AA and S were engaged in a physical confrontation before respondent intervened. Although M did not see any pushing by AA or S before respondent intervened, other students clearly observed pushing or mutual pushing that was escalating. For example, Student H testified that both AA and S had aggressive body postures, although S's posture was less so. AA was showing off his strength and he was "leaning in toward [S] menacingly." AA pushed S just before respondent ran over and told them to "break it up." Similarly, before respondent intervened in the fight: (1) Student G saw AA sitting on the bleachers yelling at S. AA then stood up and pushed S several times; (2) Student C saw AA pushing S and looking like he wanted to fight; and (3) Students K and F saw AA and S pushing each other around and calling each other names before respondent intervened; according to Student F, AA and S were "like aggressively pushing" each other.

38. The testimony of the student witnesses persuasively established that S backed off when told by respondent to stop, but that respondent was required to continue to defend S and himself from AA, whose anger quickly refocused on respondent. For example:

a. Student D testified that he saw AA punch respondent as he tried to stop AA and S from fighting. Although the threat to S seemed over after respondent got between AA and S, AA then started yelling at and hitting respondent.

b. Student F testified that, after respondent used his hands to push the two students apart, AA pushed respondent back, "like he wasn't willing to pull back from the other kid," (S) who walked away.

c. Student H testified that within a few seconds after respondent got between these students, S "kind of snuck off." AA started pushing respondent back and hit him two or three times in the face. Respondent raised his arm and AA kept hitting him. Respondent then raised his leg. AA took hold of respondent's leg and flipped him upside down and slammed him against the fence. Student H then turned away from the fight to avoid involvement. He then "felt cruddy" about his action and returned to help other students pull AA off of respondent.

d. Student G testified that after respondent intervened and yelled to stop, AA tried to push respondent out of the way to get to S. Respondent put his elbow up to hold the taller AA back. AA pushed respondent's elbow aside and that is when respondent "raised his knee as if he was going to knee him [AA] but he stopped himself." AA then got angry at respondent, began pushing him and then punching him. Student G was 5 to 10 feet away with an unblocked view. As AA began to put respondent in a headlock, G looked away at his friends in disbelief for several seconds. When he looked back, G saw AA pick up respondent and throw him against the fence. AA had respondent in a headlock holding him upside down. G then looked at his friends again and suggested that they help respondent. At that time, they heard respondent say "help." G and three friends then pulled AA off of respondent and G got between AA and respondent. After the students intervened, AA continued to go after respondent, pushing at G to move. An adult in an adjacent yard then began to yell insults over the fence and AA walked over toward the fence and yelled back at the person, with his fists clenched.

39. *Potential Bias by Student Witnesses:* As discussed below, many of the student witnesses testified about discussions they overheard or participated in between witnesses on January 29, 2013, before they completed their Incident Reports.

40. For example, Student K heard some students "huddled up" talking about the incident, before completing the Incident Reports. To K, it sounded like they were trying to have the same testimony. He was not part of this group.

41. Student D testified that a group of students was "talking about what really happened and we were wondering if—because we—Mr. Glaviano was one of our favorite teachers, we didn't know if we should write if Mr. Glaviano actually hit Student AA in the fight." Student D agreed with respondent's Incident Report statement that he hit AA with "reflex jab," but he clarified that respondent punched AA only after AA had punched him first. Student D also testified that respondent had raised his knee as if to "knee" AA. Student D did not include this fact in his Incident Report, but believed it was implied by his statement that respondent tried "self-defense."

42. Student C described the discussion between student witnesses he heard before completing the Incident Report. He testified that, after respondent intervened, AA kept pushing at respondent and he hit respondent. In his Incident Report, Student C wrote that AA "went crazy" and that respondent "tried to defend himself" from AA's attack. Student C testified that he saw respondent take a swing at AA, but he did not know if respondent actually hit him. AA then flipped respondent over, pushed him on the fence and hit him. According to Student C, when the student witnesses discussed the fight, "...there was some kind of confusion. Some people thought that Mr. Glaviano hit first but then other people said Student AA hit first and then people weren't sure. But I thought I saw Student AA hit first so that's what I believe happened." Student C listened to the discussion, but was not persuaded to add or leave anything out. Respondent took a swing at AA only after AA had hit him.

43. In their testimony, Students F, H and G candidly admitted that they had talked to other students about what had happened before they wrote their Incident Reports. At the time, they agreed it was important that the Incident Reports be consistent and they agreed to leave out facts that they were concerned might cause respondent to get into trouble. For example:

a. Student F testified that he tried to match stories with other students, including with Students G and K (who testified) and Students Q and E (who did not testify).

b. Student H testified that he saw respondent raise his arm while AA kept hitting him in the face. He then saw respondent raise his leg, which AA then grabbed and used to flip respondent upside down. Student H did not include the fact that he saw respondent raise his arm or his leg in his Incident Report, because he and the other students did not want to get respondent into trouble. Student H testified that there was nothing else that he had observed that he and this group agreed to leave out.

c. Similarly, Student G testified that he was aware several students were trying to make their Incident Reports match. For example, one student told Student G that he had seen respondent hit AA. This student told him and others that, if they saw this as well, they should not write that down on their Incident Reports. Student G testified that he was truthful in his Incident Report and that he never saw respondent hit AA; if this happened, it may have occurred when he briefly turned away. On further examination, however, Student G clarified that he did see respondent punch AA, and that this occurred "before the headlock but after Student AA punched him two to three times," twice in the face and then, possibly, another time in the ribs. Student G described respondent's punch of AA as "not full strength." Then AA put respondent in a headlock, turned him upside down.

Discussion

44. *Credibility of Student Witnesses*: The student witnesses, who ranged in age from 15 to 18 years old, were asked to prepare witness statements within a brief time after witnessing a shocking and violent fight that involved a teacher they held in high regard. Several succumbed to group pressure and left out details they perceived to be harmful to respondent; others minimized details in their Incident Reports by generally stating that respondent engaged in self-defense. The Incident Reports were prepared on a District form which had a declaration under penalty of perjury that the statement was "true and correct" immediately above the signature line. The Incident Report form does not highlight the perjury declaration. There was no evidence that Mr. Arthur explained the significance of this portion of the form to the students, and at least one student (Student M) put in the name of her friend as a witness on the signature line.[5] Each of the witnesses except Student M signed their Incident Report. Changes or inconsistencies in detail from those provided by these witnesses in their contemporaneously written Incident Reports raise obvious concerns about the witnesses' credibility.

When called as witnesses and placed under oath at the hearing, however, each of these student witnesses was subject to questioning by counsel and Commission members about their observations, about the discussions they participated in before completing the Incident Reports, and about the details contained in and/or omitted from their Incident Reports. The students candidly talked about hearing or participating in discussions with other witnesses before completing the Incident Reports and their motives for agreeing or not agreeing to leave out details. They acknowledged errors in their testimony and discrepancies between their testimony and their Incident Reports. By their testimony and demeanor, these witnesses persuasively demonstrated that they understood the obligation to tell the truth during the hearing and that they took that obligation seriously, even knowing that their testimony might harm respondent. Accordingly, these witnesses are determined to be credible.

45. *Evidence about Walkie-Talkies*: As set forth in Factual Finding 35, respondent acted reasonably by intervening in an impending fight that had gone beyond a verbal confrontation to protect S. There is no merit to the District's argument that respondent should have used a walkie-talkie to call for help rather than intervene. Respondent did not have a walkie-talkie with him that day. He testified that in his 28 years of experience, yelling has generally been sufficient to stop an impending fight and that he would not get between students who were actually engaged as willing combatants. Through Principal Lambert, the District offered evidence of a verbal policy that all P.E. teachers were required to carry walkie-talkies with them. The evidence established that the District did not provide each P.E. teacher with a working walkie-talkie. The evidence also established that the incident required immediate intervention to protect S, which could not have been

[5] In fact, Dr. Godina credibly testified that she was simply trying to complete the Incident Report form when she personally signed AA's signature immediately under the declaration under penalty of perjury.

accomplished by calling for help to the remote tennis court area. Most importantly, violation of such a policy was never alleged in the Statement of Charges and/or Accusation and cannot form the basis for disciplinary action.

46. *Spielbauer Meeting*: There is no merit to the District's charge in the Accusation that respondent was insubordinate by failing to attend a *Spielbauer* investigatory interview with the District and its counsel on February 6, 2013. Respondent's CTA representative Brian Mullins testified that Ms. Findlay attempted to schedule a meeting to discuss the situation with respondent on February 5, 2013, by informing Mr. Mullins of that meeting on February 4, 2013. Mr. Mullins did not tell respondent about the meeting, because it suddenly became clear to Mr. Mullins that the District was operating on the assumption that respondent had physically assaulted a student, rather than that he had been assaulted by a student. Mr. Mullins realized that respondent needed legal counsel. Respondent's counsel was then retained and Mr. Mullins assumed that the meeting would be rescheduled.

The District sent a similar *Spielbauer* demand letter to Attorney Lindstrom on February 5, 2013, demanding that respondent participate in an investigatory interview on February 6, 2013, or be deemed insubordinate and subject to discipline on this basis. Attorney Lindstrom objected to the timing of the interview in light of his recent retention as counsel of record, and to any implication that respondent had not cooperated with the District. Correspondence ensued between respondent's counsel and the District's counsel, and the matter was ultimately rescheduled for February 13, 2013, as a combined *Skelly* meeting[6] and *Spielbauer* investigatory interview. On February 13, 2013, respondent participated in a *Skelly* meeting with Ms. Findlay and the District's attorney, Ms. Flowers. Respondent had an opportunity to tell his side of the story. After respondent spoke, Ms. Findlay and Ms. Flowers met separately then returned and asked respondent questions about the incident. There is no basis for a finding that respondent failed to cooperate with the District in its investigation of this matter.

Fitness to Teach

47. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230, the State Board of Education revoked a teacher's teaching certificates based upon conduct alleged to be "immoral" or "unprofessional" under the Education Code. On review, the California Supreme Court held that conduct cannot be determined to be "immoral" or "unprofessional" unless it first indicates a teacher's "unfitness to teach." The Court identified the following factors to be considered in determining whether a teacher's conduct indicates unfitness to teach: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the party involved; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the

[6] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

likelihood of the recurrence of the questioned conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. Similarly, the Court of Appeals in *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555, 560, stated:

> Our high court in *Board of Education v. Jack M.* (1977) 19 Cal.3d 691, delineates the process to be considered in determining fitness. This opinion upheld the standard established in *Morrison* that a discharged teacher is entitled to a fitness hearing in which not only his conduct but also these factors are analyzed: (1) likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) impairment of teachers and students relationships; (5) disruption of educational process; (6) motive; (7) proximity or remoteness in time of conduct.

Courts have suggested that "fitness to teach" is a question of ultimate fact. (*Board of Education v. Commission on Professional Competence, supra,* 102 Cal.App.3d at 560-561, citing *Board v. Jack M., supra*, 19 Cal.3d 691, 698, fn. 3.) Similar requirements are imposed on charges of "evident unfitness for service." (*Board of Education v. Jack M.*, supra, 19 Cal.3d at 698.) The fitness criteria are applied to the facts of this case, as set forth below.

Likelihood that the conduct may have adversely affected students or fellow teachers

48. *Impact on Teachers*: There was no evidence that respondent's conduct had a negative impact on any of McClatchy's teachers. No McClatchy teachers testified about their knowledge of the incident or the effect it had on their professional relationship to respondent. One potential detrimental impact from the incident is that teachers who are or who become aware of respondent's situation may be hesitant to intervene in future situations to protect students from violence by other students.

49. *Impact on Students*: Respondent's conduct during the incident partially benefitted Student S, by extricating him from a fight with AA, with its risk of potential injuries. After the incident, Student AA was suspended for five days and was later transferred to another school within the District. There was no evidence presented about why AA was transferred and/or whether the transfer was at the request of AA's family or was a decision by the District.

As many as 23 of respondent's sixth-period students witnessed the incident and prepared Incident Reports. (see: Factual Finding 26 and footnote 4.) There was no evidence of negative effects or impacts from respondent's conduct during the incident on students who

either did not witness the incident or who witnessed the incident but did not testify.[7] As previously indicated, respondent is held in positive esteem by many of the students who testified. Students who witnessed the incident were shocked and concerned by the violence displayed during the incident. Many of these students testified that they were never afraid of respondent. Rather, these students were afraid of AA and were afraid for respondent. These students perceived that respondent needed to act in self-defense, and several intervened to protect him. While this incident and its subsequent investigation resulted in a role-reversal, there was no evidence of any lasting negative effects on students from respondent's conduct.

Degree of adverse impact on teachers and students anticipated

50. *Teachers*: As discussed in Finding 48, there was no evidence that respondent's conduct had a negative impact on any of McClatchy's teachers. Thus, the degree of adverse impact is minimal.

51. *Students*: As discussed in Finding 49, the degree of adverse impact on students from the incident is minimal.

Proximity or remoteness in time of the conduct

52. The incident occurred during the 2012-2013 school year. Less than a year has passed since the incident.

Type of teaching certificate held by the party involved

53. Respondent's single subject P.E. credential is a neutral factor.

Disruption of Educational Process

54. The incident occurred toward the end of sixth period, near the conclusion of the school day. There was no evidence that the incident disrupted or prevented any other classes from taking place that day. The incident triggered an administrative investigation and required the presence of paramedics.

Extenuating or aggravating circumstances, if any, surrounding the conduct

55. *AA's status as a special education student:* There was no evidence that respondent's conduct was in any way motivated by AA's status as a special education student, or that AA's undisputed hearing disability played any role in the incident.

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[7] Principal Lambert's testimony that Student A approached him and Mr. Guevara to change her Incident Report to state that respondent hit AA first was hearsay and is not entitled to any weight.

56. *Failure to Carry Walkie-Talkie*: As indicated in Factual Finding 45, the District did not have a written policy requiring teachers to carry a walkie-talkie with them and respondent was never personally issued a functioning walkie-talkie. Even if respondent had a walkie-talkie available on January 29, 2013, he could not have used it to protect S. The evidence was undisputed that the incident escalated within seconds and was over in less than five minutes. The walkie-talkie would have been appropriately used to report injuries or other less time-sensitive events at the tennis courts.

Praiseworthiness or blameworthiness of the motives resulting in the conduct

57. Respondent's motive in engaging in the incident was praiseworthy. Respondent intervened between AA and S to stop further escalation of a fight. Respondent was aware that the physically smaller S was a very passive student and that AA was acting aggressively. This observation was confirmed by student witnesses. Respondent's conduct of protecting S placed in him in a situation where he was required to defend himself. There was no evidence that respondent acted out of anger or animus toward AA.

Notoriety

58. As indicated in *Board of Education v. Jack M.* (1977), *supra*, 19 Cal.3d at 700, the fear that students will emulate a teacher's negative conduct (there "immoral" and/or "illegal" conduct) "becomes realistic only under two conditions. First, the teacher's conduct must be sufficiently notorious that the students know or are likely to learn of it. . . Second, the teacher must continue to model his past conduct. . ." (citations omitted.) (See also, *Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 826.)

There was no evidence that the incident generated any publicity in the media, or that there was widespread knowledge of the incident on the McClatchy campus, either among teachers or students. Officer Brown testified that his report was forwarded to the District Attorney, and that criminal charges were not filed against respondent based upon the incident. Mr. Guevara confirmed that respondent had cooperated in the investigation on January 29, 2013. In his most recent performance evaluation (March 2012), respondent exceeded performance standards or was rated as performing consistent with performance standards in all assessed areas. There was no evidence that District administrators lost confidence in respondent's ability to teach as a consequence of the incident.

Likelihood of recurrence of the questioned conduct

59. It is highly unlikely that this conduct will recur. In respondent's many years of experience, separating students and telling them to stop has proven to be an effective way to prevent fighting. Where there are fights between willing student-combatants, respondent has not attempted to physically separate such students. The escalation of violence in this incident was unanticipated and inadvertent.

Adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers:

60. This factor is neutral.

61. *Conclusion:* After considering the *Morrison* factors outlined above, the evidence did not establish that respondent is unfit to teach. Respondent's conduct during the January 29, 2013 incident did not constitute "corporal punishment" within the meaning of Education Code sections 49000 and/or 49001, and/or Board Administrative Regulation 5144. Rather, considering the circumstances as a whole, respondent used an amount of force against AA that was reasonable and necessary to protect Student S and himself from AA's aggressive attack. That AA's violence escalated after respondent hit and loosened AA's tooth does not alter the conclusion that respondent used a reasonable amount of force necessary to defend himself from AA's assault. Respondent's conduct during the January 29, 2013 incident was thus consistent with, and protected by, Education Code section 49001 and Administrative Regulation 4538. (Factual Findings 11 through 14.) There was no persuasive evidence that respondent failed to cooperate in the investigation of this matter.

LEGAL CONCLUSIONS

1. Pursuant to Education Code section 44932, subdivisions (a)(1), (a)(5), and (a)(7)), respectively, a permanent certificated teacher may be dismissed for any of the following causes: "unprofessional conduct," "evident unfitness for service," or "persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her."

2. The burden of proof is on a school district to show by a preponderance of evidence that a teacher should be dismissed. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

3. *Immoral conduct:* In *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, at 740, the California Supreme Court said the following about "immoral conduct" in the context of teacher dismissal law:

> The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public

welfare. (citing, Words & Phrases, Perm, ed. Vol. 20, pp. 159-160.)

4. As set forth in the Factual Findings and Legal Conclusions as a whole, the evidence does not establish that respondent's conduct during the January 29, 2013 incident rose to the level of "immoral conduct." Respondent's conduct did not demonstrate either hostility toward the welfare of the general public or a lack of good morals. It was not indicative of corruption or indecency; it was not flagrant or shameless conduct showing moral indifference to the opinions of members of the community, and it was not so pervasive that it constituted an inconsiderate attitude toward good order and the public welfare. In placing himself between AA and S, respondent intended to stop a fight, by separating the students and ordering them to stop as he had done under similar circumstances in the past. In doing so, respondent acted to protect a smaller and more passive student from harm. Respondent's admitted conduct of hitting and biting AA was done for the protected purpose of defending himself. This single, isolated event is unlikely to reoccur in the future.

5. *Evident unfitness for service*: In *Woodland Joint Unified School District v. Commission on Professional Competence* (*Woodland*) (1992) 2 Cal.App.4th 1429, 1444, the Third District Court of Appeal defined the term "evident unfitness for service," as used in Education Code section 44932, subdivision (a)(5), to mean "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." The court found that the term "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." (*Ibid.*) The court held that the *Morrison* factors "must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service." (*Id.* p. 1445.) As the court in *Woodland* explained, "[i]f the *Morrison* criteria are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Ibid.*)

6. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent's conduct did not demonstrate an unfitness to teach. While the analysis would normally end there (*Woodland, supra*, 2 Cal.App.4th at p. 1445), the District did not introduce any evidence that respondent suffers a "defect in temperament." The evidence did not establish that respondent is evidently unfit for teaching service.

7. *Persistent violation of or refusal to obey laws and regulations:* A charge of persistent violation of or refusal to obey requires a showing of insubordination. (*Midway School District of Kern County v. Griffeath* (*Midway*) (1946) 29 Cal.2d 13, 18-19.) Furthermore, "persistence" requires a showing of "continuing or constant" behavior. (*Governing Board of the Oakdale Union School District v. Seaman* (1972) 27 Cal.App.3d 77, 82.) As indicated in *Midway,* "[p]ersistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent." (*Midway, supra*, 29 Cal.2d at p. 18.)

8. The District seeks to dismiss respondent for persistent violation of or refusal to obey rules and regulations based on his conduct during the incident. Because the incident was a single, isolated event, respondent's conduct on that day cannot constitute a *persistent* violation or refusal to obey as a matter of law. (*Midway*, *supra*, 29 Cal.2d at pp. 18-19; *Governing Board of the Oakdale Union School District v. Seaman*, *supra*, 27 Cal.App.3d at p. 82.) The District's allegation that respondent was "insubordinate" by failing to attend the *Spielbauer* meeting appears to be a strained attempt to portray respondent's conduct as persistent. As discussed in Factual Finding 46, there is no merit to the allegation that respondent was "insubordinate" by failing to attend the *Spielbauer* meeting. To the contrary, the evidence demonstrates that respondent cooperated in the investigation.

9. *Conclusion:* The District failed to prove that respondent is subject to dismissal or to suspension without pay for immoral conduct, evident unfitness for service, and/or for persistent violation of or refusal to obey laws or regulations within the meaning of Education Code section 44932, subdivisions (a)(1), (a)(5), and/or (a)(7).

ORDER

1. The Accusation is dismissed.

2. The District shall immediately reinstate respondent to his position as a Physical Education teacher at McClatchy High School.

3. Within ten (10) business days of the date of this Decision, the District shall pay respondent his full back pay from February 7, 2013, the date on which he was placed on unpaid leave, and shall restore to him all benefits (sick leave, annual leave) that he would have accrued had he not been placed on unpaid leave.

DATED: August 13, 2013

BRIDGET BOKIDES, Member
Commission on Professional Competence

JAMES SMREKAR, Member
Commission on Professional Competence

MARILYN A. WOOLLARD, Chairperson
Commission on Professional Competence