BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
SHASTA UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

MARTIN REID, Respondent

OAH No. 2022030751

DECISION

On July 11 and 12, 2022, a Commission on Professional Competence (Commission) heard this matter by videoconference. The Commission was comprised of Julie O'Brien, Sara Pasillas, and Administrative Law Judge Jessica Wall.

Dylan C. Marques and Thomas E. Gauthier, Attorneys at Law at the law firm Lozano Smith, represented the Shasta Union High School District (District).

Matthew Chevedden and Katrina Gould, Attorneys at Law at the law firm Langenkamp, Curtis, Price, Lindstrom & Chevedden LLP, represented Martin Reid (respondent), who was present at hearing.

Evidence was received, and the Commission began to deliberate on July 12, 2022. Deliberations concluded on July 13, 2022. The record closed and the matter was submitted for decision on July 13, 2022.

FACTUAL FINDINGS

Parties, Jurisdiction, and Background

1. Respondent is a permanent certificated employee of the District. He holds a single-subject English credential from Simpson University. Respondent also earned a bachelor's degree in liberal studies from Simpson University in 2011. He has worked for the District since August 15, 2012, and taught English at Enterprise High School during the relevant period.

2. On February 14, 2022, Jason Rubin, Associate Superintendent for Human Resources for the District, signed and authorized the filing with the Governing Board (Board), a Notice of Intent to Dismiss and Statement of Charges; Imposition of Suspension Without Pay (Initial Statement of Charges) based on allegations that respondent repeatedly refused to participate in weekly COVID-19 testing. The Initial Statement of Charges informed respondent that he had been placed on unpaid suspension for immoral conduct and willful refusal to perform regular assignments (Ed. Code, § 44939). The Initial Statement of Charges also specifies the following grounds for dismissal: (1) immoral conduct (Ed. Code, § 44932, subd. (a)(1)); (2) dishonesty (Ed. Code, § 44932, subd. (a)(4)); (3) evident unfitness for service (Ed. Code, § 44932, subd. (a)(6)); (4) persistent violations or refusal to obey laws or regulations governing public schools or the school district employing him (Ed. Code, § 44932, subd. (a)(8)); and (5) willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district (Ed. Code, § 44939, subd. (b).).

3. Respondent filed a motion for immediate relief of suspension. On April 8, 2022, Administrative Law Judge Debra D. Nye-Perkins issued an order denying respondent's motion.

4. On April 11, 2022, Mr. Rubin signed and authorized for filing a First Amended Notice of Intent to Dismiss and Statement of Charges; Imposition of Suspension Without Pay (Amended Statement of Charges). The Amended Statement of Charges added additional facts about the violations while listing the same five charges as the Initial Statement of Charges. Respondent signed a Demand for a Hearing and this hearing followed.

The District's Evidence

5. Jim Cloney has been the District's Superintendent for 14 years. Associate Superintendents assist him in areas such as instruction and human resources, but he has authority over all final decisions. Mr. Rubin has been the District's Associate Superintendent for Human Resources for four years. In his role, he deals with contracts, hiring, discipline, workers' compensation claims, and salary issues. He is also responsible for employee health and safety issues. Mr. Cloney and Mr. Rubin both testified at the hearing about the District's response to the COVID-19 pandemic, implementation of state mandates, and their interactions with respondent.

SUMMER 2021 DISTRICT MESSAGE

6. On July 26, 2021, Mr. Cloney sent an email to all staff conveying the District's intent to follow state public health guidelines for the 2021–22 school year so students could return to in-person instruction five days per week without social distancing mandates. However, there would continue to be masking mandates for indoor instruction. He explained that the District could not ignore the state's mask

mandate and allow students and staff to forgo masks without a medical exemption. He expressed some agreement with and sympathy for the frustration staff felt about masking; however, he reiterated that, after consulting with the Board, legal counsel, and staff unions, that "our only option is to comply with the guidelines" so that the District could fully open and return to in-person instruction.

7. The following day, on July 27, 2021, respondent emailed a four-page letter to Mr. Cloney, Board members, and all staff at Enterprise and Shasta High Schools. He urged Mr. Cloney and the Board to reconsider its position on masking, which respondent felt was detrimental to students. Respondent accused the District of following state guidelines out of fear of litigation and asserted it was unethical to follow legal advice if it did not comport with his assertion of "what policy is *best for students*." (Emphasis in original.[1]) He said, "[f]ollowing inane advice from state authorities is *still* inane, even if they are supposed authorities." Respondent stated, "[t]he risk of a student dying from Covid is virtually zero" and argued that the superintendent and board members should openly defy the mandate. He wrote, "only **401** children ages 0-18 *nationwide* have died of Covid (many of whom had a high risk medical condition or comorbidity) since the beginning of the pandemic." He stated he was "not minimizing this tragedy, but it must be kept in perspective." Respondent suggested immunocompromised children triple-mask, vaccinate, or homeschool.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH GUIDANCE

8. On August 11, 2021, the California Department of Public Health (CDPH) Director and State Public Health Officer Tomás J. Aragón, M.D., Dr.P.H., issued an

[1] All emphases in quotes are original, unless otherwise noted.

order, titled "State Public Health Officer Order of August 11, 2021" (Order). The Order required all public and private kindergarten through grade 12 schools to verify the COVID-19 vaccination status of all workers, maintain records of employee vaccination status, and make available records of vaccination verification to the local health jurisdiction for purposes of case investigation. The Order states:

> California is currently experiencing the fastest increase in COVID-19 cases during the entire pandemic with 22.7 new cases per 100,000 per day, with case rates increasing tenfold since early June. The Delta variant, which is two times more contagious than the original virus, is currently the most common variant causing new infections in California.
>
> [¶] ... [¶]
>
> Vaccination against COVID-19 is the most effective means of preventing infection with the COVID-19 virus, and subsequent transmission and outbreaks.

Furthermore, Section II.C. of the Order states:

> Workers who are not fully vaccinated, or for whom vaccine status is unknown or documentation is not provided, must be considered unvaccinated.

Section III of the Order addressed testing requirements:

A. Asymptomatic **unvaccinated** or incompletely vaccinated workers are **required to undergo** diagnostic screening testing.

B. Workers may be tested with either antigen or molecular tests to satisfy this requirement, but unvaccinated or incompletely vaccinated workers must be tested **at least once weekly** with either PCR testing or antigen testing …

C. Unvaccinated or incompletely vaccinated workers must also observe all other infection control requirements, and are not exempted from the testing requirement even if they have a medical contraindication to vaccination, since they are still potentially able to spread the illness. Previous history of COVID-19 from which the individual recovered more than 90 days earlier, or a previous positive antibody test for COVID-19, **do not** waive this requirement for testing.

[¶] … [¶]

9. The Order was issued pursuant to various Health and Safety Code sections, and took effect on August 12, 2021, at 12:01 a.m. All schools in the District were required to comply with the Order by October 15, 2021. The Order became District policy requiring all District employees to submit proof of vaccination against COVID-19 or undergo weekly diagnostic testing in accordance with the Order. The District required full compliance with the proof of vaccination/testing requirement by October 15, 2021.

10. In late August, around the second week of school, respondent met with Mr. Cloney to discuss his concerns with the District's COVID-19 safety measures. Respondent talked with Mr. Cloney about his objections to masking and concerns about government overreach. He said he had the community's support, so the District should "stand up to the state" and violate state mandates.

OCTOBER 3, 2021 OPEN LETTER

11. On October 3, 2021, respondent sent an open letter to an unknown number of recipients and requested recipients forward it "far and wide throughout Shasta County to parents, educators, and concerned community members."[2] In the letter, respondent wrote, in relevant part:

> I am gravely alarmed by the rapidly increasing government overreach which has occurred in America over the last few years, but I am especially concerned about the most recent government overreach: Covid vaccine mandates for K-12 children and educators.

Respondent also stated, "This mandate is a doorway to more government control in everyone's personal life." Much of respondent's letter focused on his opposition to mandating vaccines for children. In the conclusion of his letter, respondent discussed the impact of mandates upon school staffing in Shasta County:

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[2] Respondent posted a copy of this letter on his blog in December 2021. While respondent's blog posts and social media were admitted into evidence as Exhibit 4, the contents of Exhibit 4 were not relied upon in the Commission's determination.

> What will happen if hundreds of Shasta County educators get fired over this? … Governor Newsom's new mandate will bring education to a standstill in the northstate. According to an article by the Associated Press, "All teachers will have to be vaccinated when the mandate kicks in for the children they teach," which is expected for high school within the next few months. Many educators will *not* comply with this mandate, and they will be fired. Schools are already short staffed, desperate for teachers and substitutes. Think education in 2020 was crazy? Just wait. Education in the northstate will utterly collapse once these mandates hit unless we all stand together in defiance of government control …

Respondent stated, "I, for one, will not stand for this control. I will be fired first." In the signature block, respondent listed his name, position, school, and District email.

DISTRICT COMMUNICATIONS REGARDING TESTING

12. On October 7, 2021, Mr. Cloney sent an email titled, "Testing Update," to all District staff. The email informed recipients that testing was mandatory for staff who had not verified their vaccination status ("unverified staff"[3]). Unverified staff who

[3] Unverified staff includes staff who have declined to be vaccinated, as well as vaccinated or partially vaccinated staff who have chosen not to share their COVID-19 vaccination records with the District.

contracted COVID-19 could opt out of testing for 90 days after their documented positive test (90-day policy). The email also stated:

> If you are in unverified status and have not had a COVID test done by the end of the day on Friday, [October 15th,] you will be ineligible to report to work on Monday, October 18th. Staff who are ineligible to report to work on the 18th will be provided information on how to test on the 18th in order to return to work the next day. Staff who remain ineligible to return to work will be contacted individually regarding their circumstances.

13. That evening, respondent participated in a Facebook Live video in which he echoed the points from his October 3 letter. He stated that, "I just decided that the mandates and the government control was overreaching" and predicted that Shasta County would "lose a lot of teachers." He demonstrated an understanding of the professional consequences of his choice to refuse testing: "If you don't test, you're going to be put on administrative leave on October 18th."

14. Mr. Rubin emailed respondent on October 8, 2021, notifying him that he was unverified and informing him about the testing schedule at Enterprise High School. He wrote, "This week's testing is **mandatory** and we appreciate your understanding through this process." On following Monday, October 11, 2021, Mr. Rubin reminded unverified staff, including respondent, about the dates and times of testing for the week of October 11 and provided paperwork for the District's testing provider, Lab 24. Respondent failed to submit to testing as required.

OCTOBER 15, 2021 WARNING LETTER

15. On October 15, 2021, Mr. Rubin emailed respondent a warning letter stating that he violated a District requirement by failing to participate in testing. It stated: "Your failure to participate in District provided COVID-19 surveillance testing created an unsafe environment for students and co-workers, as they may have had exposure to harm due to your failure to participate in testing." The letter further directed respondent not to enter his work site on October 18, 2021, and placed him on paid administrative leave unless he tested by the end of the working day on October 15, 2021. Respondent was also directed to test either at Lab 24 or at the District office on October 18, 2021, then notify Mr. Rubin. The letter added, "Continued noncompliance with the above directives will result in further disciplinary action, up to and including a recommendation for termination."

16. On October 18, 2021, Mr. Rubin sent an email to unverified staff, including respondent, regarding the testing locations and times for the week of October 18. That afternoon, Mr. Rubin sent another email specifically to respondent because respondent had not informed him whether he would be testing that day at Lab 24 or at the District office, as required by the warning letter.

LETTERS OF REPRIMAND

17. On October 18, 2021, Mr. Rubin sent respondent a letter of reprimand. He noted respondent's failure to participate in testing during the week of October 11, 2021, and on October 18, 2021. The letter informed respondent that his conduct violated the October 15 letter's directive and "caused the shifting of duties to other employees, causing an increased workload and related staff morale problems." Respondent was to test on October 18, 2021, or he would be placed on paid

administrative leave for the next two days. He was also directed to test on October 19 or 20, 2021, and notify Mr. Rubin once he tested. Continued noncompliance with the testing requirement would result in discipline, up to and including termination.

18. That evening, respondent participated in an interview on Fox News. He said: "I am on administrative leave today and I will be going forward, and then I'll be fired. … I'm just standing on my principles. I believe in natural immunity." Respondent did not express any stipulation in which he would return to the classroom and indicated that he told his students that he would not be returning to the classroom.

19. On October 20, 2021, Mr. Rubin sent respondent a second letter of reprimand. This letter informed respondent that he violated the directives in the October 18 letter to test on October 19 or 20, 2021. This noncompliance "caused the District the need to provide for the employment of substitute employees, resulting in additional cost to the district, school, or department." It further added that respondent must test by 4:00 p.m. on October 20, 2021, or he would continue to be ineligible for his work duties. Mr. Rubin placed respondent on paid administrative leave and directed him to report to the District office on October 21, 2021. If respondent reconsidered his position, he was directed to test at Lab 24 and notify Mr. Rubin.

20. On October 21, 2021, respondent, Mr. Rubin, Mr. Cloney, and respondent's union representative met on Zoom to discuss respondent's failure to test. The meeting discussed the impending disciplinary action against respondent based on his refusal to participate in mandatory weekly COVID testing and a timeline for his termination based on that refusal.

CONTESTATION OF THE OCTOBER 15 WARNING LETTER

21. On October 22, 2021, respondent wrote a letter of contestation regarding the warning letter. Respondent explained his view that testing unverified staff was discriminatory because verified staff were not tested, even though they could spread COVID-19. He further argued that testing violated the Fourth Amendment and that the District's assertion that he created an unsafe environment "violate[d] the legal principle of innocent until proven guilty." He cited to *Taylor v. Kentucky* (1978) 436 U.S. 478, for the principle that the District was required "to prove, beyond a reasonable doubt, that employees are unsafe." Respondent offered "to provid[e] the district with an antibody test showing natural immunity and a weekly 'spit test' that is non-invasive."[4]

22. On October 25, 2021, Mr. Rubin replied that the District was not considering antibody tests at that time. Additionally, Mr. Rubin offered respondent the opportunity to take a saliva test as a reasonable accommodation with a medical note.

CONTESTATION OF THE LETTERS OF REPRIMAND

23. On October 24, 2021, respondent sent Mr. Rubin two letters of contestation regarding the letters of reprimand. He directed Mr. Rubin to his October 22 letter and wrote, in relevant part:

> the directive to participate in COVID-19 surveillance testing was discriminatory and violated my 4th amendment right to

[4] Respondent refers to a saliva test as a "spit test." The terms are used interchangeably throughout this decision.

> be secure in my person from unreasonable searches. It also violated basic jurisprudence set forth by the Supreme Court.
>
> The claim that I caused shifting duties, increased workload, and staff morale problems is therefore invalid. It was the district who chose to discriminate and violate my rights, and it was the district that chose to remove a fully qualified and capable employee from campus. If I had a choice in the matter, and if my rights were not violated, I would have been present on campus, ready to fulfill all my duties as a teacher, just as I have been, faithfully, for the past eight (8) years now.
>
> Because the district has violated my right and made ill-founded claims about my personal health and implied that I have been a source of burden on the district, it has put undue mental and emotional stress upon myself and my family.
>
> [¶] … [¶]
>
> My reasonable offer to provide the district with an antibody test and a weekly non-invasive spit test still stands. Thank you for considering my position.

Respondent's second letter asserted the same theories as his first letter.

NOVEMBER 2021 THROUGH JANUARY 2022

24. Respondent took medical leave from late October through mid-December. In December 2021, respondent submitted an antibody test to the District. On December 19, 2021, Mr. Rubin emailed respondent about the antibody test and inquired if respondent had a positive COVID-19 test for the 90-day policy. He offered respondent the opportunity to return to work, stating that "[p]reviously you mentioned in a letter that you would be open to testing. If that's still accurate, then you could participate in the weekly testing that the district is using."

25. Respondent replied later that evening that he did not have a positive COVID-19 test, only an antibody test from recent bloodwork. He wrote:

> On principle, I think the Covid swab is invasive and an unreasonable search (4th Amendment) for anyone without symptoms and especially people with natural immunity. Plus, it's discriminatory to test only unvaccinated staff when vaccinated people spread Covid too. However, I'd be happy to return to work if you'd accept natural immunity as a substitute for weekly testing. Scientifically, I'm safe from infecting others or being infected myself, so there's no real liability for the school.

26. On December 20, 2021, Mr. Rubin replied that the District still required weekly testing for unverified staff. He repeated that respondent could seek a reasonable accommodation by providing a doctor's note for saliva testing, stating, "we can definitely make that accommodation for you and get you back in your classroom."

27. Two weeks later, on January 4, 2022, respondent emailed Mr. Rubin declining the offer for a reasonable accommodation. The email stated, in relevant part:

> I currently don't have any medical condition (to my knowledge) that would prevent me from taking a nasal swab -- I just think it's unconstitutional -- so I don't think I could get a doctor's note for that. Also, because I see testing only unvaccinated staff as discriminatory, the only way I could in good conscience take a weekly test is if the district had the whole staff take a weekly non-invasive spit test as well. That way it wouldn't discriminate between unvaccinated and vaccinated staff and it wouldn't be an invasive test. I hope this is an option the district would consider. If this is not something the district is willing to do, sadly, I think we've reached an impasse.

DISTRICT TESTING POLICIES, ACCOMMODATIONS, AND STAFFING

28. After CDPH promulgated the Order in August, Mr. Cloney worked to figure out the contours of compliance. He participated in webinars, contacted the CDPH to ask questions, and met with on-site administration, nursing staff, human resources staff, and three labor groups. His top priority was keeping schools open for in-person instruction, which he thought was in students' best interests. Mr. Cloney also cared about being a good steward of District resources and funds. He used COVID-19 funding to purchase more protective equipment and cleaning materials for students and staff, pay extra hours for nursing staff, provide extra sections to reduce class sizes, and increase pay for substitutes and staff who agreed to substitute during preparatory

periods. There was significant funding for COVID-19 measures; however, that funding was not unlimited.

29. About one-third (150 of 450) of District staff were unverified. At first, the District contracted with Lab 24 to provide weekly nasal swab COVID-19 tests at a subsidized rate of $50 per test. Around December 2021, the District switched to Color as their testing provider. The state provided Color tests for free, and the District only paid shipping. As of summer 2022, staff could choose to take tests at home and provide their results to the District, or they could test at school during the workday and get coverage for their classes.

30. Mr. Rubin received medical notes from seven staff members who requested a reasonable accommodation to take a saliva test instead of a nasal swab test. He researched which saliva tests would satisfy state requirements and concluded that CRL Rapid Response tests met the necessary criteria. He ordered those tests online through Walmart at the rate of $99 per test, which the District pays. The District did not provide saliva tests for all unverified staff because the saliva tests cost twice as much as Lab 24 nasal swab tests and were not free like the Color tests. The cost of complying with respondent's January 2022 demand to saliva test all 450 employees weekly during the 2021–22 school year would have cost $44,550 per week, which the District felt posed an undue financial hardship. Antibody testing was not an option permitted by the Order.

31. Mr. Rubin admits that the District's testing program was not without fault. The District struggled to keep track of which unverified staff were required to test, who was quarantining, and who was exempt based on the 90-day policy. Nevertheless, the District did not deliberately overlook or ignore any staff who have refused to test. Once the District knew an unverified staff member failed to test, the

administration contacted that person to test or sent the employee home. Unverified staff who refused to test were subject to disciplinary action.

32. Approximately six staff members, including respondent, expressly refused to take District-provided tests. Two unverified district staff chose to purchase their own tests rather than rely on the District's. These employees complied with the Order by testing with personal medical providers and submitting time-stamped test results to the District. Three other unverified staff refused to test. Each of these three employees chose to resign rather than be dismissed.

33. COVID-19 testing created staffing challenges for the District because staff who test positive must isolate and those in contact with positive staff members must quarantine. Over 250 District employees have tested positive for COVID-19. Some have been hospitalized because of the virus, but there are no reported deaths. District staff have taken on additional duties to cover staffing shortages. Mr. Rubin has served as a substitute teacher during emergencies, as have high school counselors.

34. The District never exceeded the minimum precautions imposed by state laws and regulations. Once a safety measure was no longer mandated, like social distancing or face masks, the District no longer required compliance.

35. Mr. Rubin does not believe that it is immoral to be unverified, refuse a nasal swab test, or request an alternative test. He thinks that endangering others and making choices that create an unsafe environment for students and coworkers is immoral. He also believes that employees should not be punished for free speech. Although there were no complaints about respondent's teaching or negative performance evaluations, Mr. Rubin believes termination is warranted here. The District

tried to work with respondent on numerous occasions, but respondent refused to comply. The District must follow the law.

Respondent's Evidence

36. Respondent worked as an English teacher at Enterprise High School since 2012. He enjoyed his interactions with students and building relationships with students and colleagues. He characterized his teaching style as "firm, but fair."

37. Early in the pandemic, respondent had a throat swab test and learned that he had antibodies from a prior COVID-19 infection. In his opinion, antibodies permanently protect him and offer natural immunity to COVID-19. He recognizes that antibody levels fluctuate with time, but believes they offer a broader spectrum of protection than vaccination. Similarly, he recognizes that he can get re-infected with COVID-19 even if he has antibodies.

38. Respondent finds a nasal test invasive because he does not like the feeling of an object entering his nose. He has never undergone a nasal swab test, but he stuck Q-tips up his nose in the past and found the sensation unpleasant. Respondent also does not like feeling like he is "an other" and being treated differently than his colleagues.

39. Respondent does not have a medical condition that causes his aversion to nasal swabs. He discussed getting a medical note with his nurse practitioner in November 2021, but he did not actively pursue or provide a note for an exemption to the nasal swab process. Respondent was familiar with the District's policies on reasonable accommodation because he previously provided a doctor's note to receive a mask exemption. On that issue, he found a doctor online to provide him with a medical note so he could work unmasked. Additionally, respondent shared that his

medical leave from October to December 2021 was caused by the stress he felt from COVID-19 testing. Had the District allowed him to do a saliva test in October 2021, he would have immediately returned from medical leave.

40. Respondent does not find a blood draw to be invasive because he gets bloodwork done every few years at his doctor's office. He believes his antibodies, plus a saliva test, would have been sufficient to protect his students. He does not know exactly what a saliva test entails and assumes it involves spitting on a piece of paper. Respondent testified that he was still willing to take a saliva test in December and January but neglected to mention it to Mr. Rubin. He "assumed that [Mr. Rubin] knew" about his willingness to test based on his October communications.

41. Respondent has no education, training, or work experience in medicine, immunology, virology, epidemiology, or science more broadly. He never inquired whether his students, their guardians, or fellow staff were immunocompromised. He got his information on the pandemic from Dr. Pierre Kory and the Brownstone Institute, a nongovernmental organization. Respondent took some courses related to constitutional law in college but was unfamiliar with the sole case he cited in support of his constitutional objections, *Taylor v. Kentucky* (1978) 436 U.S. 478.[5] He thinks he may have cited the wrong case but stands by his interpretation of Fourth Amendment jurisprudence and believes the District needed to obtain a warrant to test him.

[5] In *Taylor v. Kentucky* (1978) 436 U.S. 478, the Supreme Court held that failure to give a jury instruction on the presumption of innocence violated a defendant's right to fair criminal trial for his second-degree robbery charge.

Regarding his discrimination claim, he could not identify a protected class of which he was a member.

42. Respondent feels strongly about the issue of government overreach. He "tries to keep [his] views out of the classroom." He believes that his discipline could be related to his political views because other employees evaded testing.

43. At hearing, respondent's reason for refusing to test departed from the position he expressed from October 2021 through January 2022. He now asserts that the only reason he did not test was because he wanted the District to pay for his saliva test. He never addressed this issue in his communications with the District and did not inquire about the cost of saliva tests or whether he could pay the difference between a nasal swab and saliva test. His still prefers not to test.

TESTIMONY FROM COLLEAGUES

44. Three of respondent's colleagues at the Enterprise High School testified on his behalf. They all were aware of the allegations against respondent. Matthew Garrett and Amy Garrett testified about respondent's teaching fitness. Tonya Waterman testified about her experience being an unverified staff member.

45. Mr. Garrett has worked at Enterprise High School as an English teacher since 2003. He first met respondent about 10 years ago at Simpson University, where Mr. Garrett taught respondent in the credential program. Respondent then served as Mr. Garrett's student teacher. He believes that respondent is a dedicated teacher whose style creates dialogue and facilitates conversation. When respondent assisted in developing the curriculum for sophomore English classes, his presence helped offer a "younger perspective." Mr. Garrett finds respondent's lesson plans to be engaging and believes him to be "probably the best teacher in the Department."

46. Mrs. Garrett has taught in the English Department at Enterprise High School since 2003. She has known respondent for about nine years since he served as her student teacher. She also knows respondent socially. Mrs. Garrett praised respondent's willingness "to jump right in," take risks, and be consistent, fair, and thorough. She found respondent to be "the best student teacher" out of the six or seven with whom she worked.

47. Tonya Waterman has worked at Enterprise High School for 10 years. Respondent is her coworker and friend. She is an unverified staff member and did not test in January through May. However, once she returned from a vacation, the District emailed her about her need to test and she tested twice before the end of the school year. She had previously received reminders to test but ignored them. She did not tell the District that she was unwilling to test or refuse a directive to test.

Analysis

48. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*), the California Supreme Court provided a list of factors for assessing a person's fitness to teach. The inquiry can be summarized as follows:

> In determining whether the conduct indicates an unfitness to practice the profession in question the board "may consider" such matters as: (1) the likelihood that the conduct may have adversely affected others and the degree of such adversity anticipated; (2) the proximity or remoteness in time of the conduct; (3) the type of certification held by the party involved; (4) the extenuating or aggravating circumstances, if any, surrounding the

> conduct; (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (6) the likelihood of the recurrence of the questioned conduct; and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the person involved or other people in the profession.

(*Ricasa v. Office of Administrative Hearings* (2018) 31 Cal.App.5th 262, 285 [citing *Morrison*, *supra*, at p. 229].)

49. "The [*Morrison*] factors are not rules, but broad classes of issues to be considered to assist in determining whether to impose discipline." (*Ricasa*, *supra*, 31 Cal.App.5th 262 at p. 285.) "Only the relevant factors need to be analyzed." (*Ibid.*) The factors may be applied in the aggregate, considering the totality of offensive conduct. (*Woodland Joint Unified School Dist. v. Com. on Professional Competence* (1992) 2 Cal.App.4th 1429, 1456–1457 (*Woodland*) ["When a camel's back is broken we need not weigh each straw in its load to see which one could have done the deed."].)

LIKELIHOOD OF ADVERSE IMPACT

50. Respondent's persistent rule violations and refusal to perform his assignments without reasonable cause likely caused an adverse impact on students and colleagues. For example, he taught while refusing to take precautions to prevent transmission until the District ordered him off-campus. Afterwards, his students were taught by substitute teachers, who may not have any experience in teaching English, rather than a full-time credentialed English teacher. In sum, he prioritized his personal agenda over student health and learning.

51. Moreover, respondent willfully violated Health and Safety regulations set forth in the Order, encouraged others to break the law, and undermined the District's authority to enact policies to safeguard in-person instruction. Administrators had to devote an inordinate amount of time to addressing respondent's refusal to follow policy or provide a medical note justifying his inability to do so. Respondent's absence caused an increased workload for the staff and substitutes who taught his courses. Meanwhile, respondent disparaged the District's motives for following state law.

52. Additionally, respondent's apathy towards immunocompromised students and their right to receive a public education shows a profound indifference to the rights of protected classes (people with disabilities or medical conditions like cancer). While he dismisses the risks faced by those with medical conditions, the District may find protecting the health and safety of all students and staff to be a compelling interest. Moreover, respondent showed no consideration of the school's liability if he infected another staff member or student. Instead, he asserted that he would not hold the school liable if he got sick and argued, without citing any scientific evidence, that he was immune from infecting others or being infected himself. The District rightfully deferred to the guidance of CDPH, legal counsel, and staff unions, rather than relying on the unsupported argument of an individual with no legal or scientific training.

DEGREE OF ADVERSITY ANTICIPATED

53. Respondent repeatedly demonstrated that he understood the outcomes of his choices. In his open letter, respondent predicted that "[e]ducation in the northstate will utterly collapse" under vaccine mandates because educators would not comply. He knew that schools were "already short staffed, desperate for teachers and substitutes." He committed that he would "be fired first." Respondent was aware that

refusing to test meant he would not be allowed to teach, and he hoped to use the District's staffing shortage to force the District to yield to his demands.

PROXIMITY OF REMOTENESS IN TIME

54. Respondent's misconduct took place repeatedly in October 2021, then recurred in December 2021 and January 2022. The behavior is recent and was promptly charged by the District after a progressive discipline process.

TYPE OF TEACHING CERTIFICATE

55. Respondent is a high school English teacher. It is one of the core subjects that students are required to complete over all four years of high school. This factor does not weigh for or against respondent's fitness to teach.

EXTENUATING OR AGGRAVATING CIRCUMSTANCES

56. There was no evidence of justification for respondent's misconduct. Independent acts of deception by respondent's colleagues do not alter his culpability. Similarly, respondent's misunderstanding of constitutional law does not justify his actions. A cursory inquiry into Fourth Amendment jurisprudence would have revealed to respondent that the Constitution does not cater to idiosyncratic preferences.[6] Had

[6] Decades of established precedent have permitted warrantless searches of employees and "special needs" searches within public schools when there is a compelling safety interest. (See *Skinner v. Railway Labor Executives' Ass'n* (1989) 489 U.S. 602, 627 [an employee's expectation of privacy diminishes when he participates in "an industry that is regulated pervasively to ensure safety"]; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 656 ["Fourth Amendment rights … are different in public

he researched, rather than assuming the correctness of his beliefs, he would have found that the Fourth Amendment "does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 654.) Moreover, his reliance on *Taylor v. Kentucky* (1978) 436 U.S. 478, illustrates a serious lack of critical thought and an inability to understand the difference between feeling persecuted and being criminally prosecuted.

PRAISEWORTHINESS OR BLAMEWORTHINESS OF THE MOTIVES

57. Respondent claims he was motivated to respond to unlawful discrimination. Yet there is no evidence that respondent was a member of a protected class, or that the District retaliated against him because of protected speech, rather than his refusal to test. Indeed, respondent spoke frequently about his beliefs and received no ill treatment until he chose to disobey multiple directives to comply with state law. Additionally, there are well-established methods to protect oneself from unlawful discrimination, such as seeking an injunction from a court of law or filing a union grievance. Respondent cannot deflect responsibility for his choices by claiming a benevolent motive unmoored from reality.[7]

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schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."].)

[7] See, e.g., *Does 1-3 v. Mills* (2021) 142 S.Ct. 17 (denying an application for injunctive relief from unvaccinated healthcare workers challenging Maine's vaccine mandate); *Klaassen v. Trustees of Indiana University* (7th Cir. 2021) 7 F.4th 592, 593,

58. Similarly, respondent cannot usurp the state's role to ground policy decisions in scientific evidence rather than opinion. Respondent first sought special treatment based on his view of what constituted an "invasive test," then pushed to dictate who would be subject to testing and the test they would take. From his own statements, respondent's motive was not grounded in a desire to protect students, but rather to alleviate his feelings of persecution. Such a motive falls far short of praiseworthiness.

LIKELIHOOD OF RECURRENCE

59. Respondent has not acknowledged any wrongdoing. Rather than admit his mistakes, respondent has pivoted to a new explanation of his conduct—one he never articulated during the relevant period. He now argues that the sole issue preventing him from testing was desire for the District to pay the cost of saliva testing. Respondent's new reason is not credible considering the ample evidence showing that his real reason was "government overreach." He was unwilling or unable to concede his position, despite the District's numerous attempts to work with him, educate him about rules and regulations, and offer him opportunities to correct his behavior. Indeed, in his last communications before the initial Statement of Charges, respondent expanded his demands and refused to test unless the District required verified and unverified staff members to participate in saliva testing.

60. Consistent with respondent's view that he is without fault in this matter, he did not demonstrate rehabilitation or provide sufficient evidence to ensure he

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app. denied ("These plaintiffs just need to wear masks and be tested, requirements that are not constitutionally problematic.").

would not engage in similar misconduct in the future. Thus, the likelihood that respondent's misconduct will recur is substantial. Returning him to employment with the District presents the risk that respondent could be on paid administrative leave indefinitely because he views himself to be exempt from directives he disfavors.

CHILLING EFFECT OF DISCIPLINE

61. Respondent asserted that his dismissal could have been based on his political speech. To the extent other teachers or District employees perceive respondent's dismissal as being the result of those activities, it could dissuade them for engaging in protected activity for fear of retribution. However, there is little actual evidence that respondent's dismissal could have an adverse or chilling effect upon his constitutional rights or the constitutional rights of other teachers.

62. The facts of this matter show that respondent's discipline arose from his willful conduct, rather than protected speech. Respondent received no discipline until he directly violated an order from his superiors to test. The warning letter and letters of reprimand make clear that respondent's failure to test is the problem, not his personal beliefs. Indeed, Mr. Cloney's July 2021 email expressed agreement with and sympathy for staff frustration with safety requirements. Even to the extent that respondent's letters, media interviews, blog posts, and social media factored into the District's decision to terminate, the weight of the *Morrison* factors supports dismissal. (See, e.g., *Crawford v. Com. on Professional Competence of Jurupa Unified School District* (2020) 53 Cal.App.5th 327, 343 [finding that the *Morrison* factors supported dismissing a teacher solely based on social media comments].)

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The "burden of proof" means the obligation of a party, if he or she is to prevail on a particular fact, to establish by evidence a requisite degree of belief or conviction concerning such fact. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1128.) Here, the District bears the burden of proving the charging allegations.

2. The standard of proof in this proceeding is a preponderance of the evidence. (*Gardner v. Com. on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039–1040; Evid. Code, § 115.) "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.'" (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000) [internal citation omitted].)

Applicable Law

3. A permanent District employee may be dismissed for cause only after a dismissal hearing. (Ed. Code, §§ 44932, 44934, and 44944.) Under Education Code section 44944, subdivision (c), the dismissal hearing must be conducted by a three-member Commission on Professional Competence. Two members of the Commission must be non-district teachers, one chosen by the respondent and one by the district,

and the third member of the Commission must be an administrative law judge from the Office of Administrative Hearings.

4. When a school board recommends dismissal for cause, the Commission may only vote for or against it. The Commission may not dispose of a charge of dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (d)(1)(3).) The Commission's decision "shall not be based on nonsubstantive procedural errors committed by the school district or governing board of the school district unless the errors are prejudicial errors." (Ed. Code, § 44944, subd. (d)(2).)

Cause for Discipline

IMMORAL CONDUCT

5. Under Education Code section 44932, subdivision (a)(1), a school district may discipline a permanent certificated employee for immoral conduct. For dismissal of a teacher, immoral conduct is defined as conduct that:

> 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 wil[l]ful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.

(*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.)

6. A teacher is often described as "an exemplar, whose words and actions are likely to be followed by the children coming under [the teacher's] care and protection." (*Palo Verde etc. Sch. Dist. v. Hensey* (1970) 9 Cal.App.3d 967, 970.) Here, respondent's actions showed indifference to vulnerable members of his community, disrespect for his administration, and a lack of consideration towards good order and the public welfare. Respondent dismissed the knowledge and expertise of those with education and training he lacked, insisting that his perspective was correct in the face of overwhelming evidence to the contrary. Moreover, he lacked empathy, a crucial value for teachers to instill in their students, when he focused solely on his own health and preferences. Accordingly, the District established cause to dismiss respondent under Education Code section 44932, subdivision (a)(1).

DISHONESTY

7. Under Education Code section 44932, subdivision (a)(4), a school district may discipline a permanent certificated employee for "dishonesty." Dishonesty is "lack of honesty or integrity," or a "disposition to defraud or deceive." (Merriam-Webster.com Dictionary, *Dishonesty*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/dishonesty> [as of July 14, 2022].) "Dishonesty necessarily includes the element of bad faith." (*Small v. Smith* (1971) 16 Cal.App.3d 450, 456.) "[I]t means fraud, deception, betrayal, faithlessness; an absence of integrity; a disposition to cheat, deceive or defraud; deceive and betray." (*Ibid.*)

8. The evidence does not show that respondent was dishonest. Throughout the relevant period, respondent openly refused to test rather than engage in surreptitious testing avoidance. He did not intend to deceive the District about his willingness to participating in COVID-19 testing when he agreed to District employment in August 2012, nine years before COVID-19 testing was required. The

District failed to establish cause to dismiss respondent under Education Code section 44932, subdivision (a)(4).

EVIDENT UNFITNESS

9. Under Education Code section 44932, subdivision (a)(6), a school district may discipline a permanent certificated employee for "evident unfitness for service." The term "evident unfitness for service," means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." (*Woodland, supra*, 2 Cal.App.4th 1429, at p. 1444.) 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.*)

10. The evidence shows that respondent is committed to his position and unwilling to change, even when presented with notice of his misconduct. He places his own preferences and aversions above the safety and education of his students and the needs of his District. In sum, his willingness to jeopardize student learning to further a personal agenda makes him unsuitable for the profession of teaching. The District established cause to dismiss respondent under Education Code section 44932, subdivision (a)(6).

PERSISTENT VIOLATION OF LAWS AND REGULATIONS

11. Under Education Code section 44932, subdivision (a)(8), a school district may discipline a permanent certificated employee for "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." This requires a "showing of intentional and continual refusal to cooperate." (*San Dieguito Union High School*

District v. Com. on Professional Competence (1985) 174 Cal.App.3d 1176, 1196.) Persistence requires a showing of "continuing or constant" behavior. (*Governing Bd. of the Oakdale Union School District v. Seaman* (1972) 28 Cal.App.3d 77, 82.)

12. The evidence established that respondent refused to provide the District with proof of vaccination or participate in weekly testing on multiple weeks in October 2021 and again in January 2022, in violation of the Order and Board Policies. His refusal to test or cooperate with the District was intentional and repetitive. The District established cause to dismiss respondent under Education Code section 44932, subdivision (a)(8).

WILLFUL REFUSAL TO PERFORM REGULAR ASSIGNMENTS

13. Under Education Code section 44939, subdivision (b), a school district may immediately suspend a teacher for "willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district." "Although the term 'willful' has no 'single, uniformly applicable' definition, it refers generally to intentional conduct undertaken with knowledge or consciousness of its probable result." (*Patarak v. Williams* (2001) 91 Cal.App.4th 826, 829.)

14. The evidence established that respondent knew he would be unable to perform his regular teaching assignments when he refused to comply with District orders to participate in COVID-19 testing. The District established cause to dismiss respondent under Education Code section 44939, subdivision (b).

Conclusion

15. When the totality of the evidence is considered in light of the *Morrison* factors, the District established cause to dismiss respondent from employment.

ORDER

Respondent Martin Reid is DISMISSED as a permanent certificated employee of the Shasta Union High School District pursuant to Legal Conclusions 1 through 6 and 9 through 15, jointly and individually.

DATED: 08/01/2022

Sara Pasillas
Sara Pasillas (Aug 1, 2022 09:34 PDT)

SARA PASILLAS
Commissioner
Commission on Professional Competence

DATED: 07/28/2022

Jessica Wall
Jessica Wall (Jul 28, 2022 17:02 PDT)

JESSICA WALL
Administrative Law Judge, Chair
Commission on Professional Competence

DISSENT

I respectfully dissent. I believe that the District has not met its burden and that Martin Reid should not be terminated from his employment with the Shasta Union High School District on the grounds of immoral conduct, dishonesty, and evident unfitness for service. I base this conclusion on the following factors. I conclude that Mr. Reid followed all administrative orders other than those that had to do with his body. The District argued that he did not follow the duties of his assignment, but since the COVID-19 pandemic was clearly an unusual occurrence, he could not have foreseen the extent that he would have to comply and give consent to medical treatment beyond the requirements established in his pre-pandemic contract.

The District did not show that Mr. Reid was unfit for service as he did not have a negative evaluation or even a complaint from a parent. In fact, had the pandemic never occurred, Mr. Reid would still be held in high esteem by his district. Clearly, Mr. Reid was only standing up for his beliefs, something we try to teach our students on a daily basis.

As a parent, I would allow my child in his classroom. As a colleague, I understand his conduct and attitude because the State of California presented so many conflicting facts and health directives, it was easy to question the veracity of the experts. As an administrator, I would trust him because he does not politicize his classroom and prides himself on letting students make decisions for themselves.

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Therefore, as a member of this panel, I can in good conscience return Mr. Reid to the classroom, in this or any other district. I recommend Martin Reid not be terminated from the Shasta Union High School District.

DATED: 08/03/2022

Julie O'Brien
Julie O'Brien (Aug 3, 2022 09:24 PDT)

JULIE O'BRIEN
Commissioner
Commission on Professional Competence

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.