

BEFORE THE
COMMISSION ON PROFESSIONAL COMPETENCE
TWIN RIVERS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Dismissal of:

JIMMIE DURHAM,

Respondent.

OAH No. 2012110298

DECISION

This matter was heard before a Commission on Professional Competence (Commission) of the Twin Rivers Unified School District on February 11, 12, 13, and 14, 2013, in Sacramento, California. The Commission members were Rob Kerr, Patrick Cullen-Carroll, and Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, chairperson.

Attorney Elizabeth B. Mori of the law firm Fagen, Friedman & Fulfroost, LLP, represented complainant Twin Rivers Unified School District (District).

Attorney David Weintraub of the law firm Beeson, Tayer & Bodine, APC, represented respondent Jimmie Durham, who was present throughout the hearing.

The Commission met in executive session on February 14 and 15, 2013, the record was closed, and the matter was submitted for decision.

SUMMARY

During Mr. Durham's fifth period P.E. class at Rio Linda High School on October 14, 2011, student A.A. became belligerent and disruptive and refused to follow Mr. Durham's verbal instructions, threatened Mr. Durham with physical violence, and made racial epithets. After A.A. ignored several instructions to "go to the office," Mr. Durham took hold of A.A.'s left upper arm in an effort to redirect him out the door toward the office. In response, A.A. "planted" his rear foot and punched Mr. Durham in the face. A struggle between the two ensued, with Mr. Durham ultimately bringing A.A. to the ground and sitting on top of him until a public safety officer arrived. The incident was captured by the school's video surveillance system. The District seeks to dismiss Mr. Durham from employment based on his conduct on October 14, 2011, alleging that such conduct constitutes immoral conduct,

demonstrates an evident unfitness to teach, and constitutes a persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by the State Board of Education or the District's governing board. For the reasons discussed below, the District did not establish any grounds for terminating Mr. Durham's employment, and the Accusation must be dismissed.

FACTUAL FINDINGS

Jurisdiction

1. The parties stipulated that the Commission has jurisdiction to hear and decide this matter.

Background

2. Mr. Durham was issued a single subject teaching credential in physical education on February 4, 1990. On March 28, 1994, he was issued a specialist instruction credential in special education, with an authorization for learning handicap. He added a supplemental authorization for auto mechanics to his single subject teaching credential on August 11, 2008, and received his Cross-cultural Language and Academic Development Certificate on May 30, 2012.

3. Mr. Durham completed his student teaching with the Elk Grove Unified District during the 1990/1991 school year. The following school year, he began teaching for the former Grant Joint Union High School District. On July 1, 2008, that school district merged with several local elementary school districts to form the Twin Rivers Unified School District, and Mr. Durham continued teaching with the newly formed school district. The 2011/2012 school year was Mr. Durham's third year teaching at Rio Linda High School, one of several high schools within the District. That year, he taught physical education (P.E.). There is no history of prior discipline of Mr. Durham by any of his employers or the California Commission on Teacher Credentialing.

4. A.A. was a student in Mr. Durham's fifth period P.E. class for approximately the first two months of the 2011/2012 school year. That class consisted solely of freshmen students. October 14, 2011, was A.A.'s last day as a student at Rio Linda High School, but no evidence why was introduced.

Surveillance Video of the October 14, 2011 Incident

5. At all times relevant, Rio Linda High School has had a video surveillance system that includes several cameras positioned across the campus.¹ One camera is in the

¹ The surveillance system does not capture audio.

main gym. The view from that camera is from the wall behind the basketball hoop at one end of the basketball court. The foreground is from approximately the middle of the basketball key² for the nearest basketball hoop to the center court line, and from the left sideline to just to the right of the top of the basketball key. The background is from the center court line back to the far wall of the gym behind the baseline, and just beyond either sideline.

6. On October 14, 2011, at approximately 12:31 p.m., an incident occurred in the gym that was caught on video (Incident). The video footage shows that Mr. Durham was standing at mid court along the left baseline facing the opposite wall. In front of him were several of his students, who were beginning to form five rows across the basketball court. Mr. Durham walked across the court to where A.A. was prancing around the court. Mr. Durham talked to A.A. as A.A. pranced away and towards the front of the class. A.A. was punching the palm of his left hand with his right fist as he walked towards the front of the class.

7. When A.A. reached the vicinity of his designated spot for roll call, Mr. Durham reengaged him in conversation. During that conversation, A.A. continued to walk away while punching the palm of his left hand with his right fist as Mr. Durham pointed towards the door at the back of the gym. Mr. Durham then placed the clipboard he was holding on the ground and took ahold of A.A.'s left upper arm. As this occurred, A.A. tried to pull away, "planted" his back foot, and swung his right arm towards Mr. Durham's head. Mr. Durham was able gain control of both of A.A.'s arms and the two began to struggle. Eventually, Mr. Durham rolled A.A. over his (Mr. Durham's) left leg, the two of them fell to the ground, and Mr. Durham turned A.A. onto his stomach and sat on him while holding A.A.'s head, neck, and shoulders. Eventually, Mr. Durham let go of A.A.'s head, neck, and shoulders as he (Mr. Durham) continued to sit on A.A. Scott Yates, the other P.E. teacher who had students in the gym at the time, entered the gym, walked over to where Mr. Durham and A.A. were, watched them for several seconds, and then walked back out of the gym. While he was gone, a student handed A.A. a cellular telephone, and A.A. and Mr. Durham began struggling for the telephone until Mr. Durham was able to take it away. Mr. Yates returned to the gym, walked back to Mr. Durham and handed him a referral form, and then watched as Mr. Durham sat on A.A. until a public safety officer arrived and took A.A. to the office.

The District's Investigation of the Incident

8. The public safety officer brought A.A. to the front office, sat him at a desk, and went into Howard Holcomb's office, a vice principal at Rio Linda High School, and informed him of the Incident. Mr. Holcomb brought A.A. to the school nurse for medical treatment for a cut on his lip. As the nurse was treating A.A., Mr. Holcomb called Edward Delgado, the school's principal, into his (Mr. Holcomb's) office, informed him of the

² The horseshoe-shaped area under a basketball hoop where the players stand during free throws.

Incident, and the two of them watched video footage of the Incident. Afterward, Mr. Delgado interviewed A.A., respondent, and the public safety officer.³ Mr. Holcomb interviewed several students who witnessed the Incident and had come to talk to him about it. He also spoke with other students who he identified from the video as having witnessed the Incident. The school resource officer, a sworn peace officer with the Twin Rivers District Police Department, was also called in to investigate the Incident.

Interview of students

9. Students A.A., J.J., A.W., O.I., S.J., and S.M. were separately interviewed by Mr. Delgado or Mr. Holcomb the afternoon of the Incident and completed written statements.⁴ While all of them agreed that A.A. was misbehaving in class and not following Mr. Durham's instructions, there was disagreement about Mr. Durham's reaction to A.A.'s behavior. A.A., J.J., A.W., and O.I. described A.A. as having tried to comply with Mr. Durham's instructions to sit down, but said A.A. was unable to do so because Mr. Durham was "in his face" and would not allow him to sit down. They believed Mr. Durham took A.A. to the ground without justification. S.J. and S.M., on the other hand, said A.A. tried to hit Mr. Durham and Mr. Durham responded by taking A.A. to the ground. S.M. also overheard A.A. threaten to have his dad "come get" Mr. Durham after school as he was being escorted out of the gym by the public safety officer.

10. Students A.A., J.J., A.W., O.I., S.J., and S.M. were also interviewed by the school resource officer a few days after the Incident. Each provided statements similar to those which they had previously provided to school administrators, except A.A. accused Mr. Durham of making racial epithets and provided a more graphic description of when Mr. Durham took him to the ground, explaining that Mr. Durham picked him up and slammed him on the floor, the wind was knocked out of him, and he could not breathe for a minute.

Additionally, the school resource officer interviewed students D.A. and A.C., neither of whom was previously interviewed by school administrators. Both described A.A. as not listening to Mr. Durham. They also said A.A. took a swing at Mr. Durham when Mr. Durham grabbed A.A.'s left upper arm, although A.C. thought A.A. had actually struck Mr.

³ Mr. Delgado interviewed Mr. Yates the following Wednesday (the Incident occurred on a Friday), but Mr. Yates did not come into the gym until after Mr. Durham was sitting on A.A.

⁴ A.A.'s written statement was admitted for all purposes. The remaining students' written statements were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d). J.J., A.W., and O.I.'s statements were considered to the extent they supplemented or explained information in A.A.'s statement. S.J. and S.M.'s statements were considered to the extent they supplemented or explained their respective hearing testimony, as well as that of Mr. Durham, D.A., L.B., or P.B.

Durham.⁵

Students' hearing testimony

11. Of the students interviewed by school administrators and/or the school resource officer, only S.J., S.M, and D.A. testified at hearing. Additionally, students L.B. and P.B. testified, despite neither having been interviewed. S.J., S.M., and D.A. each testified consistently with his or her previous statement. S.J. and D.A. also testified to hearing A.A. make various threats towards Mr. Durham, such as “if you don’t get out of my face, I’m going to hit you” and “if you touch me, I’ll hit you.” S.M. explained he did not hear what either A.A. or Mr. Durham said because he was too far away from them. He did, however, hear A.A.’s threat to have his father get Mr. Durham after school as A.A. was being escorted out of the gym because he was walking passed S.M. when the threat was made.

L.B. was sitting on his designated spot for roll call when the Incident began and was sitting between Mr. Durham and A.A. just before Mr. Durham placed his clipboard on the ground and took ahold of A.A.’s left upper arm. After Mr. Durham took ahold of A.A.’s arm, A.A. punched Mr. Durham in the face. Mr. Durham then grabbed and restrained A.A. in order to protect himself. P.B. was sitting behind L.B. during the Incident. In fact, A.A. stepped on P.B.’s foot when A.A. planted his back foot shortly before he punched Mr. Durham in the face. P.B.’s testimony was consistent with L.B.’s.

Interview of Mr. Durham

12. On October 14, 2011, at approximately 2:00 p.m., Mr. Delgado interviewed Mr. Durham regarding the Incident. According to Mr. Delgado’s notes of the interview and testimony at the hearing, Mr. Durham reported that A.A. was playing with the badminton nets before fifth period had begun as he had done so consistently the past several days. Mr. Durham approached A.A. and told him to “knock it off.” A.A. responded by repeatedly telling Mr. Durham to “get out of my face nigga, blood.” Mr. Durham told A.A. that he was not going to knock over the nets, talk ghetto in class, or disrespect the teacher. A.A. then threatened to have his father come to school and “kick” Mr. Durham’s “ass.” A.A. then told Mr. Durham “I’ll hit you,” to which Mr. Durham responded “then you better take your best shot.” Mr. Durham then took ahold of A.A.’s left upper arm in an effort to guide him out of the gym and towards the office and said, “You better get out of here.” A.A. responded by swinging his right arm towards Mr. Durham’s head once and then swinging his arm to break free. Mr. Durham was eventually able to gain control of both of A.A.’s arms and the two

⁵ The school resource officer’s written report was admitted pursuant to the California Supreme Court’s decision in *Lake v. Reed* (1997) 16 Cal.4th 448. Therefore, A.A., J.J., A.W., and O.I.’s statements were considered as administrative hearsay to the extent they supplemented or explained A.A.’s previous written statement. S.J., S.M., D.A. and A.C.’s statements were considered as administrative hearsay to the extent they supplemented or explained either of their hearing testimony or that of Mr. Durham, D.A., L.B., or P.B.

struggled until Mr. Durham took A.A. to the ground in a “wrestling move.” As Mr. Durham held A.A. on the ground while waiting for the public safety officer to arrive, A.A. pulled his cellular telephone out and Mr. Durham took it away. As the public safety officer escorted A.A. out of the gym, A.A. again threatened Mr. Durham by stating that his (A.A.’s) father was going to “get” Mr. Durham after school.

13. At the conclusion of the interview, Mr. Delgado handed Mr. Durham notice that he (Mr. Durham) was immediately “placed on paid administrative leave pending an investigation” of the Incident. Mr. Durham promptly left campus, and has not been back since.⁶

Mr. Durham’s hearing testimony

14. At hearing, Mr. Durham testified consistently with Mr. Delgado’s notes from the interview and hearing testimony. Mr. Durham also explained that he first met A.A. at the beginning of the 2011/2012 school year because A.A. was assigned to his fifth period P.E. class. He also explained that he had previously referred A.A. to the office on many occasions prior to the Incident for not dressing in gym clothes and for running in the pool facility during class. On one occasion when A.A. did not have his gym clothes, he asked to borrow a set from Mr. Durham.⁷ When Mr. Durham explained that he was out of gym clothes in A.A.’s size, A.A. began to yell and bang his hands on the glass of the teachers’ office in the locker room. There were other instances when A.A. would run by the office, yell, and pound on the glass for no apparent reason.

15. Mr. Durham was shown the video of the Incident and asked to explain what happened. The video begins shortly after he called his class to gather for roll call. His class is in the foreground and can be seen gathering on their designated spots for roll call, which are arranged alphabetically by last name with the “A’s” gathering along the center court line. Mr. Durham looked up and saw A.A. playing with the badminton nets. Mr. Durham walked over to A.A. and told him to stop playing with the nets. As A.A. was prancing around the court, he repeatedly told Mr. Durham to “get out of my face nigga, blood.” Mr. Durham told A.A. not to call him (Mr. Durham) “blood” and said he was not A.A.’s “blood.” As A.A. continued, Mr. Durham told him to “go to the office.” As Mr. Durham walked back to the front of the class to take roll call, A.A. walked next to him and repeatedly punched the palm

⁶ On October 18, 2011, Mr. Durham voluntarily appeared at the Twin Rivers District Police Department. Before answering any questions about the Incident, however, he asserted his constitutional right to speak with an attorney before answering any questions. No negative inference is drawn from his assertion of such right. (Evid. Code, § 913, subd. (a) [“... no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter as issue in the proceeding.”])

⁷ The school keeps a few sets of “loaner” gym clothes for students to borrow when they forget their own.

of his left hand with his right fist while threatening to have his dad come after school to “take care of” Mr. Durham. Mr. Durham repeatedly told A.A. to go to the office.

When the two of them reached near the front of the class, A.A. said something that Mr. Durham could not make out that prompted him to turn towards A.A. A.A. then told Mr. Durham, “Get out of my face nigga, blood.” Mr. Durham told A.A. that such language was unacceptable in his class and not to use it. Mr. Durham again told A.A. to go to the office, which A.A. refused to do and again began punching the palm of his left hand with his right fist while stating that if Mr. Durham did not get out of his (A.A.’s) face, he (A.A.) was going to hit him. Based on the totality of A.A.’s behavior up to that point, Mr. Durham thought A.A. was going to hit him and decided to “redirect” A.A.’s behavior. Mr. Durham placed his clipboard on the ground in case A.A. tried to hit him and took ahold of A.A.’s left upper arm in an effort to “nudge” him toward the door to get him to leave for the office. At that point, A.A. “planted” his back foot and swung his right arm at Mr. Durham. Mr. Durham caught A.A.’s right arm and once he had control of both arms, Mr. Durham “took [A.A.] down with a wrestling move.”

Even after Mr. Durham got A.A. face down on the ground, A.A. was still trying to elbow and hit Mr. Durham, so Mr. Durham sat on A.A.’s back to keep from getting hit. Mr. Durham also put his hand on A.A.’s head, shoulder, and neck to keep from getting “headbutted.” Once A.A. stopping trying to hit and elbow Mr. Durham, Mr. Durham sat up on A.A. and waited for security. But when he saw A.A. trying to make a call on a cellular telephone, Mr. Durham remembered A.A.’s repeated threats to call his father and decided to take the telephone away. The two struggled until Mr. Durham was able to get the telephone away from A.A. The public safety officer arrived and took A.A. to the front office.

16. After watching the video at hearing, Mr. Durham explained that in hindsight he should have handled the situation differently. When asked how he should have handled the Incident, Mr. Durham explained that he should have let go of A.A.’s arm as soon as A.A. threw his right arm, backed up five or ten feet, and waited to see how A.A. responded. If A.A. approached and attacked, Mr. Durham said he would have responded one way. If A.A. attacked another student, Mr. Durham said he would have responded another way. But Mr. Durham said it all happened so fast, and he “wish[ed] it didn’t happen at all.” He had never been in an altercation with a student, and he had never been trained on how to handle violent students.

Evaluation of the Evidence

17. The evidence established that Mr. Durham’s description of the Incident as outlined in Factual Findings 12 and 15, and as supplemented by the hearing testimony of the students described in Factual Finding 11, is the more credible and persuasive description of what had actually occurred.

18. To the extent there was evidence contrary to the findings in Factual Finding 17, such evidence was not credible. A.A.’s statement to Mr. Delgado contained descriptions

of purported acts of violence by Mr. Durham that A.A. failed to describe to the school resource officer – Mr. Durham tried to “slame [*sic*] my face” and “chock [*sic*] me out.” Furthermore, there was no independent evidence of those alleged acts. And when A.A. spoke to the school resource officer, he provided a much more graphic description of when Mr. Durham took him to the ground, explaining that Mr. Durham picked A.A. up off the ground and slammed him on the floor, the wind was knocked out of him, and he could not breathe for a minute. Neither the video nor any witnesses corroborated A.A.’s description of events.

The statements by J.J., A.W., and O.I. differed from Mr. Durham’s description of the Incident, none of those students testified at hearing and, therefore, their credibility could not be assessed. S.J. and S.M., on the other hand, testified at hearing, and their testimony was credible. And while S.J. provided a more detailed description of events at hearing, she explained that her loyalties were torn when she was interviewed by Mr. Holcomb because A.A. had previously defended her from another student. She further explained that she initially did not want to get A.A. in trouble and decided not to provide a lot of detail to Mr. Holcomb. She was adamant, however, that she did not lie to Mr. Holcomb. S.J.’s explanation was credible. L.B. and P.B. also testified at hearing, and both were credible witnesses. L.B. was physically located in the best position to see whether A.A. actually hit Mr. Durham, and L.B. was adamant that A.A. hit Mr. Durham in the face and Mr. Durham took A.A. to the ground in response. P.B.’s testimony was similar to L.B.’s.

Fitness to Teach

19. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, the California Supreme Court identified the following eight factors to be considered in determining whether a teacher’s conduct indicates an 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 teacher; 5) the extenuating or aggravating circumstances, if any, surrounding the conduct in question; 6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; 7) the likelihood of the recurrence of the conduct in question; and 8) the extent to which disciplinary action may inflict an adverse impact or have a chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Id.*, at pp. 229-230.)

The court of appeal said the following about the *Morrison* factors in *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d 555:

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.

(*Id.*, at p. 560.)

Likelihood of adverse effect on students or fellow teachers.

20. No evidence was introduced that the Incident had any impact, adverse or otherwise, on Mr. Durham's fellow teachers. In fact, after Mr. Durham had taken A.A. to the ground and was sitting on him; Mr. Yates entered the gym and casually walked over to where Mr. Durham and A.A. were, stood and watched them for 27 seconds, and then casually walked back to the office in the locker room to call the public safety officer on the radio and get a referral form for Mr. Durham. When Mr. Yates returned; he casually walked back to Mr. Durham, handed him the referral, and stood there watching for 18 seconds until the public safety officer came and took A.A. to the office. At no time did Mr. Yates attempt to physically intervene or show any signs that he thought the situation was urgent or emergent.

There was evidence, however, that one student was adversely impacted by the incident – A.A. suffered “mild swelling on the right side of his forehead and a cut on his lower lip.” Additionally, his parents wanted to press criminal charges against Mr. Durham. And while A.A. did not return to Rio Linda High School after the Incident, there was no evidence why. Therefore, the District's argument that A.A. did not return because of the Incident was not supported by admissible evidence. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1146 [evidence that is pure speculation, guesswork, or conjecture is inadmissible].)

On the other hand, L.B. stated he did not see Mr. Durham use any force against A.A. greater than that which was necessary to restrain A.A. and protect himself from getting hit again. P.B., S.J., and D.A. testified to the same. Additionally, L.B. opined that A.A. deserved to be wrestled to the ground because he punched Mr. Durham; and S.M., S.J., and P.B. testified that A.A. misbehaving in class was a common occurrence. No witnesses expressed any sympathy towards A.A.

But the most compelling evidence that students treated the Incident as nothing out of the ordinary was their reaction to the Incident as shown on the video. For the entire duration of the Incident – a total of 3 minutes and 54 seconds – most of Mr. Durham's students remained sitting or standing on their designated spots for roll call. While some of them eventually moved over to where their friends were sitting or standing and began talking and a few moved closer for a better look; none misbehaved, left class, or came to A.A.'s defense. In fact, some had their backs to the Incident while talking to friends, only occasionally glancing over their shoulders to see what was happening. L.B. remained seated as Mr.

Durham and A.A. stood over him just before A.A. punched Mr. Durham, and P.B. simply leaned back for a moment when A.A. stepped on his foot just before punching Mr. Durham. And while a large group of students eventually gathered around where Mr. Durham and A.A. were on the floor, almost all of them were from Mr. Yates' class, and none came to A.A.'s defense, except for his cousin who handed him the cellular telephone.

When all the evidence is considered, the likelihood that the Incident had an adverse impact on teachers or students as a whole was not established.⁸

Proximity in time of Mr. Durham's conduct

21. The Incident occurred on October 14, 2011, and Mr. Durham has been on administrative leave since then.

Mr. Durham's teaching certificates

22. Mr. Durham holds a single subject teaching credential in physical education, with a supplemental authorization for auto mechanics. He also holds a specialist instruction credential in special education, with an authorization for learning handicap, as well as a Cross-cultural Language and Academic Development Certificate. His conduct on October 14, 2011, was inappropriate regardless of the type of certificates he holds.

Extenuating or aggravating circumstances

23. A.A. was misbehaving during class on October 14, 2011, and Mr. Durham told him to go to the office several times. Instead of complying, A.A. continuously threatened Mr. Durham and made racial epithets. Mr. Durham explained at hearing that maintaining integrity is important as a teacher and once students see a classmate get away with not following the rules, threatening the teacher, and being disrespectful towards the teacher; they all begin to think they can do the same. Therefore, it was necessary for A.A. to leave gym class and go to the office. But Mr. Durham's verbal instructions fell upon deaf ears and the next logical step was for him to redirect A.A. by physically guiding him toward the door. Unfortunately, A.A. responded by punching Mr. Durham in the face.

Mr. Durham has been a dedicated teacher with the District for 22 years and has had no prior incidents of discipline either by an employer or the California Commission on Teacher Credentialing. He also has coached wrestling and football in the District. In fact, it was because of his knowledge and skills as a wrestler that he was able to take down A.A. in a manner that minimized the risk of injury to both of them.

Praiseworthiness or blameworthiness of respondent's motives

⁸ Given the absence of evidence of the likelihood of adverse effect on students or fellow teachers, an analysis of the degree of expected adversity is not necessary.

24. As discussed in Factual Finding 23, Mr. Durham was attempting to maintain his integrity as a teacher by insisting that A.A. report to the office. After several verbal commands proved ineffective and A.A.'s threats of violence continued, Mr. Durham decided to redirect A.A.'s behavior by physically guiding him towards the door.

Likelihood of recurrence of the conduct

25. Prior to the Incident, Mr. Durham had dealt with A.A. misbehaving during fifth period P.E. on numerous occasions without incident. No evidence was introduced to explain why A.A. acted so violently on October 14, 2011 – first by threatening Mr. Durham with physical harm while punching the palm of his left hand with his right fist and saying racial epithets, and then by punching Mr. Durham in response to being guided towards the door after repeatedly ignoring verbal instructions. After the Incident, the video showed Mr. Durham walking nonchalantly back to the front of his class to continue with roll call. He did not show any signs of physical or emotional distress or of being on an adrenalin rush, and he was able to finish teaching his fifth period class and at least started teaching his sixth period class (there was no evidence whether Mr. Delgado called Mr. Durham out of sixth period or waited until class was over to interview him). In other words, Mr. Durham did not physically react to the Incident in a manner that was consistent with a person who was prone to acts of violence.

Mr. Durham candidly admitted at hearing that in hindsight he should have handled the Incident differently as explained in Factual Finding 16. And when he was asked why he wanted to remain a teacher with the District, he explained that he has worked for the District for 22 years, coached wrestling for most of those years, and has also coached football. He “love[s] doing what [he] do[es],” has a great relationship with his students, and enjoys his fellow staff members. He finds it particularly rewarding to meet students during their freshmen year, follow them through their subsequent years in high school, and then see them graduate. But what was particularly compelling was the emotion Mr. Durham showed immediately after being asked the question and before answering – he became visibly choked up and took a moment to regain his composure, which was seen as a spontaneous and genuine showing of remorse.

Kathryn Bolton Johnson, a special education teacher at Rio Linda High School who was hired to teach at the school at about the same time as Mr. Durham, described an incident during which one of her students was suffering a panic attack during class and was balled up in the corner of the classroom. Mr. Durham overheard the commotion and came in to see what was happening. Through his calm demeanor and gentle approach, he was able to calm the student. Ms. Johnson described Mr. Durham as someone who is willing to work with her students who are assigned to his P.E. class, adapt his P.E. activities to match their abilities, and help them excel in his class. She explained that some of her students may need a modification to the particular activity the class is doing or a completely different one altogether. And she appreciates Mr. Durham's willingness to doing whatever is necessary to

accommodate her students.⁹

When all the evidence is considered, the evidence established that the Incident was an anomaly. Mr. Durham regrets his conduct, understands how he should have acted differently, and has had no other incidents of misconduct. There was no evidence to suggest that he is likely to reengage in his conduct from October 14, 2011.

Impact on constitutional rights

26. Mr. Durham's conduct did not implicate the exercise of constitutional rights.

Effects of notoriety and publicity

27. While evidence was introduced that A.A. and his parents were interviewed by a television crew on the afternoon of the Incident and that interview was shown on the evening news, the evidence did not establish that such news coverage was an important factor in this case.

Disruption of the educational process

28. On October 14, 2011, A.A. was acting extremely belligerent towards Mr. Durham and was disrupting the class. Several students testified that this was a common everyday occurrence. Mr. Durham initially tried to redirect A.A.'s behavior by telling him to stop playing with the badminton nets. When his belligerence and disruptive behavior escalated, Mr. Durham told him repeatedly to go to the office. Only after A.A. ignored several verbal prompts to go to the office did Mr. Durham opt for trying to redirect A.A.'s behavior by physically guiding him towards the door. And after A.A. was escorted out of class by the public safety officer, Mr. Durham immediately returned to his teaching duties. Therefore, it was A.A.'s behavior and actions that disrupted the educational process, not Mr. Durham's. Had Mr. Durham not followed through on his insistence that A.A. leave the classroom, Mr. Durham would have risked losing his integrity with his other students. And that would have caused a greater disruption to the educational process.

Conclusion

29. After considering the *Morrison* factors outlined above, the evidence did not establish that Mr. Durham is unfit to teach. He was responding to a situation that deteriorated quickly and did not allow for significant forethought. He was trying to maintain his integrity as a teacher, and was trying to maintain control over his "classroom."

⁹ The character testimony provided by Frank Richard Negri, John Ennis, and Monica Leora Taylor was not given much weight. Mr. Negri has never observed Mr. Durham's interactions with students in a classroom setting, and Mr. Ennis and Ms. Taylor have not seen such interactions since "maybe 2007" and sometime prior to the 2009/2010 school year, respectively.

When considering the Incident with the benefit of hindsight, Mr. Durham took responsibility for his actions, showed remorse, and recognized how he should have handled it differently. He has taught for the District for 22 years without any other incident, and clearly has the respect and admiration of his students as evidenced by their good behavior during the Incident. It is unlikely, under all the facts and circumstances, that the conduct will be repeated.

LEGAL CONCLUSIONS

Applicable Burden of Proof and Standard of Proof

1. The District has the burden of proving the existence of grounds to dismiss Mr. Durham by a preponderance of the evidence. (*Gardener v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1040.)

Applicable Law

2. A permanent certificated teacher may be dismissed for any of the following reasons: “immoral... conduct,” “evident unfitness for service,” of “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.” (Ed. Code, § 44932, subs. (a)(1), (5), (7).)

Immoral conduct

3. In *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 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.

(*Id.*, at p. 740; citing, Words & Phrases, Perm, ed. Vol. 20, pp. 159-160.)

4. The evidence does not establish that Mr. Durham’s conduct during the Incident rose to the level of “immoral conduct.” It was not sufficiently serious to demonstrate either hostility toward the welfare of the general public or a lack of good morals.

Nor was it 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. Rather, this was a single, isolated event that is unlikely to reoccur in the future.

Evident unfitness for service

5. A charge of “evident unfitness for service” requires proof that the teacher is “clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. [It] connotes a fixed character trait, presumably not remediable merely on receipt of notice that one’s conduct fails to meet the expectations of the employing school district.” (*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) When considering such a charge, the *Morrison* factors “must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service.” (*Id.*, at p. 1445.) Only if the conduct demonstrates an unfitness for service does one proceed to the next step of determining “whether the ‘unfitness’ is ‘evident’; i.e., whether the offensive conduct is caused by a defect in temperament.” (*Ibid.*)

6. As set forth in Findings 20 through 29, Mr. Durham’s conduct did not demonstrate an unfitness to teach. And while the analysis would normally end there (*Woodland Joint Unified School District v. Commission on Professional Competence, supra*, 2 Cal.App.4th at p. 1445), the District did not introduce any evidence that Mr. Durham suffers a “defect in temperament” either. His calm demeanor and ability to continue teaching immediately after the Incident demonstrated otherwise, as did the students’ reactions to the Incident while it was occurring.

Persistent violation of or refusal to obey

7. A charge of persistent violation of or refusal to obey requires a showing of insubordination. (*Midway School District of Kern County v. Griffeath* (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.) “Persistence, 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 School District of Kern County v. Griffeath, supra*, 29 Cal.2d at p. 18.)

8. The District seeks to dismiss Mr. Durham for persistent violation of or refusal to obey school rules based solely on his conduct during the Incident. But the Incident was a single, isolated event, and his conduct on that day cannot constitute a *persistent* violation or refusal to obey as a matter of law. (*Midway School District of Kern County v. Griffeath, 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.)

Conclusion

9. As determined in the Factual Findings and Legal Conclusions, it was not established that Mr. Durham engaged in either immoral conduct or the persistent violation of or refusal to obey the schools laws of the state or reasonable regulations prescribed by the State Board of Education or the District's governing board. Nor did his conduct constitute evident unfitness for service. Therefore, no cause exists to dismiss Mr. Durham from employment by the Twin Rivers Unified School District under Education Code section 44932, subdivisions (a)(1), (5), or (7).

ORDER

The Accusation against Jimmie Durham is DISMISSED.

DATED: March __, 2013

ROB KERR, Member
Commission on Professional Competence

PATRICK CULLEN-CARROLL, Member
Commission on Professional Competence

COREN D. WONG, Chairperson
Commission on Professional Competence