

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

In the Matter of:

JERALD GLAVIANO,

Respondent.

OAH No. 2013030338

**DECISION**

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

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

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

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

**ISSUE**

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

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

## SUMMARY

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

## FACTUAL FINDINGS

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

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

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<sup>1</sup> To protect students' privacy, designated initials will be used instead of students' names.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *Corporal Punishment and Defense of Self and Others*

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

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

threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, is not and shall not be construed to be corporal punishment within the meaning and intent of this section. . .

(b) No person employed by or engaged in a public school shall inflict, or cause to be inflicted corporal punishment upon a pupil. ..

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

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

Corporal punishment shall not be used as a disciplinary measure against any student. Corporal punishment includes the willful infliction of, or willfully causing the infliction of, physical pain on a student. (Educ. Code, §§ 49000, 49001.)

For purposes of this policy, corporal punishment does not include an employee’s use of force that is reasonable and necessary to protect the employee, students, staff or other persons or to prevent damage to district property. (Educ. Code, § 49001.)

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

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

#### *Participants in the Incident*

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

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

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

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

#### *Photographic Evidence*

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

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

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

#### *Respondent's Statements and Condition after the Incident*

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

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

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

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

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

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

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

Respondent signed the Incident Report under penalty of perjury.



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

#### *AA’s Hearsay Statements to District Personnel*

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

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

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

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

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

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

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

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

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

### *Respondent's Testimony*

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

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

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

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<sup>4</sup> In his February 7, 2013 letter to Ms. Flowers, Mr. Lindstrom reported he was provided 23 witness statements.

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

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

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

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

29. Once in Mr. Guevara’s office, respondent told Mr. Guevara “what [he] knew.”

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

retrieve it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Testimony of Student Witnesses*

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

## *Discussion*

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

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

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

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

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

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

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

#### *Fitness to Teach*

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

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<sup>6</sup> *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

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

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

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

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

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

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

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

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

*Degree of adverse impact on teachers and students anticipated*

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

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

*Proximity or remoteness in time of the conduct*

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

*Type of teaching certificate held by the party involved*

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

*Disruption of Educational Process*

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

*Extenuating or aggravating circumstances, if any, surrounding the conduct*

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

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

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

*Praiseworthiness or blameworthiness of the motives resulting in the conduct*

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

*Notoriety*

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

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

*Likelihood of recurrence of the questioned conduct*

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

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

60. This factor is neutral.

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

## LEGAL CONCLUSIONS

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

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

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

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

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

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

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

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

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



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

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

#### ORDER

1. The Accusation is dismissed.
2. The District shall immediately reinstate respondent to his position as a Physical Education teacher at McClatchy High School.
3. Within ten (10) business days of the date of this Decision, the District shall pay respondent his full back pay from February 7, 2013, the date on which he was placed on unpaid leave, and shall restore to him all benefits (sick leave, annual leave) that he would have accrued had he not been placed on unpaid leave.

DATED: August 13 2013

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//s//  
BRIDGET BOKIDES, Member  
Commission on Professional Competence

\_\_\_\_\_  
//s//  
JAMES SMREKAR, Member  
Commission on Professional Competence

\_\_\_\_\_  
//s//  
MARILYN A. WOOLLARD, Chairperson  
Commission on Professional Competence