

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LOMPOC UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

GARY WEST,

A Permanent Certificated Employee,

Respondent.

OAH No. 2022080354

DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on January 9, 10, 11, and 18, 2023.

On August 12, 2022, the parties stipulated to waive their right to designate commissioners to hear this matter and elected to have the ALJ hear the matter alone pursuant to Education Code section 44944, subdivision (c)(1).

Matthew P. Juhl-Darlington and Leilani Battiste, Attorneys, represented complainant Debbie Blow, Superintendent of the Lompoc Unified School District (District). Paul Bommersbach, party representative and District administrator was present throughout hearing.

Jason Wojciechowski and Estephanie Villalpando, Attorneys, represented Gary West (Respondent), who was present throughout hearing.

The attorneys respectively representing Respondent, and the student in question and his parents in Respondent's pending civil lawsuit against the student and his parents, observed the hearing. The attorney for the student and his parents, Rebecca D. Martino, observed the hearing on January 9, 2023. Respondent's attorney, Roger Fredrickson, observed the hearing on January 10, 11, and 18, 2023.

Testimonial and documentary evidence was received. The record was closed and the matter was submitted for decision on January 18, 2023.

SUMMARY

The District seeks to dismiss Respondent on grounds of immoral conduct, evident unfitness for service and persistent refusal to obey school laws. Respondent disputed some of the factual allegations and argued that grounds for dismissal do not exist. The District established through a preponderance of the evidence Respondent's dismissal was warranted based on his immoral conduct and evident unfitness for service. The evidence presented by the District was insufficient to establish Respondent persistently refused to obey school laws.

FACTUAL FINDINGS

Introduction and Summary of Findings

1. On February 1, 2022, Cabrillo High School (Cabrillo) administration received a complaint from a Cabrillo student's parent that during class that day,

District employee, Respondent, had grabbed his son, BDJ (also referred to as “the student”), a Cabrillo student, on the student’s shirt/shoulder/neck area and pushed the student back two to three steps, squeezing the student’s neck in a choking manner as he pushed the student back. (Initials are used in lieu of full names to protect the students’ privacy. In some instances, first name and last name initial are used when students have the same initials to avoid confusion.) The incident took no more than several seconds. After the incident, Respondent kicked BDJ off the football team and then, after the student left the class, used the profane word “fuck” in front of the other remaining students in the class during a lecture about why he had kicked BDJ off the football team and the type of behavior Respondent expected from the football class going forward.

2. The allegations against Respondent were reported and investigated by both Cabrillo’s School Resource Officer (SRO) on behalf of law enforcement, and Cabrillo’s administrators, Principal Mark Swanitz and Paul Bommersbach, a District administrator. During the simultaneous SRO criminal investigation and Cabrillo’s administration investigation, some students indicated they saw Respondent grab BDJ. A few students indicated they saw Respondent grab BDJ near his shoulders or neck. Some students also claimed they did not see anything. After a two-day investigation conducted between February 2 and 4, 2022, Cabrillo’s SRO determined Respondent did not commit a crime and closed the criminal investigation, forwarding his findings to the District Attorney’s office, who ultimately declined to press criminal charges against Respondent. (Ex. 17.) Cabrillo’s administration forwarded its inconclusive findings to the District.

3. On or about February 7, 2022, the District, concerned with the serious nature of the allegations against Respondent and the quality and impartiality of the

Cabrillo administration and the SRO's investigations, retained Public Interest Investigations, Inc. (PII), to conduct an outside independent investigation of the allegations and make factual findings. During PII's investigation, several students again indicated they saw Respondent grab BDJ around the neck; a few students reported seeing Respondent grab BDJ near the neck or shoulder area; some students changed their original statements; and several students said they did not see anything.

4. PII's investigation concluded, by a preponderance of the evidence, that on February 1, 2022, during seventh-period football class: 1) Respondent grabbed the student with two hands near the neck area in an angry gesture that forced the student backward by several feet, in violation of District policies, and 2) Respondent used the word "fuck" in front of the class, in violation of District policy.

5. Respondent denied grabbing BDJ and pushing him back during both investigations and at hearing. Respondent asserted at hearing that he did not remember touching BDJ and if he had touched the student on February 1, 2022, it was in "an insignificant way." (Testimony of Respondent; Ex. 24, p. A3601.) Respondent admitted to kicking BJD off the team and then using the word "fuck" when speaking to the football class on February 1, 2022.

6. As more fully discussed below, based on the weight of the credible evidence, it was established at hearing through a preponderance of the evidence that: 1) Respondent grabbed BDJ with one hand near the neck, shoulder, and shirt area in an angry gesture and applied pressure to the student's neck, shoulder, and shirt area which forced the student backward by between one and three feet, in violation of District policies, and 2) Respondent used the word "fuck" in front of the class, in violation of District policies.

Jurisdictional Matters

7. Respondent is a permanent certificated employee of the District. He holds a physical education credential and holds a pupil personnel services credential for high school counseling. He has been an educator at various schools for approximately 39 years.

8. On June 28, 2022, then-Deputy Superintendent Bree B. Valla (former DP Valla), recommended to the District's Governing Board of Education (Board) Respondent be placed on immediate unpaid suspension and dismissed pursuant to Education Code sections 44932 and 44939. (Statutory references are to the Education Code.) The Board approved former DP Valla's recommendation, and on June 29, 2022, the District notified Respondent of the Board's decision.

9. On August 12, 2022, the District filed a Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension, seeking Respondent's dismissal. The parties stipulated to waive their right to designate a commissioner to hear this matter and elected to have the ALJ hear the matter alone pursuant to Education Code section 44944, subdivision (c)(1).

10. Respondent thereafter requested a hearing.

11. On October 11, 2022, Deputy Superintendent Debbie L. Blow (DP Blow), recommended to the Board Respondent be placed on immediate unpaid suspension and dismissed pursuant to sections 44932 and 44939 based on an Amended Statement of Charges and Recommendation for Dismissal and For Immediate Unpaid Suspension.

12. On October 11, 2022, the District filed a Motion to Amend the Statement of Charges with OAH. The District sought to remove references to an August 25, 2010 incident and subsequent disciplinary interventions included in the Statement of Charges because such reference falls outside of the statute of limitations and are outside of the scope of the issues to be considered by OAH at hearing. Respondent did not oppose the District's motion. On October 31, 2022, the District's motion was granted by the ALJ.

13. On November 1, 2022, the District filed and served the Amended Statement of Charges (Amended Charges). The Amended Charges are the operative pleading in this matter. (Ex. 20.)

Background Summary

14. Respondent has been a permanent certificated employee of the District for approximately 22 years. His most recently assignment for the past four years was as Cabrillo's Athletic Director. Before teaching physical education, Respondent worked as a counselor for 15 years at Cabrillo and was the head basketball coach.

15. During his tenure at Cabrillo, Respondent taught a conflict resolution class to students whose class curriculum included teaching students who were in conflict to avoid physical confrontation by resolving conflict in a productive way. Since December 2021, Respondent was also the acting football coach until he was placed on paid administrative leave on February 3, 2022. On June 28, 2022, Respondent was placed on unpaid suspension pending his dismissal.

16. In 2018, Respondent took over Cabrillo's athletic director position. At that time, the football team had a dismal performance record of one and 29 and there were discipline issues with the football program. Respondent and Cabrillo's principal

conducted an extensive search for a football coach, who was unsuccessful in turning the team around after two years and was not brought back as a teacher. As a result, in December 2021 after the football season ended, Respondent assumed the position of the interim football coach while he looked for a new football coach and he and the principal interviewed potential football coach replacements. Respondent took on the interim football coach position because he believed he was good at building culture and weight training instruction. His goal in assuming the interim football coach position was to build a "winning" football team. (Testimony of Respondent; Ex. 24, p. A3604.)

17. As part of his acting football coach duties, Respondent taught a seventh-period physical education class for football players (football class or class). The class consisted of approximately 40 students some of whom were members of the Cabrillo football team. At the time Respondent became the interim football coach, the Cabrillo football team had lost approximately 48 football games in a row. Respondent's primary goal in assuming his duties as the interim football coach was to help the football team turn their losing streak around. To achieve that goal, Respondent, who believed in strict discipline as a coaching tool, introduced the football team to his winning philosophy which consisted of four things: positive attitude, commitment, discipline, and work ethic. Because it was the off season, the team did not practice the game of football.

18. Instead, on Mondays, Wednesdays, and Fridays, Respondent took the football class to the weight room for the seventh period and for an additional 45 minutes after school. On Tuesdays and Thursdays, Respondent led the football class in a classroom setting where the team discussed goals and engaged in team culture building. Respondent read out of a book called, "Championship Mindset," as a tool to

help the football class change their mindsets to a winning mindset. The remainder of the class period was a study hall where the football class could work on their grades.

19. The typical classroom routine on the Tuesday and Thursday study hall days consisted of students coming in, putting their cell phones in a filing cabinet located at one of the back corners of the classroom so they would not be interrupted or attempt to be on their phones, and then taking their seats. By all accounts, the beginning of the football class was somewhat chaotic because approximately 40 students entered all at once and made their way to their seats after depositing their phones in the file cabinet. To assist in football class management and to promote leadership roles by football team members, Respondent placed several football team members in positions of authority, assigning four of the football class team members captain positions. The job of the football team captains in the football class included, among other things, locking the filing cabinet with the cell phones and quieting down the football class. The football team captains included AC, TJ, JZ, and RH.

20. Respondent's daily custom and practice was to greet the students at the classroom door and then take roll by either walking through the rows by the students' desks or waiting until the bell rang and all the students were seated in their seats. One to two students sat per desk in the classroom. Respondent's daily habit and custom when greeting students as they entered the football class or when he worked with the students in the weight room included touching most students with "a pat, a tap, a handshake, a fist bump, a high five or whatever it might be." (Testimony of Respondent; Ex. 24, p. A3644.)

21. After Respondent took roll, either he or a student he chose would go to the head of the classroom and read a portion or section the "Championship Mindset" book and then discuss the book reading for about five to ten minutes. The remaining

time would consist of a study hall. Respondent allowed those football class students who were in season in winter sports, such as basketball, or had another sport they were working on to leave the football class early to go to either their games or practice. Cabrillo student athletes generally carry two backpacks at school, one for their schoolbooks and one for their athletic equipment.

22. BDJ was a then-14-year-old freshman at Cabrillo on the junior varsity (JV) football and basketball teams. BDJ had been a District student since kindergarten at the time of the incident. He was under an Individual Education Program (IEP) since approximately elementary school based on struggles with memory and retaining information.

23. At the time of the hearing, BDJ was no longer a District student, having left Cabrillo high school in April 2022 due to the February 1, 2022 incident and subsequent negative fall-out from BDJ's accusations against Respondent. The accusations caused Respondent, a well-liked long-standing Cabrillo teacher, to be placed on leave, to the detriment of the Cabrillo's football program. BDJ now attends high school in Nevada and resides with his grandparents. The rest of BDJ's family, including his parents, continue to reside in Lompoc.

Applicable Board Policies and Administrative Regulation

BOARD POLICY 4119.21/4319.21

24. Board Policy (BP) 4119.21/4319.21 is the District's statement of Professional Standards. It specifies the Board's expectations for how employees are to behave. The preamble of this policy states:

The Governing Board expects district employees to maintain the highest ethical standards, exhibit professional behavior, follow district policies and regulations, abide by state and federal laws, and exercise good judgment when interacting with students and other members of the school community. Employee conduct should enhance the integrity of the district, advance the goals of the district's educational programs and contribute to a positive school climate. . . .

(Ex. 20, p. A675.)

25. BP 4119.21/4319.21 also outlines what is considered inappropriate employee conduct by the District, providing that "any employee who is found to have engaged in inappropriate conduct in violation of law or Board policy shall be subject to disciplinary action and, in the case of a certificated employee, may be subject to a report to the Commission on Teaching Credentialing." (Ex. 20, p. A675.) According to BP 4119.21/4319.21, the District considers inappropriate employee conduct to include, but not be limited to, "engaging in any conduct that endangers students," "engaging in harassing or discriminatory behavior towards students," and "physically abusing . . . or otherwise willfully harming or injuring a child." (*Ibid.*) The use of "profane, obscene, or abusive language against students" is also considered inappropriate. (*Id.* at p. A676.)

ADMINISTRATIVE ETHICS REGULATION E 4127

26. Administrative Regulation E 4127 (E 4127) is the District's Code of Ethical Conduct for Athletic Team Coaches and states, in relevant part:

5. Respect – treat all people with respect all of the time and require the same of student athletes. [¶] . . . [¶]

10. Profanity – don't engage in or permit profanity or obscene gestures during practices, sporting events, on team busses, or any other situation where the behavior could reflect badly on the school or the sports program.

11. Positive Coaching – use positive coaching methods to make the experience enjoyable, increase self-esteem and foster a love for the sport. Refrain from physical or psychological intimidation, verbal abuse and conduct that is demeaning to student athletes or others.

(Ex. 20, p. A684, emphasis in original.)

BP 5137

27. BP 5137 is the District's statement dedicated to fostering a positive school climate and prohibits discrimination, harassment and bullying of students. The policy focuses on creating "an orderly, caring and nurturing educational and social environment in which all students can feel safe and take pride in their school and their achievements." (Ex. 20, p. A689.) Pursuant to BP 5137, "[A]ll staff are expected to serve as role models for students by demonstrating positive, professional attitudes and respect toward each student and other staff members. Teachers shall use effective classroom management techniques based on clear expectations for student behavior." (*Id.*)

ADMINISTRATIVE REGULATION 5131.41

28. Administrative Regulation (AR) 5131.41 is the District regulation that prohibits the use of seclusion and behavioral restraint to control student behavior by District staff. (Ex. 20, pp. 691-695.) AR 5131. 41 provides that “[S]eclusion and behavioral restraint of students shall not be used in any form as a means of coercion, discipline, convenience, or retaliation. (Education Code 49005.8)” (*Id.* at p. A692.)

29. Pursuant to AR 5131.41, “behavioral restraint” is defined, in relevant part, as:

physical restraint used as an intervention when a student presents an immediate danger to self or to others.
Behavioral restraint does not include postural restraints or devices used to improve a student’s mobility and independent functioning rather than to restrict movement.
(Education Code 49005.1)

(Ex. 20, p. A692.)

30. Pursuant to AR 5131.41, “physical restraint” is defined, in relevant part, as:

a personal restriction that immobilizes or reduces the ability of a student to move the torso, arms, legs, or head freely.
Physical restraint does not include a physical escort in which a staff member temporarily touches or holds the student’s hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location. (Education Code 49005.1)

(Ex. 20, p. A692.)

31. Pursuant to AR 5131.41, "seclusion," is defined, in relevant part, as "the involuntary confinement of a student alone in a room or an area from which the student is physically prevented from leaving. (Education Code 49005.1.)" (Ex. 20, p. A692.)

32. AR 5131.41 provides for the limited use of seclusion or restraint by District staff, providing:

Staff shall avoid the use of seclusion and behavioral restraint of students whenever possible. Seclusion or behavioral restraint may be used only to control student behavior that poses a clear and present danger of serious physical harm to the student or others, which cannot be prevented by a response that is less restrictive. (Education Code 49004.4, 49005.6, 49005.8.)

(Ex. 20, p. A693.)

February 1, 2022 Incident

33. Respondent considered BDJ to be a class disruption who interfered with Respondent's goal of creating a disciplined winning culture for the football team. Respondent's assessment of BDJ as a "disruptive" student was shared by many students in the football class. Between the time Respondent became the interim football coach in December 2021 and the February 1, 2022 incident (February 1 incident) described below, Respondent had spoken to BDJ's father on one occasion about BDJ being late to class and wearing his earrings to class. At no time prior to

kicking BDJ off the football team on February 1 did Respondent speak with BDJ's school counselor about BDJ's classroom behavior. At hearing, Respondent testified he was not aware BDJ was under an IEP while BDJ was a student in Respondent's football class and became aware of BDJ's IEP after the February 1 incident.

34. Around the time of the incident, Respondent was increasingly frustrated and annoyed with BDJ's behavior in football class. The day prior to the February 1 incident, on January 31, 2022, when the football class was in the weight room, Respondent described BDJ as disrupting the class when BDJ asked Respondent three times to go to the restroom while Respondent was taking roll and trying to get the weight programs organized.

35. At hearing, Respondent described how he ordered BDJ to leave the football class on February 1 and go to see his counselor because Respondent wanted BDJ out of his class and, hence, off the football team. Respondent referenced BDJ's repeated requests to go to the restroom during class on January 31, 2022 as a basis for his decision to kick BDJ off the football team on February 1. Respondent testified, "[A]nd [BDJ] wouldn't sit down. [BDJ] kept asking [Respondent] and asking [Respondent]. So it was just kind of enough is enough. [BDJ] was being a disruption, and it was kind of taking the time away from what we needed to get done." (Testimony of Respondent; Ex. 24; p. A3601.)

36. In sum, by the time BDJ arrived to football class on February 1, Respondent was already frustrated and annoyed with BDJ's ongoing behavior in the football class, which Respondent viewed as an impediment to his goal of forming a disciplined winning football team. It was in this context that Respondent's intentional application of physical force on BDJ occurred on February 1, as follows.

37. On February 1, Respondent was in the process of assigning new seats to the football class students. BDJ arrived at football class before the bell rang and realized he had forgotten his second backpack, containing his basketball equipment, in his prior class. BDJ wanted to get the bag because he had a basketball game that day and needed to leave the football class early to attend the game. As BDJ was walking to the filing cabinet to put his cell phone in the cabinet, he told Respondent he forgot his backpack and asked to get it from his last class. While BDJ had forgotten his backpack previously, this was the first occasion when BDJ asked Respondent to get his backpack from another class.

38. Respondent denied BDJ's request, telling BDJ to take his seat and wait for a more appropriate class time to get his bag. BDJ did not take his seat as instructed and continued to ask Respondent to get his bag. Respondent became increasingly annoyed and angry with BDJ. BDJ was standing in the aisle and Respondent was walking towards BDJ, taking classroom roll. The two met in the middle of the aisle, with BDJ again asking Respondent if he could get his bag from the other class. In response, Respondent angrily grabbed BDJ with one hand by the shirt/shoulder/neck and applied physical force and pressure, shoving the student back one to two steps towards his seat.

39. Respondent's physical attack on BDJ was brief, lasting seconds. BDJ's breathing was not obstructed by Respondent's grabbing and shoving him, and Respondent's hand did not leave a mark on BDJ's neck where he grabbed and shoved him. BDJ was scared, shocked, and embarrassed by Respondent's grabbing and shoving him as many of the football class who witnessed Respondent's actions laughed.

40. After Respondent grabbed and shoved BDJ, BDJ sat down in his seat as other students continued to come into the classroom. Based on the brevity of the physical attack and the typical daily chaotic nature of the football classroom when students first arrived in class, some students witnessed Respondent grab and shove BDJ while other students did not witness the incident. Some of the students who witnessed Respondent grab and shove BDJ initially laughed, not realizing the seriousness of the incident and shocked by Respondent's actions.

41. After the physical attack on BDJ and all the students were in their seats, Respondent angrily addressed BDJ, ordering BDJ to go to the counselor's office and switch out of Respondent's class. BDJ and the rest of the football class who heard Respondent order BDJ out of the class accurately understood Respondent's instruction to mean Respondent was kicking BDJ off the football team. Prior to leaving quietly as instructed, BDJ asked Respondent if he could retrieve his cell phone from the filing cabinet. Respondent answered "yes." BDJ gathered his belongings and left the classroom as instructed.

42. Respondent's use of force against BDJ, a student, on February 1, was not reasonable and necessary to protect himself, students, staff, or other persons. By grabbing and pushing BDJ on February 1, Respondent's violated applicable District policies and regulations BP 4119.21/4319.21, BP 5137, E 4127, and AR 5131.41, as set forth in Factual Findings 24 through 41.

43. No evidence was presented at hearing that Respondent previously used physical force against any student in violation of District policy prior to his physical attack on BDJ on February 1. Accordingly, insufficient evidence was presented at hearing to establish that Respondent's February 1 physical attack on BDJ constitutes a

persistent violation of or refusal to obey the rules governing Respondent's employment.

44. Because Respondent was talking loudly when he ordered BDJ to leave the classroom and then cursed after BDJ left when addressing the football class, Cabrillo Assistant Vice Principal Brian Grimnes (AP Grimnes), who was passing the classroom, heard Respondent speaking and stopped outside the classroom. (Testimony of AP Grimnes; Ex. 24; p. A2902.) AP Grimnes heard Respondent order BDJ to leave the class, and BDJ passed AP Grimnes when he exited the classroom. AP Grimnes then heard Respondent lecture the class in "a kind of animated" way after BDJ left about his disappointment with the football class's behavior and lack of responsibility. (*Id.* at pp. A2903-A2904.) During his lecture, Respondent used profanity, stating that if any of the other football class students did not grow the "fuck" up and behave they could get out of the class because Respondent was not going to babysit them. After his lecture, Respondent walked from the back of the class towards the front of the class and saw AP Grimnes standing in the classroom doorway. Respondent had not previously seen AP Grimnes because he was at the back of the class and did not know he was listening to Respondent address the class. Respondent then asked if AP Grimnes had heard Respondent use profanity and apologized to him after AP Grimnes responded that he had heard Respondent use the word "fuck." (*Id.* at pp. A2905-A2906.) AP Grimnes took no action against Respondent for using profanity in the classroom in violation of District policies. During his angry lecture to the class, Respondent also told the class they needed winners and that BDJ did not have that in his DNA. (Ex. 14, p. A188; Testimony of JA, p. A3101.)

45. At hearing, Respondent admitted he used the profane word "fuck" when addressing the football class on February 1. Respondent testified he could not recall

using profanity on prior occasions when speaking with students. TJ, one of the football captains, testified at hearing Respondent used profanity, such as the word “pussy,” daily when addressing students. (Testimony of TJ; Ex. 24, pp. A3356-A3357.) Other student witnesses also testified Respondent’s habit and custom was to use profanity for emphasis when addressing his student athletes. However, no evidence was submitted at hearing that Respondent was previously counseled or disciplined by the District for his use of profanity in violation of District policies during his tenure at Cabrillo.

46. By using the word “fuck” during the February 1 incident when angrily lecturing the football class about their behavior and his disciplinary expectations for the team, Respondent violated District policies BP 4119.21/4319.21 and E4127, as set forth in Factual Findings 24 through 26, 44, and 45. In the absence of evidence regarding prior counseling or discipline regarding Respondent’s use of profanity when communicating with students, however, insufficient evidence was presented to establish the District’s allegation that Respondent’s use of profanity on February 1 in violation of District policy amounts to Respondent’s persistent violation of or refusal to obey the rules governing Respondent’s employment.

47. After football class concluded on February 1, Respondent went to the counselors’ office to see if BDJ switched out of his football class. BDJ, however, did not go see his counselor as ordered by Respondent because he did not want to miss his basketball game. Instead, BDJ went to the other classroom to retrieve his basketball bag and then sat on a bench near the football class waiting for other members of the basketball team who were also in the football class (including students BG, CZ, TK, and JA) to leave Respondent’s classroom so he could go to the basketball game with them.

48. After they arrived at the gym for their basketball game, BG told Cabrillo's basketball coach, Todd Zarkovacski (Coach Zarkovacski), about what had occurred in football class that day. However, Coach Zarkovacski was already aware Respondent had grabbed and shoved BDJ and then kicked BDJ off the football team, having been told about the incident by a football player who was not on his basketball team as the coach was hurrying across the Cabrillo campus to the basketball game. (Testimony of Coach Zarkovacski; Ex. 24, p. A3189.) While describing the incident to the coach, BG exaggerated the extent of Respondent's physical assault of BDJ, describing Respondent as choking BDJ. Once BG began describing the incident, other football class students who witnessed the incident, including JA, interjected to correct BG's exaggeration to the coach, accurately characterizing Respondent as grabbing and shoving BDJ, not choking him. According to Coach Zarkovacski, BDJ sat silent with his head down and "seemed upset" while the other students described the February 1 incident to the coach and mocked BDJ about the incident. (*Id.* at p. A3185.)

49. CZ is Coach Zarkovacski's son. Later that evening, Coach Zarkovacski asked CZ to describe to him what happened that day in football class. CZ corroborated what the coach had been told that day by other football class student witnesses—Respondent had grabbed and pushed BDJ in football class on February 1. (Testimony of Coach Zarkovacski; Ex. 24, p. A3187.) Coach Zarkovacski testified at hearing that CZ was "upset" by the February 1 incident "because [CZ] saw his teammate and friend [BDJ] assaulted." (*Id.* at p. A3188.)

50. Respondent went to the basketball game after visiting the counselors' office. He approached and spoke to BDJ's parents, AD and BD Sr. Respondent told them there had been an incident that day in football class and that he had kicked BDJ out of the football class and told him to go to his counselor's office and switch to

Physical Education (PE) class. Respondent did not tell BDJ's parents that he had grabbed and pushed BDJ. When BDJ's father asked why he had removed BDJ from the football class, Respondent stated it was because BDJ had forgotten his backpack.

51. When BD Sr. questioned whether merely forgetting a backpack caused Respondent to react by removing BDJ from the football class and team, Respondent told BDJ's parents that he was sick of BDJ's behavior. As examples of BDJ's unacceptable behavior, Respondent cited some examples to BDJ's parents, such as BDJ forgetting to remove his earrings prior to football class the week before and asking to use the bathroom. During their conversation, Respondent added that BDJ could come back to play football next year, but that BDJ needed to mature and understand he cannot keep forgetting his things and being late. Respondent then offered to change his decision kicking BDJ out of the football class and have BDJ come back to football class the following Monday. (Testimony of Respondent; Ex. 24, p. A3605.) AD refused Respondent's offer to have BDJ return to football class, telling Respondent she believed BDJ needed to learn a lesson from the experience. AD and BD Sr. both testified at hearing that at the end of the conversation Respondent jokingly stated they should take BDJ home that night and "whoop his ass." At hearing, Respondent admitted speaking to BDJ's parents prior to the basketball game but denied making the latter statement to them during their conversation.

52. When BDJ saw his parents after his basketball game, he asked AD if she had heard what happened with Respondent. AD cut BDJ off before he said anything more, believing BDJ was asking about Respondent kicking him off the football class for forgetting his backpack, and responded that she had heard what happened in football class. As punishment, AD told BDJ that he was not allowed to stay to watch the Junior Varsity and Varsity basketball games after his freshman basketball game was over. She

texted Coach Zarkovacski to let him know BDJ was in trouble and would not be staying for the other games and lectured BDJ about his class behavior while they drove home. After receiving AD's text notifying the coach she was taking BDJ home early, Coach Zarkovacski called AD and told her that some of the other basketball players had told him Respondent had grabbed BDJ by the neck. After she hung up, AD asked BDJ whether Respondent had grabbed him, BDJ immediately started crying and confirmed Respondent had grabbed him. BDJ told his parents that he had forgotten his backpack and asked Respondent to get it, and, in response, Respondent had grabbed him by the neck and pushed him back.

53. Upon hearing what Respondent had done to BDJ in football class, BD Sr. turned the car around and drove back to Cabrillo with AD and BDJ. BD Sr. wanted to confront Respondent about touching BDJ. BD Sr. could not find Respondent, who had already left the gym. He spoke to Coach Zarkovacski, who offered to get the students who told him about the incident so that BD Sr. could speak to them. The students, one of whom was JA, did not want to talk to BD Sr.

54. AD, in the meantime called BD Sr.'s parents, who advised her to call the sheriff's department, which she did. As a result of AD's call to the sheriff's department, Dennis Thomas (SRO Deputy Thomas), a deputy employed by the Santa Barbara County Sheriff's Department, who is contracted to work for the District as Cabrillo's SRO, was notified at home by one of the sheriff deputies who responded to AD's call that a student had told his parents that he was choked by a Cabrillo teacher. (SRO Deputy Thomas coached basketball at Cabrillo for many years and had an existing friendly relationship with Respondent.)

Cabrillo February 1 Incident Investigation

55. SRO Deputy Thomas told the sheriff's deputy who informed him of the incident to ask BDJ's parents to come in the following day to Cabrillo so he could investigate the incident. BDJ's parents followed sheriff deputies' instructions and left Cabrillo with the intention of reporting the incident the next day at Cabrillo. Later that evening, after sheriff's deputies notified SRO Deputy Thomas about the incident, he contacted Cabrillo's principal, Mark Swanitz (Principal Swanitz), and told him that the allegation was that Respondent had choked BDJ and that BDJ's parents would likely be in the following morning to report the incident. Principal Swanitz contacted former DP Valla on the evening of February 1 to notify her BDJ's parents were alleging that there was a physical altercation between Respondent and BDJ.

56. The District is a small one where teachers know each other. The District was concerned that the circumstances surrounding the accusations against Respondent would become "politically charged" with two strong camps, some for and some against Respondent. (Testimony of former DP Valla; Ex. 24, p. A2927.) In addition, there was also a perception that the District's then-Superintendent had a fondness for athletics which could result in the favoring of coaches and anything having to do with athletics. (*Id.* at p. 2928.) As a result, former DP Valla requested District administrator Paul Boomersbach (Administrator Boomersbach) be involved in the Cabrillo investigation.

57. On the morning of February 2, SRO Deputy Thomas went to Cabrillo and spoke to Principal Swanitz about whether he had received any phone calls or had spoken to BDJ and his parents. Principal Swanitz told SRO Deputy Thomas he had not and that he would first be talking to BDJ and his parents before he contacted Respondent about the incident. SRO Deputy Thomas did not wait to interview BDJ and

his parents prior to speaking with Respondent. Instead, SRO Deputy Thomas went to Respondent and asked Respondent whether he had choked a student, telling Respondent that there was an allegation that he had choked BDJ. Respondent denied choking BDJ and described BDJ to the deputy as a disrespectful and disruptive student who had tested his patience until he felt compelled to kick him out of class.

58. Later that day, after first obtaining Respondent's version of the February 1 incident, SRO Deputy Thomas interviewed BDJ and his parents. During his interview, BDJ did not simply tell SRO Deputy Thomas that Respondent had "choked" him. Rather, while BDJ used the word "choking" as part of his explanation for what Respondent did to him, he explained to SRO Deputy Thomas that when Respondent grabbed his shirt/shoulder/neck and slightly squeezed, BDJ felt "*as if*" Respondent were "choking" him. (Ex. 261, p. B521 (emphasis added).) The subtle distinction between BDJ's use of the word "choked" to describe his feeling from being grabbed and pushed by Respondent during the incident morphed into a simplistic characterization of the incident. Namely, both the school administration and SRO Deputy Thomas focused their investigation on whether BDJ was accusing Respondent of choking him and whether Respondent had, in fact, choked BDJ, which he had not. The fact that Respondent had grabbed and pushed BDJ during the February 1 incident was obfuscated as the narrative that BDJ had accused Respondent of choking him quickly spread through the Cabrillo student and administration community.

59. BDJ also completed a "Cabrillo Incident Report" (incident report) describing the February 1 incident on February 2. (Ex. 13, p. A155.) In the incident report he wrote as follows:

I was walking to the back of the class to put my phone in
the back of the class. I was headed to my seat and me and

[Respondent] met in the middle of the class. than [sic] I told him that I forgot my bag then [Respondent] grabbed the side of my neck. While [Respondent] was grabbing my neck [Respondent] was forcing me to go back [sic]

(Ibid.)

60. In addition to BDJ's incident report, BDJ was also interviewed by District Administrator Bommersbach and Principal Swanitz on February 2. According to Administrator Bommersbach's notes from the interview, BDJ described the February 1 incident as follows:

Right when I told [Respondent] I forgot my bag he put his hand on my neck and pulled my shirt for about 2 seconds, then walked back. [Respondent] forced me to walk back. At the beginning of class. Grabbing my neck and shirt. I was just shocked. It didn't affect my breathing. [Respondent] didn't say anything. I walked to my seat, [Respondent] said you can see your counselor about leaving the class. I saw mr grimness (sic). When this happened were all the students in there? Yes. There might be some who didn't see it but most saw it. Has [Respondent] touched you before? Yes, he touched my ribs before. Just to have fun, not because he was mad. [Respondent] was upset with me yesterday. 4 weeks ago he touched my ribs. I still want to be there in football even if [Respondent] is there. Do you feel safe with [Respondent]? Yes. [Respondent] probably won't do it again. No marks from yesterday. Law enforcement

took pictures. Did it hurt when he grabbed you? No, not really. [AH, JA] saw what happened.

(Ex. 14, p. A187.)

61. According to Principal Swanitz's notes from the February 2 interview, BDJ described the February 1 incident as follows:

Entered classroom, put phone in box, told [Respondent] he forgot backpack, [Respondent] grabbed throat (thumb across air pipe), pushed him back toward door, [BDJ] went to his desk when [Respondent] was at the back of the classroom. [Respondent] then told [BDJ] to leave class and go see his counselor to get out of the class. No prior physical interaction between the two. Student feels safe with [Respondent]. Wants to stay in the class and on the team. Potential witnesses [AH] (sitting down right next to it), [JA] (sitting down up front)

(Ex. 15, p. A191.)

62. Principal Swanitz and Administrator Bommersbach also interviewed 12 other student witnesses on February 2 who were in the football class on February 1. According to their notes, eight of the students interviewed (JZ, AC, AW, RH, RR, BY, MM, TJ) told them they did not see a physical interaction between Respondent and BDJ. (Exs. 14 and 15.) JZ also told the Cabrillo administrators Respondent did not use inappropriate language and described Respondent as "pretty chill." (Ex. 14.) AC described Respondent as "calm" when he told BDJ to go to the counselor and get out of the football class. AW described Respondent as "yelling" during the class and RH

described Respondent as “stern” and “angry, borderline yelling” when he told BDJ to leave. (Exs. 14 and 15.) MM stated that he was late to class, was not really paying attention, and focuses on himself, but that Respondent was “definitely pissed off.” (*Id.*)

63. According to their notes, three of the twelve students (JA, CZ, and GM) told Principal Swanitz and Administrator Bommersbach that Respondent grabbed and pushed BDJ during the February 1 incident. (Exs. 14 and 15.) GM described BDJ as a “troublemaker” who “messes around all the time” and “deserved to be kicked out.” (*Ibid.*) He saw Respondent “push [BDJ] back a few steps in anger before kicking him out” with “one hand near throat.” (Ex. 15.) CZ stated Respondent “was pretty mad” and that he saw Respondent “grab [BDJ’s] shirt for a few seconds” and hold BDJ by his shirt. CZ further stated that Respondent grabbing and pushing BDJ was discussed in the team room before the basketball game with his father, Coach Zarkovacski, who called BDJ’s parents and told them about the February 1 incident. (Exs. 14 and 15.)

64. As documented by Principal Swanitz and Administrator Bommersbach, JA stated during his interview that BDJ had been messing around all year. (Ex. 14.) On February 1, JA heard Respondent talking to BDJ about him not having his bag, so JA turned around in his seat to listen and that’s how he saw what happened; Respondent grabbed BDJ by his shirt collar and “kind of” turned BDJ so that JA saw the entire incident, which lasted two to three seconds. (Ex. 14.) After Respondent grabbed and pushed BDJ, JA stated BDJ went back to his seat but Respondent “said go to the counselor because I want you out of this class” and “was yelling this.” (Ex. 14.) After BDJ left Respondent told the class that BDJ did not belong on the team and that all of them are winners, but that BDJ did not have that in his DNA. (Exs. 14 and 15.) According to Principal Swanitz’s notes, JA told him during his interview that some students who witnessed Respondent’s actions against BDJ will definitely not say

anything about what happened in football class during the February 1 incident. (Ex. 15.) TK told the administrators he saw BDJ kicked out of class and heard about the physical part of the interaction but did not witness it. (Exs. 14 and 15.)

65. Later that February 2 school day, SRO Deputy Thomas handed out blank incident reports to the students in the football class while all the students were assembled in the football classroom. Neither BDJ nor Respondent was present. The football class was the last class of the school day. By the seventh-period football class on February 2, rumors about the February 1 incident had spread through the members of the football class, with students discussing that Respondent was on leave because he had touched BDJ. (Testimony of TJ.) Before passing out the blank incident reports to the class, SRO Deputy Thomas told the class they needed to take filling out the incident reports seriously; that the students were to describe what they saw in football class on February 1; that the incident reports they filled out could potentially be used in a case or lawsuit that would determine if Respondent continued to be a teacher at Cabrillo. (Testimony of MM; Ex. 24, p. A3424.)

66. While SRO Deputy Thomas was asking the football class students to write statement, students discussed that they would say they "saw nothing." (Testimony of MP; Ex. 24, p. A3770.) In addition, some of the football team captains, TJ, JZ and AC, instructed the other football class students to write they did not see anything on their incident reports because they were loyal to Respondent, they did not want Respondent's potential dismissal due to his actions against BDJ to end Cabrillo's football season, and they viewed BDJ in unfavorable terms. (Testimony of JC; Ex. 24, p. A3143.) The football team captain instructions to lie about the February 1 incident when writing the incident reports affected student witnesses' accounts of the February 1 incident. For example, the evidence established BG, JC, and RR falsely wrote in their

written incident statements that they did not witness Respondent have physical contact with BDJ during the February 1 incident when, in fact, they had observed various degrees of physical contact between Respondent and BDJ. (Ex. 12, pp. A135-136, A138; Testimony of JC, Ex. 24, p. A3131; Ex. 16.)

67. There were 38 incident report statements (in addition to BDJ's incident report) written by the football class witnesses which were submitted into evidence. (Ex. 13.) Most of the incident reports, 27 in total, were not submitted by students during the football class on February 2, but were submitted by students the following day, on February 3, 2022. Nine of the football class student incident reports corroborate BDJ's assertion and establish, through a preponderance of the evidence, Respondent physically touched BDJ during football class on February 1 to an extent and in a manner which violated relevant District policies. Though the descriptions of where and how Respondent touched BDJ vary in the incident reports (JA, JB, AH, LM, GM, SM, NR, and CZ), the written statements credibly refute Respondent's denials that he significantly touched BDJ during the February 1 incident. (*Id.* at pp. A148, A149, A159, A169, A171, A172, A176, and A185.)

68. In summary, the incident reports variously describe Respondent as engaging in the following physical contact with BDJ: grabbing BDJ's shirt collar and shaking BDJ around; grabbing BDJ "by the collar like playing around"; grabbing BDJ's shirt and putting BDJ in his chair; not putting Respondent's hands around BDJ's neck but on Respondent's shoulder; "[making] contact with [BDJ's] throat and . . . pushing [BDJ] towards the back of the room" and choking him; "kinda [moving] [BDJ] so Respondent could walk away"; putting Respondent's hands on [BDJ's] "shoulder not neck"; seeming "mad" as Respondent "grabbed [BDJ's] shirt collar and twisted it and

was talking to [BDJ] and walked [BDJ] back to his seat." (Ex. 13, pp. pp. A148, A149, A159, A169, A171, A172, A176, and A185.)

69. Twenty-nine of the incident reports stated the football class student witnesses did not observe any physical contact between Respondent and BDJ. (Ex. 13, pp. AA150-AA158, AA160-168, AA170, AA173-AA175 A177-A184, and AA186.) (The evidence subsequently established three of the 29 student witness statements were false and that the students had, in fact, witnessed Respondent have physical contact with BDJ (BG, RR, and JC).) The students' descriptions notably vary. Thirteen of the 29 statements stated the student witnesses either did not know what occurred or did not see what happened on February 1. The 13 statements state variously: "I didn't see anything"; "I did not see anything"; "I didn't see what happened [*sic*]" "I didn't witness anything." "I don't know what happened."; "I didn't see anything happen I don't [*sic*] know when it happened but when he got kicked out he was across the room"; "I didn't [*sic*] see anything."; "I didn't see"; "Didn't see anything."; "I don't know anything."; "I was sleeping, so I don't know whats [*sic*] happening." (Ex. 13, pp. A150 (JC), A151 (FC), A 156 (CE), A157 (BG), A158 (CJH), A162 (JH) A165 (CL), A166 (SL) A167 (BL), A168 (JLJ), A179 (IR), A180 (ES), A181 (MS).)

70. Six of the twenty-nine student witness statements affirmatively denied Respondent touched BDJ. (Ex. 13, pp. A152, A153, A154, A161, A163, A173.) JC wrote "BDJ always [*sic*] a "trouble maker" who "was spreading false information by saying [Respondent] grabbed [BDJ] by the throat." (*Id.* at p. A152.) TC wrote "[Respondent] did not put his hands on [BDJ]. I think [BDJ] said that to get [Respondent] in trouble because [BDJ] was mad." (*Id.* at p. A 153.) AC wrote "[T]here was no physical action between the persons involved in incident." (*Id.* at p. A154.) CH wrote, "I didn't see anyone get hit." (*Id.* at p. A161.) TJ's statement described his February 2 interview with

Principal Swanitz and Administrator Boomersbach and stated, “[Principal Swanitz] asked me if I knew anything about people that would be against [Respondent] and I stated [AH] . . . I was asked if I had seen any physical altercation and I replied no.” (*Id.* at p. A163.) MP wrote “there was no physical contact between the two at least from my perspective only [Respondent] telling the student to leave the classroom. In my opinion any accusations made was probably made out of anger from the student.” (*Id.* at p. A173.)

71. Some of the statements described Respondent kicking BDJ out of football class on February 1 because BDJ was misbehaving again, frequently forgot his bag, and distracted his teammates. Some statements describe Respondent as yelling and angry when he instructed BDJ to leave the class. (Ex. 13, pp. A160, A175, and A182.)

72. On February 3, 2022, Respondent was interviewed by Principal Swanitz with his union representative and Administrator Bommersbach present. According to Administrator Bommersbach’s notes of the interview, Respondent stated he did not touch BDJ on February 1. (Ex. 14, pp. A189-A190.) Respondent stated he was arranging the football classroom for seating on February 1 when Respondent came and asked if he could get his bag. Respondent told BDJ no and told him to wait until roll. BDJ continued to ask to get his bag. After the third time BDJ asked to get his bag and Respondent answered no, Respondent told BDJ to go to his counselor and get out of the football class. (*Ibid.*)

73. As recorded in Bommersbach’s notes of the February 3 interview, Respondent and his union representative questioned how the investigation was being conducted and suggested to Principal Swanitz how the allegations against Respondent should be investigated. In response to Respondent and his union representative’s

questioning and suggestions, Principal Swanitz fully disclosed the details about the pending investigation to Respondent and his union representative by discussing, among other things, what BDJ's parents had told him when they had called to report the February 1 incident, what BDJ had told investigators, what other student witnesses had said (i.e., "[W]hen we interviewed kids it was more of a grab or push"), which "good kids" they could interview, and the number of kids who said they saw "something" and those who did not. (Ex. 14, pp. A189-A190.)

74. On February 3, 2022, after Respondent was placed on administrative leave, BG's mom called BDJ's mom, AD, to discuss the February 1 incident. In response to her questions, AD told BG's mom what had occurred. BG's mom expressed concern that if Respondent was dismissed because of the incident, Cabrillo would not have a football team next year and urged AD to speak with Respondent in person to discuss the matter. Approximately a week after Respondent was placed on leave, BDJ was removed from the football team's Instagram chat group, which had begun to post the hashtag "@coachteam[Respondent]" prior to BDJ being removed from the group.

PII Investigation

75. On February 7, 2022, the District retained PII to conduct its independent investigation of what occurred during the February 1 incident. PII completed its investigation on April 8, 2022.

76. PII's investigation concluded, by a preponderance of the evidence that: "1) [Respondent] grabbed [BDJ] with two hands near the neck area in an angry gesture that forced [BDJ] backward by several feet, in violation of District policies, and; 2) [Respondent] used the word "fuck" in front of the class, in violation of District policy." (Ex. 12.) As part of its investigation, PII's investigators interviewed BDJ with his parents;

AP Grimnes; Coach Zarkovacski; 12 students from the football class who were present on February 1 (GM, AH, JA, CZ, CJH, JC, BG, TJ, JZ, AC, AW, BY), and Respondent, with his union representative, Mr. Alvarez, present. (*Id.*) PII also reviewed the following documents in reaching its investigative conclusions: Administrator Bommersbach's notes from witness interviews; Principal Swanitz's notes from witness interviews (incorrectly identified as SRO Deputy Thomas notes in PII's report); the 39 incident reports from students present in the football class on February 1; a note from Cabrillo teacher Lisa Torina regarding her conversation with two students (AH and RR) and from the football class (Ex. 16); and BP 4119.24/4219.24/4319.24 (Maintaining Appropriate Adult-Student Interactions), BP 4119.21/4319.21 (Professional Standards), and AR 5131.41 (Use of Seclusion and Restraint). (Exs. 11 and 12.)

77. The PII finding that Respondent grabbed BDJ with both hands, rather than one hand, as BDJ had previously indicated, was based primarily on BDJ's account of the incident to investigators. In all other respects, BDJ's statement to investigators was consistent with his written incident report and prior statements to SRO Deputy Thomas, and Principal Swanitz and Administrator Boomersbach. As recorded by PII investigators, during BDJ's February 16, 2022 interview with PII investigators Keith Rohman and Alissa de Vogel, BDJ told the investigators that on February 1, Respondent put both his hands on BDJ's neck during the incident and "started putting pressure" on BDJ's neck. (Ex. 12, p. A126.) BDJ said Respondent pushed him and "forced him back," "two or three steps" "while [Respondent's] hands were at his neck. BDJ used his mother to demonstrate to PII's investigators how Respondent had grabbed him by "[grasping] Ms. Dunson's neck with both hands, [placing] his thumb on her windpipe, and [pushing] her back." BDJ told investigators that while Respondent had closed his hands "tightly around his neck," Respondent did not leave a bruise or any type of mark. (*Ibid.*) BDJ also told PII investigators that, prior to this

incident, he and Respondent had always “gotten along” and had a “friendly relationship” and that “[BDJ] would like to return to football even if [Respondent] was coaching the [football] team.” (Ex. 12, p. A127.)

78. At hearing, both BDJ and AD testified that BDJ did not demonstrate to PII investigators during his February 8, 2022 interview that Respondent had grabbed him with both hands around the neck on February 1. However, PII investigator Mr. Rohman credibly testified that BDJ reported Respondent grabbed him with two hands during his February 8 interview. Respondent argues that BDJ’s varying account of a one versus two hands grabbing undermines the allegations against Respondent. This argument is unconvincing. BDJ’s February 8 statement to PII investigators that Respondent grabbed him with two hands, rather than one hand, is not material and does not change the ultimate finding in this matter that the preponderance of the evidence demonstrates Respondent physically grabbed and pushed BDJ during the incident on February 1.

79. JC’s written incident report to SRO Deputy Thomas stated, “I did not see anything, all I heard was that [BDJ] has to drop the class.” (Ex. 13, p. A150.) However, during his PII interview on February 28, 2022, JC told PII investigator Ms. de Vogel the following:

[JC] said that he was pulling out his computer to begin study hall when he looked behind him and saw [BDJ] and [Respondent] arguing. JC said that he turned a bit to get a better view of [BDJ] and [Respondent]; he saw [Respondent] grab [BDJ’s] upper body, but he could not tell whether [Respondent] grabbed [BDJ’s] collar or [BDJ’s] shoulders. [JC] said that he saw [BDJ] move about five to seven feet

back while [Respondent] was grabbing [BDJ], but he could not tell whether [Respondent] was pushing [BDJ] or if [BDJ] was walking backward on his own. . . [JC] said that [BDJ] left the class immediately after the incident with [Respondent].

(Ex. 12, p. A135.)

80. JC was not the only football class student witness who changed his account of the February 1 incident when interviewed by PII investigators; at first writing in their incident reports that they did not see anything and then stating to PII investigators during their interviews that, in fact, Respondent had physical contact with BDJ on February 1. For example, BG, the football class student who had first reported Respondent having physical contact with BDJ during the February 1 incident when he recounted it to Coach Zarkovackski during the basketball game, characterizing the contact as a “choking,” changed his account in his incident report, writing “I did not see anything.” (Factual Findings 48 and 68; Ex. 13, p. A157.) However, on February 28, 2023, when he was interviewed by PII investigator Ms. De Vogel, BG reported that Respondent “nudged” [BDJ] toward his seat by placing his hand on [BDJ’s] back and guiding [BDJ] toward his seat.” (Ex. 12, p. A135.) BG’s mom was present during BG’s PII interview and, as reported by Ms. De Vogel, expressed concern that Respondent’s dismissal would lead to the end of football at Cabrillo. (Ex. 12, footnote at pp. A136-A137.)

81. CJH submitted a written incident report to SRO Deputy Thomas in which he wrote, “I didn’t see what happened.” (Factual Finding 68, Ex. 13, p.158.) However, when he was interviewed by PII interviewer Ms. de Vogel, he changed his account, stating that “at some point after [BDJ] returned from getting his bag, [Respondent]

grabbed [BDJ] by the shirt, walked [BDJ] back two steps, and told [BDJ] to go to [BDJ's] counselor." (Ex. 12, pp. A134-A135.)

82. To support his allegation that BDJ and his friends fabricated the allegations against him, Respondent provided the written statement of fellow Cabrillo teacher Linda Torina to PII investigators. As reported by Ms. Torina's February 8, 2022 written statement, she "overheard" student AH and RR discuss what they were going to say about the February 1 incident if they were called in for questioning. (Ex. 16.) Ms. Torina reported RR stated, "I think [Respondent] just grabbed the front of his shirt" and demonstrated on himself, "pulling lightly on the front of [RR's] own shirt several inches below the collar." (*Ibid.*) She reported AH stated he did not know what he was going to say. Ms. Torina concluded, based on the conversation on which she eavesdropped between AH and RR, that "both boys seemed to be planning their stories, as if they were considering possibly fabricating their stories." (*Ibid.*) After reporting the February 2 conversation between AH and RR to Respondent, Ms. Torina then took it upon herself on February 3, 2022, to "casually" ask AH and RR "what was going on" and "why students were being called out of class for questioning." (*Ibid.*) Ms. Torina recorded AH telling her "[I]t wasn't anything" and RR as responding it was "nothing," as support for her conclusion that "both boys replies clearly indicated they believed that [Respondent] had done nothing unprofessional that would warrant ongoing attention." (*Ibid.*)

83. Ms. Torina's statement does not, in fact, support Respondent's narrative that BDJ and his friends fabricated the fact that Respondent grabbed and pushed BDJ on February 1. When RR's various statements are considered, Ms. Torina's account supports the conclusion there were student witnesses in the football class who were reluctant to be honest and forthright with investigators about seeing Respondent grab

and push BDJ. Ms. Torina heard RR tell AH that Respondent grabbed BDJ and physically demonstrate on himself how he witnessed Respondent grab BDJ on February 1. (Ex. 16.) However, in the incident report RR provided to SRO Deputy Thomas, RR wrote, "All I saw was [Respondent] yelling at [BDJ] but multiple other people said that [Respondent] coached out [BDJ]." (Ex. 13, p. A175.) Accordingly, PII investigators correctly dismissed Ms. Torina's conclusion that RR and AH were considering fabricating their accounts when they were discussing the February 1 incident in her class.

84. At hearing, Respondent admitted to using the word "fuck" in front of the class and disputed the allegation he touched the student in any manner other than in an insignificant manner. Respondent alleged the student and any football class student who stated he grabbed and shoved BDJ fabricated any other type of touching in retaliation against Respondent because Respondent threw the student off the football team based on the student's ongoing disruptive class behavior.

85. On March 18, 2022, Respondent was interviewed by PII investigators, Mr. Rohman and Ms. de Vogel with Mr. Alvarez, Respondent's union representative present. (Ex. 12, P. A141.) As reported, consistent with his prior statements to SRO Deputy Thomas and Principal Swanitz, Respondent again denied "touching" [BDJ], stating there was a distance of five to ten feet between himself and [Respondent] during the February 1 incident. Respondent also told investigators that he was holding a clipboard the entire time that would have prevented him from using both hands to touch or grab [BDJ]. (*Ibid.*)

86. Based on their investigation, PII did not find Respondent's denial of physical touching of BDJ during the February 1 incident credible because it was contradicted by 12 of the 39 students in the football class, including GM, AH, JA, CZ,

CJH, JC, BG, LB, JB, NR, and RR. PII's investigation considered whether some witnesses were biased towards BDJ and noted, as part of their investigation that two of the six witnesses who reported significant touching by Respondent indicated they were friends with BDJ, including AH and CJH. PII investigators, however, rejected the suggestion that BDJ's friends provided biased accounts, concluding that even BDJ's friends' accounts were critical of BDJ, which gave their account of Respondent's conduct more credibility." (Ex. 12, p. A142.) As examples, PII cited that both GM and JA, BDJ's then-friends, respectively described BDJ as a "a troublemaker" who had been "messing around" all year. (*Ibid.*)

87. PII found no support for AC, MP, and TC's written incident report speculative allegations that BDJ made a false accusation against Respondent. (Exs. 12, p. A142 and 13, pp. A152, A153, and A173.) In fact, the totality of the evidence indicated BDJ had no negative feelings towards Respondent at times proximate to the February 1 incident. For example, he made positive statements about his relationship with Respondent to both SRO Deputy Thomas and Principal Swanitz. Similarly, as reported by PII, BDJ told PII "he had always had a good relationship with [Respondent] and that [BDJ] would like to return to football, even if [Respondent] was coaching." (Ex. 12, p. A142.)

88. PII discussed that 27 of the witnesses reported they did not observe any physical contact between Respondent and BDJ. However, PII noted that the accounts differed, with some stating affirmatively they did not observe Respondent touching BDJ and denying it occurred, while others stated they did not know what happened or did not see what happened. For the latter category of witnesses, PII concluded that not knowing what happened or not seeing what happened does not indicate Respondent did not touch BDJ during the February 1 incident. Based on the chaotic nature of the

football classroom and the brevity of the February 1 incident, PII stated that “[I]t is reasonable to assume that students may have viewed the incident from different vantage points or simply not seen what happened.” (Ex. 12, pp. A142-A143.)

89. Finally, PII discussed BDJ’s status as a freshman who was relatively new to the football team and was viewed by some in unfavorable terms as a behavior problem and distraction. That set of circumstances, coupled with some of the football class students concern that Respondent’s dismissal could lead to the end of the football program at Cabrillo, could have reasonably impacted witness accounts and their willingness to accurately report Respondent’s physical aggression against BDJ during the February 1 incident.

90. As set forth in Factual Finding 4, PII’s investigation concluded, by a preponderance of the evidence, that on February 1, 2022, during seventh-period football class: 1) Respondent grabbed the student with two hands near the neck area in an angry gesture that forced the student backward by several feet, in violation of District policies, and 2) Respondent used the word “fuck” in front of the class, in violation of District policy. With the exception that Respondent grabbed BDJ with one, rather than two, hands near the neck area, the remainder of PII’s investigative findings are credited and corroborate the findings of this Decision.

Hearing

DISTRICT WITNESSES

91. BDJ, AD, BD Sr., former DP Valla, DP Blow, AP Grimnes, Coach Zarkovacski, JA, JC, CZ, and PII Investigator Mr. Rohman credibly testified on behalf of the District at hearing. The percipient witness’s testimony is addressed below.

Testimony of BDJ

92. BDJ testified at hearing. He is now a tenth grader who attends Liberty High School in Las Vegas, Nevada. After the February 1 incident, BDJ stopped attending Cabrillo in April 2022. BDJ credibly testified that on February 1 Respondent angrily grabbed him by the neck with one hand with Respondent's thumb in the middle of his neck and the rest of the hand towards BDJ's shoulder and pushed BDJ back so that BDJ was forced to step back one or two steps. BDJ's testimony about Respondent's actions on February 1 is consistent with BDJ's written incident report, and with what BDJ reported after the incident on February 1 to his parents, SRO Deputy Thomas, Principal Swanitz, and Administrator Bommersbach. At hearing, BDJ described Respondent's physical assault as scary, shocking, and embarrassing. Almost a week after the February 1 incident, BDJ told PII investigators that Respondent grabbed him with two hands, rather than one hand, on February 1. At hearing, BDJ did not recall telling PII investigators during his February 7 interview that Respondent grabbed him with two hands and testified that Respondent grabbed him with one hand. Based on a variety of reasons, including BDJ's memory issues and the shocking effect of the February 1 incident, BDJ may have exaggerated the extent of Respondent's physical assault during his interview with PII investigators. Nevertheless, whether Respondent grabbed BDJ with one or two hands is immaterial to the ultimate finding that Respondent angrily physically grabbed BDJ and pushed him back on February 1 without reasonable justification in violation of District policies.

Testimony of JA, JC, CZ

JA

93. JA is a tenth grader who continues to attend Cabrillo. He testified at hearing in a forthright and credible manner. By all accounts, JA is an honest individual. JA's hearing testimony was consistent with his prior contemporaneous statements about the February 1 incident as contained in his written incident report and statements to SRO Deputy Thomas, Principal Swanitz, Administrator Bommersbach, and PII. At hearing, JA testified that BDJ "was kind of my friend last year but that's not true anymore." (Ex. 24, p. A3903.) JA described the February 1 interaction he observed between Respondent and BDJ as follows:

So, BDJ walked into the classroom and he told [Respondent] that he forgot his basketball bag because we had a game that day for basketball and he had forgotten his basketball bag in another room. And he asked [Respondent] if he could go retrieve his basketball bag from the other - - for the last classroom. And [Respondent] told him no and to wait for a more appropriate time to go get the bag and [Respondent], also, said to go sit down in your seat. And BDJ did not listen and he just continued to stand and not listen to [Respondent]. So, then, [Respondent] kind of like - - he started getting angrier and more annoyed with BDJ. And, then, it led to [Respondent] grabbing BDJ's like neck, like collar, and shook him around into a - he did like a 180 so then BDJ was then - - he was facing me because before I was seeing his back. And then, [Respondent] after

that he told him to go see his counsel and get - - and change his schedule so you're not in this class anymore. And then - - so, then BDJ left the class and that's what happened.

(Ex. 24, pp. A3097-A3098.)

94. No convincing evidence was presented by Respondent to support his assertion that JA's testimony was fabricated or biased because of his friendship with BDJ. Indeed, JA's credible hearing testimony is sufficient evidence, standing alone, to establish through a preponderance of the evidence that Respondent physically assaulted BDJ on February 1 in violation of District policies. (Evid. Code, § 411.)

JC

95. JC is an eleventh grader at Cabrillo who credibly testified at hearing. JC is not and was not friends with BDJ at the time of the February 1 incident. JC testified at hearing that on February 1 he observed BDJ and Respondent "arguing" and that Respondent "pushed or was grabbing BDJ and they took a step back." (Ex. 24, p. A3130.) JC's testimony was consistent with his prior statements to PII investigators. However, as set forth in Factual Finding 78, JC initially wrote in his incident report that he did not see anything on February 1 and only heard that BDJ had to drop the class. At hearing, JC explained he had previously provided a false statement in his incident report because the football captains (TJ, JZ, and AC) wanted him "to lie for Respondent." (Ex. 24, p. A3133.) Specifically, JC testified that "the people who I was sitting next to kind of pressured me into not saying what I saw and I kind of fell into that pressure." (Ex. 24, p. A3131.)

96. No credible evidence was presented by Respondent to impugn JC's testimony. JC's admission that he previously lied about the February 1 incident due to peer pressure from other football class students is a statement that is clearly against his self-interest. Accordingly, JC's testimony lends credence to the District's argument that some football class student witnesses failed to be forthcoming about what occurred on February 1 to protect Respondent. In addition, JC's credible hearing testimony is sufficient evidence, standing alone, to establish through a preponderance of the evidence that Respondent physically assaulted BDJ on February 1 in violation of District policies. (Evid. Code, § 411.)

CZ

97. CZ is a tenth grader at Cabrillo who is BDJ's friend and Coach Zarkovacski's son. CZ's hearing testimony was consistent with his prior contemporaneous statements about the February 1 incident to Coach Zarkovacski, his written incident report, statements to SRO Deputy Thomas, Principal Swanitz, Administrator Bommersbach, and PII. At hearing, CZ described the February 1 interaction he observed between Respondent and BDJ as follows:

[BDJ] walked into the classroom and asked [Respondent] if he could grab his bag and, then, [Respondent] didn't really give him a full response, he just kind of gave him a look. [BDJ] walked back to his desk. He didn't sit down all the way or he was standing up and then he asked him again. [Respondent] got mad and walked over to him. [BDJ] wasn't at his desk, he was standing near a desk but he wasn't at his desk. [Respondent] grabbed his shirt like this (indicating), he was saying something to him, I couldn't hear what he

saying, but I could hear his tone he was very angry, and he walked [BDJ] back down to his desk and kind of pushed him down by his shirt.

(Ex. 24, pp. A3152-A3153.)

98. No convincing evidence was presented by Respondent to support his assertion that CZ's testimony was fabricated or biased because of his friendship with BDJ. CZ's credible hearing testimony is sufficient evidence, standing alone, to establish through a preponderance of the evidence that Respondent physically assaulted BDJ on February 1 in violation of District policies. (Evid. Code, § 411.)

RESPONDENT'S EVIDENCE

99. Respondent, TJ, MP, AC, MM, JZ, Ms. Torina, and SRO Deputy Thomas testified on behalf of the Respondent at hearing.

Ms. Torina and SRO Deputy Thomas

100. Ms. Torina and SRO Deputy Thomas's hearing testimony is afforded little evidentiary weight because neither of them observed what occurred on February 1 in the football class. In addition, Ms. Torina and SRO Deputy Thomas' hearing testimony is not credited because it is biased towards Respondent. SRO Deputy Thomas, charged with conducting an independent criminal investigation of what occurred on February 1, engaged in private text messages with Respondent between February 4 and 22, 2022 regarding the details of the investigation. (Ex. B241.) The informal tone and nature of the text message exchanges support former DP Valla's hearing testimony that the criminal investigation clearing Respondent of wrongdoing was unreliable because it was influenced by SRO Deputy Thomas's personal bias towards Respondent.

Similarly, SRO Deputy Thomas's police report includes subjective positive statements about Respondent which are irrelevant to the February 1 incident. (Ex. 261, p. B253.)

101. Ms. Torina is a Cabrillo English teacher who has known Respondent since 2006. On February 2, 2022, she overheard a conversation between two football class students (AH and RR) in her English class who witnessed the February 1 incident. (Factual Finding 81-82.) Ms. Torina then reported the conversation to Respondent who instructed her to write down what she heard because he would likely need her statement. Ms. Torina followed Respondent's instructions. She also solicited additional information from the two students about what they said to investigators about the February 1 incident by approaching the students directly and questioning them. Ms. Torina documented her investigative efforts in a written statement, dated February 8, 2022, she gave exclusively to Respondent for his personal use. (Ex. 16.) Ms. Torina's conclusion that the two students intended to fabricate their statements was dispelled by the evidence at hearing, as set forth in Factual Finding 81 and 82.

102. Ms. Torina testified at hearing that the motivation for her actions in documenting what she overheard and soliciting information from the football class witnesses was to ascertain the truth. Her testimony is not credited. Ms. Torina did not ask BDJ, a student in the same English class, what occurred on February 1. During her testimony, Ms. Torina exhibited a bias against BDJ by negatively referencing BDJ's tardiness to her English class, an alleged cheating incident, and the additional time he was afforded to complete schoolwork due to his IEP. Ms. Torina did not notify Cabrillo's administration about the conversation she overheard between the two students or about the written statement she provided to Respondent. Ms. Torina's actions illustrate her motivation was not, as she maintains, to ascertain the truth of

what occurred on February 1, but to aid Respondent in the pending allegations against him by BDJ.

Testimony of TJ, MP, AC, MM, and JZ

TJ

103. TJ is now a twelfth grader at Cabrillo. At the time of the February 1 incident, TJ was an eleventh grader and one of the football team captains Respondent appointed. The team captains acted as leaders in the football class with TJ assuming the role, at Respondent's instruction, to quiet down the class on a regular basis. TJ is the son of Cabrillo Coach "Dano" Jacobson, who coached football with Respondent and coached football at Cabrillo during the 2022/2023 school year. Coach "Dano" was present during TJ's hearing testimony but was not visible on videoconference. TJ confirmed Coach "Dano" was present during his testimony after the administrative law judge observed TJ looking off camera during his hearing testimony and asked if anyone was present in the room while he was testifying. The administrative law judge then instructed TJ to answer questions based on his own independent recollection and to stop looking off-camera because it created the impression he was looking to Coach "Dano" for input during his testimony.

104. At hearing, TJ denied any physical contact between Respondent and BDJ occurred and described the February 1 interaction he observed between Respondent and BDJ as follows:

[Respondent] - - I mean I walked into the classroom and

[Respondent] was standing at his desk with his clipboard.

That day we were moving seats. He told me to quiet the class up and so I asked everybody to be quiet. And we

started to like use the new seating arrangement, and [Respondent] was moving people around to their new seats. [Respondent] got to [BDJ's] table which is directly behind mine, and [Respondent] asked [BDJ] to move one seat over. [BDJ] did not want to and complained and argued and that's when I said, hey, can you just move, please. And [BDJ] rolled his eyes and then moved. And then after that [Respondent] got the class to completely go silent. [Respondent] asked everybody to be quiet and he told [BDJ] to pack up his stuff, leave the room, and go to the office and get P.E. moved to his new seventh period because he wasn't going to be in football anymore.

(Ex. 24, p. A3334.)

105. During cross-examination by District counsel, TJ testified that Respondent was around three feet away when he leaned over BDJ to tell BDJ to move seats because BDJ was refusing to move seats. (Ex. 24, pp. A3345-A3356.) TJ confirmed Respondent was angry during his interaction with BDJ, describing Respondent as "very frustrated." (*Id.* at p. A3335) However, on cross-examination, TJ denied Respondent was angry during the interaction and characterized Respondent as disappointed. (*Id.* at p. A3334.) TJ testified Respondent used the word "fuck" after BDJ left on February 1 when addressing the football class.

106. TJ testified that after the February 1 incident "[E]very student was talking about it." (Ex. 24, p. A3336.) He described sides forming among the students, with AH, IR, and CZ "claiming that something had happened." (*Ibid.*) During his testimony, TJ admitted to being "annoyed with [BDJ] because he would constantly disrupt the class."

(*Id.* at p. A3344.) He described BDJ in unfavorable terms, testifying BDJ “was a very disruptive student,” who “would constantly go against the coaching,” “cause problems on the field and in the weight room,” “wouldn’t participate in football,” and “wasn’t a good listener.” (*Id.* at pp. A3336-A3337.) In contrast, TJ described Respondent in positive terms and testified he was “well-liked on our campus because [Respondent] was a very good AD for us in sports during the Covid-19 outbreak.” (*Id.* at p. A3338.)

107. TJ was present when SRO Deputy Thomas came to class on February 2, 2022 to ask the football class to fill out written incident reports about what they observed on February 1. TJ testified that despite SRO Deputy Thomas instructions to be quiet when they filled out their written incident reports, students were talking while filling out the incident reports. On February 2, 2022, TJ was interviewed by Principal Swanitz and Administrator Boomersbach about the February 1 incident. TJ prepared a February 3, 2022 dated incident report detailing their February 2 interview. In his February 3 incident report, TJ did not mention Respondent leaning over BDJ on February 1 during their interaction, as he testified at hearing. He also made no mention of Respondent cursing during the February 1 class. (Ex. 13, p. A153.) During his subsequent interview with PII investigators, TJ also told investigators Respondent did not touch BDJ during their interaction, but included the assertion Respondent leaned over BDJ while BDJ was seated, stating to PII investigators that Respondent “got in on [BDJ], though.” (Ex. 12, p. A136.)

108. After Respondent was placed on leave, TJ, JR, DR, and AC met with Principal Swanitz in or around March/April 2022 to find out the status of Respondent’s suspension. The students met with Principal Swanitz because they were upset about not having a football coach and wanted Respondent back or for someone to be put in his place to get the football season going. TJ and the other players were notified a

Board meeting would be held regarding Respondent. TJ told the football class about the Board meeting and that students could go to the meeting to express support for Respondent. TJ attended the Board meeting remotely, and wrote a statement in support of Respondent, which was submitted to the Board. (Ex. B503.) At hearing, TJ testified he wrote the statement "because I was frustrated that for a long period of time we did not have a coach and so our athletic director had to take over the classroom and control all of our lifting and everything. But we didn't have a teacher, we didn't have a grade, so it was very frustrating to not have someone there representing us." (Ex. 24, p. A3340.)

109. Based on Factual Findings 102 through 107, TJ's testimony about Respondent and BDJ's interaction of February 1 is not credited. TJ's description of the basis of the conflict on February 1 as BDJ refusing to move seats is unsupported by any other credible evidence. In addition, TJ's bias towards Respondent and against BDJ is evident throughout his testimony and conduct.

MP

110. MP is a twelfth grader at Cabrillo. MP's mother is Cabrillo's athletic director and has known Respondent for the past 21 years. Respondent, MP, and his mom see each other socially outside of school. At hearing, MP testified he did not witness any physical contact between Respondent and BDJ on February 1, testifying "[A]ll I saw was [Respondent] telling BDJ to leave the classroom and without any back and forth BDJ left the classroom and everything resumed like normal." (Ex. 24, p. A3362.) MP's football class seat was located at the back right-hand corner of the classroom. He testified BDJ and Respondent were 15 feet apart when Respondent ordered BDJ out of class on February 1 and that Respondent did not lean over BDJ's desk. MP described Respondent's tone as "angry" when he ordered BDJ to leave the

class. (Ex. 24, p. A3363.) MP testified he could not recall Respondent curse during class on February 1, testifying "everything resumed like normal" after BDJ left the classroom. (*Id.* at p. A3363.)

111. MP testified that after the incident on February 1 he learned that there were accusations he believed were untrue against Respondent including "there was strangulation and like hitting and physical contact in a harmful attempt." (Ex. 24, p. A3363.) During his testimony, MP described BDJ in unfavorable terms as a "very misbehaved" student who "would goof off often in the class." (*Ibid.*) MP described Respondent in positive terms as a coach whom he liked who was "funny" and "tough." (*Id.* at p. A3365.)

112. MP testified that on February 2 when SRO Deputy Thomas handed out the incident reports for the football class students to fill out about what they observed in class on February 1, students said to each other "that they would say they saw nothing." (Ex. 24, p. A3370.) MP wrote in his incident report that "there was no physical contact between the two at least from my perspective" and opined "any accusations made was probably made out of anger from the student." (Ex. 13, p. A173.)

113. During MP's testimony the administrative law judge heard someone speak to MP prior to him answering a question that was being posed to him by District's counsel on cross-examination. As a result, the administrative law judge instructed whoever was in the room speaking to MP as he testified not to speak or coach MP while he was answering questions. MP testified his mother would relay information about the District's recommendation for Respondent's dismissal to him after Respondent was placed on leave in February 2022. At his mother request, MP dictated a May 4 statement to his mom, which she typed, providing his perspective on the February 1 incident and to "help Respondent," whom he liked as a coach and

friend. (Ex. 24, p. A3376.) MP testified that the football class student athletes were divided in two sides, with one side trying to protect their friend and the other side trying to protect their coach. When asked which side he was on, MP testified, "I'm trying to protect my coach." (Ex. A3337.)

114. MP's testimony that he did not witness Respondent have physical contact with BDJ on February 1 is credited. However, the fact that MP did not witness the physical contact between Respondent and BDJ does not mean that no physical contact occurred on February 1. In fact, the contrary has been established by a preponderance of the credible evidence. Further, based on his admitted bias in favor of Respondent as illustrated by his failure to be forthcoming about Respondent's use of the word "fuck" when addressing the class on February 1, MP is an unreliable witness whose willingness to be truthful as to what occurred on February 1 is compromised by his loyalty to Respondent.

AC

115. AC is now a twelfth grader at Cabrillo. At the time of the February 1 incident, AC was an eleventh grader and one of the football team captains Respondent appointed. AC testified at hearing that nothing happened on February 1 and that there were no unusual interactions between Respondent and another student that day aside from Respondent kicking a student out of class. AC testified BDJ was kicked out of class by Respondent because "[BDJ] was constantly distracting the class." (Ex. 24, p. A3382.) AC described Respondent as "very calm" and that he "wasn't angry in any sort of way" when Respondent kicked BDJ out of class. (*Id.* at p. A3384.) AC testified that the class "carried on the day normally like any other day" after BDJ left the class on February 1. (*Id.*) AC denied Respondent used profanity in class on February 1 and

testified he had not heard Respondent use profanity in the past in front of him or other students. AC testified he liked Respondent as a coach.

116. AC testified that Principal Swanitz told him, JZ, AR, DR, and TJ during a meeting in March or April 2022 that Respondent was probably going to be put on leave for an extended period and “was most likely not coming back.” (Ex. 24, p. A3389.) According to AC, the football players met with Principal Swanitz because “[w]e were very upset because we were about a month in to having no football coach, and we wanted [Respondent] back or we wanted someone to be put into place so we could get this football season going.” (*Ibid.*)

117. On February 2, AC wrote an incident report at the request of SRO Deputy Thomas in which he wrote “there was no physical action between the persons involved in incident.” Subsequently, AC drafted a second statement describing the February 1 incident, dated May 5, 2022. (Ex. B502.) According to AC, he was asked to write the May 5 statement by Cabrillo campus liaison, Ms. Watson, who works with Principal Swanitz while he was in his third period class at Cabrillo. AC testified he did not recall why he was asked to write the May 5 statement and did not know how his statement was to be used.

118. AC’s testimony that he did not witness Respondent have physical contact with BDJ on February 1 is credited. However, the fact that AC did not witness the physical contact between Respondent and BDJ does not mean that no physical contact occurred on February 1. The contrary has been established by a preponderance of the credible evidence. Further, based on AC’s failure to be forthcoming about Respondent’s observed emotional state and use of the word “fuck” when addressing the class on February 1 and vague testimony about his recollection regarding his May 5, 2022 written statement, AC is an unreliable witness whose willingness to be truthful

as to what occurred on February 1 is compromised by his allegiance to Respondent and unfavorable views of BDJ.

MM

119. MM is a twelfth grader at Cabrillo and was present in class on February 1. MM testified at hearing that he did not observe any physical contact between Respondent and BDJ on February 1, but only observed Respondent kick BDJ out of class after BDJ interrupted Respondent and caused a "ruckus." (Ex. 24, p. A3408.) The next day, February 2, 2022, MM testified he learned "[t]hrough chitchat from the team" that BDJ had accused Respondent "of choking him." (Ex. 24, p. A3411.) During his February 2, 2022 interview with Principal Swanitz and Administrator Bommersbach, MM is recorded by Administrator Bommersbach as stating he had arrived late to class on February 1 and was not really paying attention to what happened between Respondent and BDJ. (Ex. 14.) In his incident report, MM wrote he "walked in close to the tardy bell," put his phone away, and "kept to myself." (Ex. 13, p. A170.)

120. MM testified at hearing he and Respondent communicated after Respondent was placed on administrative leave, using personal email addresses, and that Respondent asked MM to write a statement about what he observed on February 1 for Respondent to use as part of a court case. MM did as Respondent requested, preparing a written statement of the February 1 incident, dated May 4, 2022. (Ex. B250.) Contrary to his prior representations that he was late to class and was not paying attention to what occurred, MM wrote, among other things, in the statement that on February 1 he "walked into class a few minutes before the bell rung." (*Ibid.*) MM also wrote that after Respondent told BDJ to leave class and switch to P.E., BDJ left "after some arguing." (*Ibid.*)

121. MM's testimony is unreliable as to what occurred on February 1. Based on his prior representations, MM arrived to class late and, most likely, did not witness Respondent grab and push BDJ, but only witnessed the later part of the incident, in which Respondent kicked BDJ out of class. Further, MM provided inconsistent statements and was vague about the nature of his ongoing communications with Respondent after the latter was placed on leave. In addition, MM's allegation that BDJ argued with Respondent after being ordered out of class is inconsistent with MM's prior statements and unsupported by the credible evidence, which established BDJ left class without any argument after being instructed to do so by Respondent.

JZ

122. JZ is now a twelfth grader at Cabrillo. At the time of the February 1 incident, JZ was an eleventh grader and one of the football team captains Respondent appointed. His role in the football class was to lock and unlock the filing cabinet where the students placed their cell phones prior to class. JZ testified that on February 1 Respondent asked BDJ to leave class because he had previously "messed around" and had "kind of been a distraction." (Ex. 24, p. A3455.) JZ testified Respondent did not touch BDJ on February 1 and was not angry when he ordered BDJ out of the class. JZ confirmed Respondent used the word "fuck" in addressing the class after BDJ left the classroom and had previously used profanity "fairly often." (*Id.* at p. A3476.)

123. JZ testified that after the February 1 incident he was told BDJ had "told others that [Respondent] had grabbed him by the throat and shoved him out of the room." (Ex. 24, p. A3458.) JZ's February 2 incident report makes no mention of the established fact that Respondent kicked BDJ out of class after Respondent refused BDJ's requests to retrieve his backpack and describes Respondent as suddenly

deciding to kick BDJ out of class on February 1 because of BDJ's general "lack of discipline . . . and commitment." (Ex. 13, p. A186.)

124. JZ testified that he and the other team captains told everyone in the football class to attend a Zoom meeting after Respondent was placed on leave to talk about the effects on Cabrillo athletics since Respondent had been gone. In addition, after Respondent was placed on leave, he and other members of the football team continued to communicate via text in a group chat. JZ described the text message communications as "words of encouragement," such as "hang in there, Coach. We're doing the best we can to keep the program together." (Ex. 24, p. A3483.)

125. JZ testified Respondent texted him to ask JZ to write a statement of what he observed during the February 1 incident, which was to be provided to Respondent's lawyer. JZ drafted the statement and emailed it to Respondent using their private email addresses on May 3, 2022 (Ex. B249.) In his statement, JZ writes that he "cannot recall what or if there was anything specifically that was the final straw resulting in [BDJ] being asked to transfer that day, but there were several events leading to [Respondent] finally requesting [BDJ] to leave." (*Id.*)

126. JZ's account of the February 1 incident is unreliable and inherently improbable. JZ's statement and hearing testimony omit Respondent and BDJ's exchange regarding BDJ's backpack and present a scenario where Respondent suddenly chose to kick BDJ out of class on February 1 because of BDJ's past disruptive behavior. His account is inconsistent with the credible evidence to the contrary presented by the District. The reasonable conclusion is that either JZ did not witness Respondent grab and push BDJ, and only observed the aftermath of Respondent kicking BDJ out of class, or JZ intentionally failed to be forthcoming about Respondent

grabbing and pushing BDJ on February 1 because of his loyalty towards Respondent and unfavorable views towards BDJ.

Respondent's Additional Evidence

127. Respondent takes no responsibility for his physical aggression against BDJ and maintains he did nothing wrong aside from using the word "fuck" on February 1. Respondent's self-serving testimony denying that he grabbed and pushed BDJ on February 1 is unconvincing based on the weight of the credible evidence to the contrary established at hearing. Respondent credibly testified that he is a committed educator who would like to continue to be employed at Cabrillo.

128. Respondent submitted character reference letters from former students, Cabrillo teachers and administrators in support of his assertions that he possesses the requisite skills, integrity, and character to continue to be a teacher at Cabrillo. The evidence was reviewed and considered in rendering this Decision. (Exs. 207-211; 213, 215, and 221-236.)

129. Except as set forth in this Decision, all other allegations in the Amended Charges and all other contentions by the parties lack merit or constitute surplusage.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The District has the burden of proving cause for dismissal by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.'" [Citation.] (*People*

ex rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1567.)

Preponderance of the evidence also means that “the evidence on [the District’s] side outweighs, preponderates over, is more than, the evidence on the other side.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Causes for Dismissal

2. The governing board of a school district may dismiss a permanent certificated employee if one or more of the causes described in section 44932, subdivision (a), are established. Here, the District seeks Respondent’s dismissal based on subdivisions (a)(1) [immoral conduct], (a)(6) [evident unfitness for service], and (a)(8) [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 or by the governing board of the school district employing him or her].

IMMORAL CONDUCT

3. The phrase “immoral conduct” as used in the Education Code is to be construed according to the common and approved usage, having regard for the context in which the legislature used it, as “conduct which is hostile to the welfare of the school community.” (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 224-225 (*Morrison*), citing *Jarvella v. Willoughby-Eastlake City School District* (1967) 12 Ohio Misc. 288, 289; *Palo Verde Unified School Dist. of Riverside County v. Hensey* (1970) 9 Cal.App.3d 967; see, e.g., *Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808 [falsifying attendance records for purpose of securing continued employment and defrauding state and district].) The term “immoral conduct” in section 44932, subdivision (a)(1), “stretch[es] over so wide a range” of behavior that it “embrace[s] an unlimited area of conduct. (*Morrison* at pp. 224-225.)

Accordingly, a teacher's conduct is considered "immoral" pursuant to section 44932, subdivision (a)(1), when that conduct negatively impact the school community in a manner that demonstrates the teacher is "unfit to teach."

4. The "immoral conduct" charges against Respondent are based on District's allegations 1) Respondent used physical force against the student on February 1, 2022, which was not reasonable and necessary to protect himself, students, staff, or other persons, when he grabbed the student with two hands near the neck area in an angry gesture that forced the student backward several feet, in violation of District policies, and 2) Respondent used the word "fuck" in front of class on February 1, 2022, in violation of District policy.

5. Based on Factual Findings 1 through 98, the District failed to establish Respondent grabbed the student with two hands near the neck area in an angry gesture that forced the student backward several feet, in violation of District policies. It was also not established Respondent put his hands around the student's neck and applied pressure.

6. The District did, however, establish through a preponderance of the evidence at hearing Respondent used physical force in grabbing the student with one hand near the neck and shoulder area in an angry gesture that resulted in pressure being applied to the student's neck as Respondent forced the student backwards at least a couple of feet, in violation of District policy. It was further established Respondent used the word "fuck" in front of class on February 1, 2022, in violation of District policy. Accordingly, cause for dismissal was established pursuant to sections 44932, subdivision (a)(1).

Evident Unfitness for Service

7. Evident unfitness for service means “clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. [Fn. omitted.]” (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444 (*Woodland*)). This cause for discipline 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.*) “‘Unprofessional conduct’ is, as it were, often a lesser included form of proscribed behavior within ‘evident unfitness for service.’ Thus, conduct constituting ‘evident unfitness for service’ will often constitute ‘unprofessional conduct.’ But the converse is not true. ‘Evident unfitness for service’ requires that unfitness for service be attributable to a defect in temperament – a requirement not necessary for a finding of ‘unprofessional conduct.’” (*Id.* at p. 1445.)

8. Based on Factual Findings 1 through 98, the District established through a preponderance of the evidence Respondent’s evident unfitness for service as a District teacher. Accordingly, cause for dismissal was established pursuant to section 44932, subdivision (a)(6).

Persistent Violation Of Or Refusal To Obey The Rules Governing Respondent’s Employment

9. Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed by the governing board of one’s employing school district is another independent basis for dismissal. (§ 44932, subd. (a)(8).) Persistent refusal requires a “showing of intentional and continual refusal to cooperate.” (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985)

174 Cal.App.3d 1176, 1196.) The term “persistent” in this context can be defined as “refusing to relent; continuing, especially in the face of opposition . . . stubborn; persevering . . . constantly repeated.” (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 82 (*Seaman*).) Isolated incidents or incidents involving an issue unresolved over a period of time are not generally considered “persistent.” (*Bourland v. Commission on Professional Competence* (1985) 174 Cal.App.3d 317; *Seaman, supra*.)

10. Based on Factual Findings 1 through 98, the District failed to establish Respondent persistently violated or refused to obey the rules governing his employment within the meaning of section 44932, subdivision (a)(8), i.e., BP 4119.21, 5137, Administrative Regulations E 4127, 5131.41, and sections 49000 and 49001. No evidence was presented that Respondent was given any prior verbal or written directives not to engage in the type of violent behavior against a student and use profanity he engaged in on February 1, 2022. Accordingly, Respondent’s conduct, including angrily grabbing and pushing the student on February 1, 2022 was established to be an isolated incident. In addition, in the absence of evidence of prior counseling, Respondent’s use of the word “fuck” on February 1, 2022 does not constitute his persistent and willful disregard for applicable policies, regulations, and education code sections.

Analysis of Morrison Factors

11. In deciding whether cause for dismissal exists based on Respondent’s immoral conduct and evident unfitness for service, it also must be established that a teacher’s misconduct relates to her fitness to teach, within the meaning of *Morrison*. (*Id.* at pp. 227-230.) The *Morrison* factors were considered and compared to the facts established above. Not all “*Morrison* factors” need be present for the *Morrison* test to

be satisfied. (*Governing Board of ABC School District v. Haar* (1994) 28 Cal.App.4th 369.) Further, the *Morrison* analysis need not be conducted on each individual fact established but is applicable to the collectively established facts. (*Woodland*, *supra*, 2 Cal.App.4th 1429, 1457.)

12. The applicable factors demonstrate Respondent's misconduct had a direct relationship with teaching and Respondent's unfitness to teach. (Factual Findings 1-98.)

1. THE LIKELIHOOD THE CONDUCT MAY ADVERSELY AFFECT STUDENTS OR

FELLOW TEACHERS. Respondent's misconduct, subjecting BDJ to physical aggression and humiliation, and his subsequent failure to be honest about his conduct, adversely affected BDJ, other students, the school administration, and the school community.

2. THE DEGREE OF SUCH ADVERSITY. The adversity was severe; the February 1 incident polarized the football class witnesses, the Cabrillo school administration and teachers, and the student victim who transferred out of the District as a direct result of the fall-out from the February 1 incident. Some football class student witnesses were greatly bothered by Respondent's conduct, and some students lied to protect Respondent. Overall, Respondent's behavior on February 1, 2022, failure to take responsibility, and actions negatively impacted the Cabrillo environment.

3. THE PROXIMITY OR REMOTENESS IN TIME OF THE CONDUCT. The misconduct is proximate.

4. THE TYPE OF TEACHING CERTIFICATE HELD BY THE PARTY INVOLVED.

Respondent holds a physical education credential and a pupil personnel services credential. The type of teaching certificates held by Respondent require Respondent to be able to handle the day-to-day stressors of teaching, including dealing with a disruptive student in a temperate manner and to exhibit integrity in his dealings with students. Respondent's physical aggression on February 1 and subsequent failure to take responsibility for that conduct preclude his ability to function as a teacher in an effective manner and indicate that he is unable to provide the requisite safe school environment for students.

5. THE EXISTENCE OF EXTENUATING OR AGGRAVATING CIRCUMSTANCES, IF ANY, SURROUNDING THE CONDUCT. Neither aggravating nor extenuating circumstances were proven.

6. THE PRAISEWORTHINESS OR BLAMEWORTHINESS OF THE MOTIVES

RESULTING IN THE CONDUCT. Respondent's conduct is blameworthy. He is a veteran teacher with decades of experience as both a teacher and counselor. He knew or should have known his violent actions towards BDJ and use of profanity on February 1, 2022, were dangerous, inappropriate, and unproductive. He refused to accept any responsibility for his violent actions against BDJ and minimized in the significance of using the word "fuck" when addressing students.

7. THE LIKELIHOOD OF RECURRENCE OF THE QUESTIONED CONDUCT. It is highly likely Respondent would engage in the same activity if put back in a District classroom. Respondent took no responsibility for his physical misconduct and demonstrated no remorse for his actions.

**8. THE EXTENT DISCIPLINE MAY CAUSE ADVERSE IMPACT OR CHILLING EFFECT
UPON THE CONSTITUTIONAL RIGHTS OF THE TEACHER INVOLVED OR OTHER**

TEACHERS. This is not foreseeable. No teacher has a constitutional right to use physical force without any reasonable justification against a student and use the word "fuck" when addressing students in a classroom.

ORDER

The dismissal of respondent Gary West from employment with the Lompoc Unified School District is sustained.

DATE: 04/24/2023

Irina Tentser

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings