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| COLORADO COURT OF APPEALS<br>2 East 14th Ave. Denver CO 80203 | |
| District Court, City and County of Denver<br>No. 2014CV30371; Hon. Michael A. Martinez | |
| **Plaintiffs-Appellants:**<br>Cynthia Masters, Michelle Montoya, Mildred Anne Kolquist, Lawrence Garcia, Paula Scena, Jane Harmon, Lynne Rerucha, and Denver Classroom Teachers Association<br>v.<br>**Defendants-Appellees:**<br>School District No. 1 in the City and County of Denver, Jane Goff, Elaine Gantz Berman, Deborah Scheffel, Pam Manzanec, Marcia Neal, Paul Lundeen, and Angelika Schroeder | **▲ COURT USE ONLY ▲**<br>Case No.: 2014CA1348 |


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# OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:
☒It contains 9,497 words.
☐It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☒I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Mathew S. Shechter
Mathew Shechter

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## STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that the legislature's enactment of the Teacher Employment Compensation and Dismissal Act of 1990 ("TECDA")—which repealed and re-enacted Colorado's long-standing statutory scheme providing fair-dismissal protections for proven teachers—eliminated the contractual rights created by previous iterations of the fair-dismissal law?

2. Did the District Court err in ruling that the Teachers were not entitled to Due Process when they were placed on unpaid leave on the grounds that (a) the legislature's enactment of TECDA in 1990 eliminated the property interest in continued employment created by TECDA's predecessor statutes, even though TECDA left the prior statutes' dismissal-for-cause provision in place; and alternatively, (b) involuntary placement on indefinite "unpaid leave" does not amount to a deprivation of a constitutionally protected property interest in continued employment?

## STATEMENT OF THE CASE

Plaintiffs-Appellants ("the Teachers") are teachers who earned non-probationary status under the Teacher Employment Compensation and Dismissal Act ("TECDA") as well as the Denver Classroom Teachers Association, a

membership organization representing the interests of teachers working for School District No. 1 in the City and County of Denver ("the District"). (ROA pp. 4-6.)[1]

On their own behalf, and as representatives of classes of similarly situated individuals, the Teachers filed the instant lawsuit against the District and the members of the Colorado State Board of Education ("the School Officials"), challenging the constitutionality of the provisions of Senate Bill 2010-191 ("S.B. 191"), codified at Colo. Rev. Stat. § 22-63-202(2)(c.5). (ROA pp. 5-22 (Complaint), 61-77 (Amended Complaint).) The Teachers bring two claims for relief. First, the Teachers allege that the challenged provisions impair the vested contractual rights of teachers who earned non-probationary status prior to the 2010 amendments, and thus violate Article II, Section 11 of the Colorado Constitution, which prohibits the state from passing any "law impairing the obligation of contracts" ("the Contract Clause"). Second, the Teachers allege that the challenged provisions violate the procedural due process rights of non-probationary teachers in violation of the clause of Article II, Section 25 of the Colorado Constitution prohibiting the state from depriving persons of property "without due process of law" ("the Due Process Clause"). (ROA pp. 14-17.)

[1] While this Court's rules require references to the record be made by "appropriate page and line numbers," Colo. R. App. Pro. 28(e), the record prepared by the District Court is not paginated. Consequently, the parties have agreed to paginate

On June 6, 2014, the District Court granted the School Officials' motion to dismiss the Teachers' Amended Complaint in its entirety. (ROA pp. 206-219.) This appeal followed.

## STATEMENT OF THE FACTS

### A. TECDA Establishes Fair-Dismissal Protections for Proven Teachers

TECDA establishes that teachers who have proven their abilities by successfully completing a probationary period of employment are entitled to certain protections against discharge. Like its various predecessor statutes, *see, e.g.*, *Frey v. Adams Cnty. Sch. Dist. No. 14*, 804 P.2d 851 (Colo. 1991); *Marzec v. Fremont Cnty., Sch. Dist. No. 2*, 349 P.2d 699, 701-02 (Colo. 1960), TECDA provides two fundamental fair-dismissal protections to proven, or "non-probationary" teachers (*i.e.*, teachers who have successfully completed their probationary service): protection against discharge in the absence of statutory cause and the right to a hearing before an impartial decision-maker to contest a school district's dismissal decision. A non-probationary teacher may be dismissed only for the causes specified in the statute, *see* Colo. Rev. Stat. § 22-63-301 (2013), and only if the teacher is afforded an opportunity for a hearing before an impartial decisionmaker, *see id.* Colo. Rev. Stat. § 22-63-302(1)-(10) (2013).

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the record in a consistent manner, with the first page of the record marked as ROA 0001 and in sequential order thereafter.

As for probationary teachers, TECDA provides that these teachers work under annual employment contracts that may be "non-renewed" by school districts without a hearing "for any reason … deem[ed] sufficient." *Id.* § 22-63-203(2)(a) & (4)(a). In other words, they are at-will employees.

### B. TECDA is Amended in 2010 to Allow School Districts to Remove Non-Probationary Teachers from their Positions and Place those Teachers on Unpaid Leave Indefinitely Without Cause or a Hearing

On May 20, 2010, Colorado enacted S.B. 191, which made prospective changes to TECDA's requirements for achieving and retaining non-probationary status,[2] but left intact TECDA's fair-dismissal provisions. TECDA still specifies that non-probationary teachers may be discharged only for cause, or when there is a justifiable reduction in the number of teaching positions, and that when a non-probationary teacher is dismissed, the teacher has the right to a hearing before an impartial hearing officer and the right to judicial review of a school board's dismissal decision. S.B. 191 thus preserved the essential distinction between teachers working on a probationary basis (who are subject to dismissal at-will on a summary basis) and teachers who have successfully completed the applicable probationary requirements (who may be dismissed only for cause and after being afforded an opportunity to be heard). (ROA pp. 67-68.)

S.B. 191, however, also added the provisions challenged here, which purport to allow school districts in certain circumstances to "remov[e]" non-probationary teachers from their positions and, if such teachers cannot secure within one year a principal's consent to employ them in alternative positions within the school district, place such teachers on indefinite, involuntary "unpaid leave"—without complying with TECDA's cause requirements and without providing any opportunity to be heard. *See* Colo. Rev. Stat. § 22-63-202(2)(c.5) (2013).

The challenged provisions apply only to teachers who are "displaced" from their positions—specifically, only when there is "a drop in enrollment; turnaround; phase-out; reduction in program; or reduction in building, including closure, consolidation, or reconstitution." Colo. Rev. Stat. §§ 22-63-202(2)(c.5)(III)(B), & (VII) (2013). The challenged provisions mandate that if such a displaced teacher is unable to secure a principal's consent to another assignment in the school district after twelve months or two hiring cycles, "the school district shall place the teacher on unpaid leave until such time as the teacher is able to secure an assignment." Colo. Rev. Stat. § 22-63-202(2)(c.5)(IV). The legislation goes on to authorize school districts to place such teachers in short-term assignments while they seek permanent positions, it specifies that such assignments do not "interrupt the period

[2] *See* Colo. Rev. St. §§ 22-63-203(1)(b) & (7), 22-9-105.5(IV) (2013) (tying acquisition and retention of non-probationary status to performance criteria).

in which the teacher is required to secure an assignment through mutual consent before the district shall place the teacher on unpaid leave." *Id.* § 22-63-202(2)(c.5)(V).

Nothing in the challenged provisions requires school districts to meet TECDA's cause requirement before placing non-probationary teachers on unpaid leave. Nor do they provide for any kind of hearing. Indeed, the challenged provisions do not even require school districts to justify their determinations that teachers' services are no longer required by reason of a legitimate "drop in enrollment, turnaround, phase-out, reduction in program, or reduction in building." Yet non-probationary teachers who are placed on unpaid leave under these provisions perform no work for, and receive no pay or benefits from, their former school districts.

### C. The District Places Teachers on Unpaid Leave Without Cause or a Hearing

The same day S.B. 191 was enacted, the District announced that it would implement the challenged provisions with respect to more than 400 positions that the District had slated for full or partial elimination pursuant to a "reduction in building" some months earlier. The District stated that teachers whose positions were "reduced" would be placed on unpaid leave if they did not obtain a "consent" assignment by the end of August 2011. From September 2010 to September 2011,

the District announced further "reductions in building," affecting hundreds of additional teachers. (ROA p. 9-10.) The District subsequently placed scores of non-probationary teachers on unpaid leave in the aftermath of S.B. 191—including five of the Teachers who bring this action. (ROA pp. 10-11.)

Plaintiff Cynthia Masters was a non-probationary teacher who had served seven years as a full-time special education teacher for the District. In September 2010, the District announced that it was eliminating one-half of her position as part of a reduction in building, and one year later it announced that it was eliminating the remaining half of her position due to a further reduction in building. Masters applied for more than 140 alternative positions in the District without success, despite her long service to the District and her favorable performance evaluations. In October 2011, the District placed Masters on half-time "unpaid leave" as she had not secured a "consent assignment" to replace the first half-time reduction in her position, and in October 2012, the District placed her on full unpaid leave because she had not secured a "consent assignment" to replace the remaining eliminated half-time position. Unable to secure an alternative assignment in the District, Masters ultimately accepted a lower-paying position in another school district, beginning in the 2013-14 school year. (ROA p. 10.)

Plaintiff Michele Montoya was a non-probationary teacher who had served eleven years as a full-time teacher for the District. In September 2010, the District

announced that it was eliminating her position as part of a reduction in building. Montoya applied for more than 100 alternative positions in the District without success notwithstanding her long service to the District and favorable performance evaluations. Because she had not secured a "consent assignment" with the District within a year of her removal, the District placed Montoya on unpaid leave in October 2011. Montoya remained unemployed for nine months before securing a new full-time teaching position with the District. (ROA p. 10.)

Plaintiff Mildred Anne Kolquist was a non-probationary teacher who had served more than three years as a full-time teacher for Denver Public Schools. In February 2012, the District announced that it was eliminating her position as part of a reduction in building. Kolquist applied for more than 100 alternative positions in the District without success, notwithstanding her favorable evaluations from the District. Because she had not secured a "consent assignment" within one year of her removal, the District placed Kolquist on unpaid leave beginning in the 2013-14 school year. (ROA p. 11.)

Plaintiff Jane Harmon was a non-probationary teacher who had served thirteen years as a full-time teacher for the District. In February 2012, the District announced that it was eliminating her position as part of a reduction in building. Harmon applied for more than 80 alternative positions in the District without success, notwithstanding favorable evaluations and letters of recommendation from

her District supervisors. Because she had not secured a "consent assignment" in the District within one year of her removal, the District placed Harmon on unpaid leave in September 2013. Harmon has been forced to take lower-paying temporary assignments and has been unable to secure full-time employment. (ROA p. 70.)

Plaintiff Lynne Rerucha was a non-probationary teacher who had served eight years as a full-time teacher for Denver Public Schools. In February 2012, the District announced that it was eliminating her position as part of a reduction in building. Rerucha applied for dozens of alternative positions in the District without success, notwithstanding her favorable performance evaluations from the District. Because she had not secured a "consent assignment" with the District within a year of her removal, the District placed Rerucha on unpaid leave in September 2013. Rerucha has been forced to take significantly lower paying temporary or substitute work assignments and has been unable to secure full-time employment. (ROA p. 70.)

## SUMMARY OF ARGUMENT

The District Court dismissed the Teachers' Contract Clause claim on the erroneous ground that the Colorado legislature "remove[d] any contractual rights previously present in the statute" when it amended the Colorado's fair-dismissal in 1990. The District Court's primary basis for this conclusion—that TECDA's omission of the term "tenure" to describe its fair-dismissal protections—is wrong

because the *substance* of Colorado's fair-dismissal protections for proven teachers has not changed, and that being so, the legislature's choice with regard to nomenclature is of no legal significance here. The only other ground offered by the District Court is the 1990 legislature's deletion of a provision that the court construed to have been an explicit guarantee of employment for tenured teachers; but in reality, that provision had discriminatorily *restricted* tenure to teachers who were below the age of seventy, and was so understood by the legislature when it removed that provision. The District Court compounded these errors by ignoring statutory text showing that the legislature did *not* intend to eliminate the contractual and property rights of non-probationary teachers.

The District Court erred in dismissing the Teachers' claim under the Due Process Clause. The District Court's primary ground for rejecting the Teachers' due process claim—the idea that the legislature in 1990 had eliminated the reasonable expectation of continued employment created by earlier iterations of Colorado's fair-dismissal law—fails because, again, TECDA carried forward the relevant substantive protections of earlier versions of the fair-dismissal law (namely, the protections against dismissal without statutory cause). The District Court's ruling also is untenable because it is contrary to a binding decision of this Court holding that TECDA does, in fact, create a protected property interest in continued employment. The court's alternative ground for dismissing the

Teachers' due process claim—the idea that being placed on unpaid leave is not a deprivation of that protected property interest because it does not amount to "dismissal" or "discharge"—fares no better. The court's fixation on semantics misses the point of the due process analysis, which turns on whether teachers are deprived of their property right in continued employment when placed on indefinite unpaid leave. Because unpaid leave deprives a teacher of income—the primary benefit of employment—this Court and courts in other jurisdictions have held that the relegation of a public employee to unpaid status constitutes a deprivation of the employee's property right in continued employment.

## ARGUMENT

### I. THE DISTRICT COURT'S DISMISSAL OF THE TEACHERS' CLAIMS IS REVIEWED *DE NOVO*

This Court reviews a district court's grant of a motion to dismiss *de novo*. "[A]ll averments of material facts must be accepted as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff," *English v. Griffith*, 99 P.3d 90, 92 (Colo. App. 2004), and the dismissal cannot be upheld "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Dunlap v. Colo. Springs Cablevision, Inc*., 829 P.2d 1286, 1291 (Colo. 1992) (citation and quotation marks omitted). The specific questions raised in this appeal—whether TECDA creates

contractual rights for non-probationary teachers, whether TECDA creates a protected property interest in continued employment, and whether involuntary placement on unpaid leave is a deprivation of such a protected property interest—are all questions of law, reviewed *de novo*. *See Holland v. Bd. of Cnty. Comm'rs*, 883 P.2d 500, 505 (Colo. App. 1994).

## II. THE AMENDED COMPLAINT STATES A VALID CLAIM UNDER THE CONTRACT CLAUSE

To make out a violation of the Contract Clause, a plaintiff must demonstrate: (1) that "there is a contractual relationship" pursuant to which the plaintiff has "a vested right"; (2) that the challenged statute works a substantial impairment of that right; and (3) that the impairment does not "reasonabl[y] and appropriately serve[] a significant and legitimate public purpose when considered against the severity of the contractual impairment." *Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002).

The District Court dismissed the Teachers' Contract Clause claim on the threshold question of whether TECDA creates contractual rights and did not address the second or third prongs of the test. The court reasoned that the Teachers had no vested contractual rights because the Colorado legislature "remove[d] any contractual rights previously present in the statute" when it amended the Colorado's fair-dismissal in 1990. (ROA p. 6.) On that basis, the court ruled that

the substantial body of case law holding that TECDA's predecessor statutes created contractual rights is inapplicable. (ROA pp. 7-8.)

The District Court based this theory on the fact that TECDA, unlike its predecessors, does not use the term "tenure" to describe its fair-dismissal protections, and on TECDA's deletion of a provision that the District Court construed to have been "an explicit guarantee" of employment for tenured teachers. (ROA pp. 6-7). The District Court's theory is wrong in each particular. First, because the *substance* of Colorado's fair-dismissal protections for proven teachers has not changed, the legislature's choice with regard to nomenclature is of no legal significance to the Contract Clause question here. Second, the District Court erred in relying on the legislature's deletion of a provision that had actually *restricted* tenure to teachers who were below the age of seventy, and was so understood by the 1990 legislature, and it further erred in ignoring other statutory text showing that the legislature did *not* intend to eliminate the contractual and property rights of non-probationary teachers as well as a recent decision of this Court that is inconsistent with the district Court's conclusion.

### A. The Legislature Did Not Eliminate the Contractual Rights Established by Colorado's Fair-Dismissal Law When It Omitted the Word "Tenure" When it Repealed and Re-Enacted Colorado's Fair-Dismissal Law in 1990

(1) In *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), one of the seminal Contract Clause decisions, the U.S. Supreme Court held that the fair-dismissal protections of Indiana's Teacher Tenure Act conferred contractual rights on teachers who had satisfied the act's prerequisites and that a law repealing those protections for teachers employed by some school systems violated the Contract Clause of the U.S. Constitution.[3]

*Brand* makes clear that when legislation offers a public employee robust cause and hearing protections that curtail the employer's otherwise unfettered common-law right to discharge employees at will, the legislature creates vested contractual rights. The same features of the tenure, or fair-dismissal, law in *Brand* that supported the Supreme Court's conclusion that that law in that case created vested contractual rights, support a conclusion that TECDA creates contractual rights here. The statute in *Brand*, like the statute here, constituted an offer that, upon successful completion of a probationary employment period (during which

[3] Although *Brand* arose under the federal Contract Clause, the decision applies with equal force here, because decisions arising under Colorado's Contract Clause track the U.S. Supreme Court's analysis under the federal Contract Clause, *see In re Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002), and the fair-dismissal protections,

the teacher works on an at-will basis), and renewal by the school district in the following year, a teacher gains basic fair-dismissal protections—namely the requirement that any discharge thereafter be for statutorily defined cause and that the teacher be afforded the right to a hearing in dismissal cases.

The particulars of the *Brand* decision are instructive. The Court explained that although "the principal function of a legislative body is not to make contracts but to make laws that declare the public policy of the state and are subject to repeal when a subsequent legislature," a special case is presented where legislation "contain[s] provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." 303 U.S. at 100. Such legislation, the Court continued, comes within the purview of the Contract Clause insofar as it reflects a legislative "policy of contracting in respect to public business for a term longer than the life of the legislature." *Id.*

In reaching its conclusion that the Indiana tenure statute was just such a law, the Court stressed that "the cardinal inquiry is as to the terms of the statute supposed to create a contract." *Id.* at 104. In conducting this "cardinal inquiry," the Court emphasized that the Indiana statute provided that teachers, after serving at-will for five years under annual contracts and being re-employed for a further

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and the fair-dismissal protections afforded by Colorado law are indistinguishable in any material respect from those at issue in *Brand*.

year, could be terminated "only upon compliance with the terms of the statute"—*i.e.*, only "after notice and hearing" and only "for incompetency, insubordination, neglect of duty, immorality, justifiable reduction in the number of teaching positions, or other good and just cause, but not for personal or political reasons." *Id.* at 103-04.

The Court concluded that the state's offer of those fair-dismissal protections, "when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." *Id.* at 100. The Court reasoned that "[t]he policy which induced the legislation evidently was that the teacher should have protection against the exercise of the right, which would otherwise inhere in the employer, of terminating the employment at the end of any school term without assigned reasons and solely at the employer's pleasure." *Id.* at 104. The Court also emphasized that the statute referred frequently to contracts and regulated the employment contract in numerous ways, including by requiring written contracts of employment between teachers and school districts. *Id.*

(2) The very characteristics that the *Brand* Court found to have created contractual rights have been present in Colorado's fair-dismissal law for proven teachers for more than half a century. Since the 1950s, Colorado's fair-dismissal statutes have offered the following bargain to education professionals: In exchange for accepting employment at Colorado school districts, and remaining so

employed, teachers who successfully complete the probationary service period, and whose contracts are renewed after their last probationary year, are granted two basic fair-dismissal protections: (1) protection against dismissal for any reason other than statutorily defined "cause," and (2) the right to a hearing to contest a school district's dismissal decision.

These fair-dismissal protections have been consistent features of Colorado's law governing the employment of teachers for more than 60 years and, pursuant to a raft of binding precedents, are contractual in nature.

The Teacher Tenure Act of 1953, Colo. Rev. Stat. § 123-18-1, *et seq*. (1953), provided that a teacher who had worked continuously on a full-time basis for a probationary period of three years, and who was thereafter re-employed for a fourth year, gained "the benefits of tenure," notably being "subject to removal only as provided in the act." *Marzec v. Fremont Cnty., Sch. Dist. No. 2*, 349 P.2d 699, 701-02 (Colo. 1960). The 1953 Act specifically provided that a teacher could be discharged only for "(1) incompetency, (2) neglect of duty, (3) immorality, (4) insubordination, (5) justifiable decrease in the number of teacher positions, (6) or other good and just cause." *Sch. Dist. No. 2 in Fremont County v. Brenton*, 323 P.2d 899, 902 (Colo. 1958) (citing Colo. Rev. Stat. § 123-18-7 (1953)). The 1953 statute gave a teacher the option of having a hearing before an impartial panel, with

one member chosen by the teacher, *Lovett v. Blair*, 571 P.2d 731, 733 (Colo. App. 1977).

The purpose of the 1953 statute, the Supreme Court explained, was "to protect competent and qualified teachers in the security of their positions, to assure them, in other words, in their employment during competency and good behavior, and to protect them, *after they have undergone an adequate probationary period*, against removal for unfounded, flimsy, or political reasons." *Marzec*, 349 P.2d at 701 (citation and quotation marks omitted; emphasis supplied by the Court). As the Court made clear, the statute operated "in derogation of the common law," specifically, the common-law doctrine of employment at will: "Prior to the adoption of teacher tenure legislation, school boards were at liberty to hire and fire at will. The present act ... deprives school boards of such privileges ...." *Id.*

The 1953 Act's key features—its distinction between probationary teachers who worked on an at-will basis and tenured teachers who could only be dismissed for cause, its specification of grounds for discharge of teachers who have successfully completed the probationary period, and its provision for impartial hearings for the discharge of tenured teachers—established the template that Colorado's fair-dismissal statutes have followed ever since. While subsequent amendatory legislation has refined the law in various ways, these key features remain unchanged to this day.

The legislature revisited the fair-dismissal law in the Teacher Employment Dismissal and Tenure Act of 1967 ("TEDTA" or "the 1967 Act"), Colo. Rev. Stat. § 123-18-1, *et seq*. (1968). The principal features of the 1967 Act are summarized in the Colorado Supreme Court's decision in *Frey v. Adams Cnty. Sch. Dist. No. 14*, 804 P.2d 851 (Colo. 1991). The 1967 Act, first of all, carried forward the earlier statute's provisions establishing that teachers work on a probationary basis during their first three years of continuous, full-time employment for a district. *Id.* at 852. The 1967 Act also expanded on the 1953 Act's prescribed grounds for dismissal of a teacher who had successfully completed the probationary period and therefore acquired tenure:

> The grounds for dismissal of a tenure teacher shall be physical or mental disability, incompetency, neglect of duty, immorality, conviction of a felony or the acceptance of a guilty plea or a plea of nolo contendere to a felony, insubordination, or other good and just cause. No tenure teacher shall be dismissed for temporary illness, leave of absence previously approved by the board, or military leave of absence …. [*Id.* (quoting Colo. Rev. Stat. 22-63-116 (1988)).]

The 1967 Act added further procedural protections for proven teachers by establishing that tenured teachers are entitled, on request, to a recorded hearing before an administrative law judge, and also providing that a tenured teacher may appeal a school district's final decision to the Colorado Court of Appeals. *Id.* (citing Colo. Rev. Stat. §§ 22-63-117, 13-4-102(2)( l ) (1988)).

In 1990, the legislature repealed and re-enacted the 1967 law, re-titling it as the Teacher Employment, Compensation, and Dismissal Act ("TECDA"), Colo. Rev. Stat. § 22-63-1 (1991), the relevant provisions of which are in force to this day. Although TECDA does not use the term "tenure" to describe the status earned by teachers who successfully complete their probationary period, TECDA retained the key substantive features of its predecessor acts. TECDA maintained—and continues to maintain—the distinction between "probationary" teachers and those who have successfully completed the statute's probationary period, conferring on the latter group of non-probationary teachers all of the key fair-dismissal protections provided by the earlier legislation—namely, protection against dismissal without cause and the right to a hearing in dismissal cases.

More specifically, TECDA carried forward the three-year probationary period from the 1953 and 1967 Acts as well as the rule that probationary teachers are employed from year to year on an at-will basis. Colo. Rev. Stat. § 22-63-203(2)(a) & (4)(a) (1991). At the same time, TECDA provides that a teacher who successfully completes the probationary period may be dismissed only for the causes specified in the statute and only if the teacher is afforded an opportunity for a hearing. TECDA added one ground for discharge to the causes set forth in the 1967 Act—namely, "unsatisfactory performance"—but otherwise carried forward

the operative language of the 1967 Act's cause provision verbatim. *See id.* § 22-63-301 (1990).

TECDA also carried forward, with some minor amendments, the 1967 Act's hearing and appeal provisions. *See* Colo. Rev. Stat. § 22-63-302(1)-(10) (2009). TECDA replaced the 1967 Act's provision for teachers to request hearings before administrative law judges with one providing for hearings before "hearing officers," and required that such hearing officers be "impartial individuals with experience in the conducting of hearings and with experience in labor or employment matters." Colo. Rev. Stat. § 22-63-302(4) (2009). In all other respects, the notice, hearing, and appeal provisions of TECDA mirror those of the 1967 Act, *see id.* § 22-63-302(2)-(10) (2009), save that TECDA added a provision making clear that TECDA's hearing and appeal procedures do not apply if the teacher has been convicted of, or entered a plea of guilt, or *nolo contendere* to, certain enumerated crimes, *id.* Colo. Rev. Stat. § 22-63-302(11) (2009).

In sum, Colorado's fair-dismissal law, in its various iterations from the 1953 Teacher Tenure Act through TECDA, has provided the same fundamental fair-dismissal protections for proven teachers: protection against discharge in the absence of statutory cause and the right to a hearing before an impartial decision-maker. While the laws have been modified to some extent—in particular, the grounds for discharge and hearing procedures have been refined over the years—

the basic substance of Colorado's fair-dismissal law for proven teachers has remained uniform.

Consistent with the Court's teaching in *Brand*, the Colorado Supreme Court and this Court have repeatedly held that Colorado's fair-dismissal law for proven teachers creates contractual rights. In *Martin v. Montezuma-Cortez School District RE-1*, 841 P.2d 237, 254 (Colo. 1992), for instance, the Court explained that a tenured teacher's "standard contract ... is required by the Teacher Tenure Act," that the "[t]erms of the contract are direct reflections of provisions of the Tenure Act" and that "[t]he dismissal procedures of the Act form part of the contract."

Indeed, the Colorado Supreme Court's description of the policy underlying the 1953 act in *Marzec, supra*, tracks the U.S. Supreme Court's description of the policy embodied in the contractual tenure law at issue in *Brand*. As the *Marzec* Court explained, the purpose of the tenure act was "to protect competent and qualified teachers in the security of their positions, to assure them, in other words, in their employment during competency and good behavior, and to protect them … against removal for unfounded, flimsy, or political reasons," and therefore the legislation operated in "in derogation of" the common-law doctrine of employment at will, which applied to teachers before the advent of fair-dismissal laws: "Prior to the adoption of teacher tenure legislation, school boards were at liberty to hire and fire at will. The present act ... deprives school boards of such privileges ...."

*Marzec*, 349 P.2d at 701. *Compare Brand*, 303 U.S. at 104 ("The policy which induced the legislation evidently was that the teacher should have protection against the exercise of the right, which would otherwise inhere in the employer, of terminating the employment at the end of any school term without assigned reasons and solely at the employer's pleasure.")

Beyond that, numerous other decisions of this Court and the Colorado Supreme Court squarely hold that the fair-dismissal provisions of Colorado's laws governing the employment and dismissal of teachers create contractual rights. *See Julesburg Sch. Dist. No. RE-1, in Sedgwick Cnty. v. Ebke*, 562 P.2d 419, 421 (Colo. 1977) ("[T]he Teacher Tenure Act creates a contract by law between the school board and its teachers."); *Maxey v. Jefferson Cnty. Sch.l Dist. No. R-1*, 408 P.2d 970, 972 (Colo. 1965) ("[A] tenure act has the effect of a contract between teacher and district.); *Lockhart v. Bd. of Educ. of Arapahoe Cnty. Sch. Dist. No. 6*, 735 P.2d 913, 918 (Colo. App. 1986) ("Tenure, and the right to compensation which accompanies it, rises to the level of a constitutionally protected interest."); *Ebke v. Julesburg Sch. Dist. No. RE-1,* 622 P.2d 95 (Colo. App. 1980) ("The Teacher Employment, Dismissal, and Tenure Act … creates, by law, a contract between the school board and its teachers.").

(3) To avoid this well-established understanding that tenure rights are contractual, the District Court concluded that in enacting TECDA in 1990, the

legislature "made systematic efforts to remove any contractual rights previously present in the statute." (ROA p. 6.) The District Court's primary evidence for this alleged legislative about-face was that TECDA, unlike the previous acts, does not use the term "tenure" to describe the status of teachers who have successfully completed their probationary service. The District Court, however, failed to come to grips with the fact that the *substance* of Colorado's fair-dismissal protections for proven teachers have remained in place, making the District Court's reliance on the absence of the term "tenure" from TECDA an elevation of a mere label over the actual substance of the law.

Again, the substance of the fair-dismissal protections provided by TECDA is the same, in every material respect, to that of the previous iterations of Colorado's fair-dismissal law for proven teachers. TECDA, no less than its 1967 predecessor (or, for that matter, that law's 1953 predecessor), offers robust employment protections for teachers who successfully complete their probationary service—*viz.*, protection against dismissal without statutorily defined cause and the right to a hearing to contest the grounds for a school district's dismissal decision. These are the very types of protections that *Brand* held to be contractual, and they are the very same protections that the 1953 and 1967 iterations of the fair-dismissal law provided, and that were held to be contractual in *Martin*, 841 P.2d at 254, and in the other decisions of the Colorado Supreme Court and of this Court cited above.

A comparison of the language of TECDA's fair-dismissal provisions with that of its immediate predecessor, the 1967 "tenure" act as it stood in 1989, confirms the point. Under both iterations of the law, probationary teachers are appointed on annual contracts, which are subject to nonrenewal for any reason. *Compare* Colo. Rev. Stat. § 22-63-115(1) (1989) *with* Colo. Rev. Stat. § 22-63-203(2)(a), (4)(a) (1991). Under the pre-TECDA "tenure" law and under TECDA, tenured and non-probationary teachers, respectively, may only be discharged for cause or by reason of a legitimate layoff. The pre-TECDA for-cause provision stated as follows:

> The grounds for dismissal of a tenure teacher shall be physical or mental disability, incompetency, neglect of duty, immorality, conviction of a felony or the acceptance of a guilty plea or a plea of nolo contendere to a felony, insubordination, or other good and just cause. No tenure teacher shall be dismissed for temporary illness, leave of absence previously approved by the board, or military leave of absence pursuant to article 3 of title 28, C.R.S. [Colo. Rev. Stat. § 22-63-116 (1989).]

TECDA's for-cause provision states as follows:

> A teacher may be dismissed for physical or mental disability, incompetency, neglect of duty, immorality, unsatisfactory performance, insubordination, the conviction of a felony or the acceptance of a guilty plea, a plea of nolo contendere, or a deferred sentence for a felony, or other good and just cause. No teacher shall be dismissed for temporary illness, leave of absence previously approved by the board, or military leave of

> absence pursuant to article 3 of title 28, C.R.S. [Colo. Rev. Stat. § 22-63-301 (2009).[4]]

The only difference of any note between the two for-cause provisions is that TECDA added "unsatisfactory performance" as a ground for discharge. But TECDA made no change to the basic protection offered by the for-cause dismissal standard.

The notice-and-hearing rights granted to tenured teachers by the pre-TECDA statute and those granted to non-probationary teachers by TECDA also are substantively identical. Under both the 1967 law and under TECDA, a tenured or non-probationary teacher is entitled to written notice of the charges or reasons for dismissal, along with all exhibits, witnesses and other documentation to be presented against them. *Compare* Colo. Rev. Stat. § 22-63-117(3) (1989), *with* Colo. Rev. Stat. § 22-63-302(2) (2009). Under the pre-TECDA law as well as under TECDA, the teacher is guaranteed a public, recorded hearing before a neutral decision maker, and the right to be accompanied by counsel; the only difference being that under the pre-TECDA law, the neutral decision-maker was an administrative law judge while TECDA provides for a professional "hearing officer." *Compare* Colo. Rev. Stat. § 22-63-117(6)-(8) (1989), *with* Colo. Rev.

[4] While TECDA's description of the grounds for dismissal uses the word "teacher," it is plain from the context of this provision—and it is undisputed—that these fair-dismissal provisions apply only to non-probationary teachers (*i.e.*, teachers who successfully completed their probationary service).

Stat. § 22-63-302(4)-(7) (2009). Finally, both statutory schemes grant tenured or non-probationary teachers the right to appeal any adverse decision to the Colorado Court of Appeals. *Compare* Colo. Rev. Stat. § 22-63-117(11) (1990), *with* Colo. Rev. Stat. § 22-63-302(10)(a) (2009).

In sum, it is plain that TECDA provides the same substantive and procedural employment protections to non-probationary teachers that the prior iteration of Colorado's fair-dismissal law provided to the teachers that were termed "tenure teachers." Given that the "cardinal inquiry" under the Contract Clause looks "to the terms of the statute," *Brand*, 303 U.S. at 104, and that the terms of TECDA are in all relevant respects consistent with those of the pre-TECDA "tenure" law, it is plain that the removal of references to the word "tenure" in TECDA is of no legal or practical consequence. Indeed, in this context, the standard legal dictionary defines the term "tenure" as consisting of these very substantive protections: "Status afforded to teacher or professor upon completion of a trial period, thus protecting him or her from summary dismissal without sufficient cause or economic reasons." *See* H.C. Black, *et al.*, *Black's Law Dictionary* 1469 (6th Ed. 1990).

### B. The District Court Erred in Relying on the 1990 Legislature's Deletion of a Provision Restricting Fair Dismissal Protections Based on Age and Ignoring Textual Evidence and Case Law Contrary to its Interpretation of the 1990 Legislation

The District Court erroneously construed TECDA's removal of a provision formerly codified at Colo. Rev. St. § 123-18-15(1) (1967) as demonstrating that the legislature intended to eliminate the contractual rights created by prior iterations of the fair-dismissal statute. Quoting a portion of that provision out of its context, the District Court interpreted that provision of the pre-TECDA law as an "explicit guarantee that a tenured teacher 'shall be entitled to a position of employment,'" and from that premise held that the provision's removal was a clear indication that "the legislature intended to remove any contractual language from the [earlier] version of the Act." (ROA p. 6) (quoting, in part, Colo. Rev. St. § 123-18-15(1) (1967).) The District Court's interpretation of that provision—and thus its interpretation of the provision's removal by the 1990 legislature—is entirely misguided.

When words of the pre-TECDA provision are viewed in their context, it is apparent that the provision was in fact one *limiting* tenure rights to those teachers who were younger than seventy years of age—not one *conferring* a "guarantee" of employment for tenured teachers. The provision as removed by TECDA stated, more fully, that a teacher who achieved tenure "shall be entitled to a position of

employment as a teacher in the school district where tenure was acquired and while possessing a valid Colorado teacher's certificate, *until he has attained the age of seventy years* or has been dismissed pursuant to this article." Colo. Rev. Stat. § 123-18-115(1) (1989) (emphasis added). The fact that this provision actually *limited* the availability of fair-dismissal protections based on a teacher's age certainly colors the interpretation of the 1990 legislature's removal of that provision: Indeed, it suggests that the legislature's goal was to eliminate age-based discrimination on the statute's fair-dismissal protections, and *not* that it intended to eliminate the act's fair-dismissal protections for proven teachers (which, as detailed above, remained in place with some minor modifications). The official legislative history of TECDA confirms that this was in fact the legislature's intent. In its summary of the changes made by the legislation, the 1990 legislature described this provision as "deleting … *a provision which required a teacher to lose tenure upon reaching the age of seventy*." H.B. 90-1159, Engrossed (Bill Summary), Addendum at 2 (emphasis added).

That being the case—and given that the 1990 legislature, as detailed above, retained all of the substantive protections of the pre-TECDA fair-dismissal laws (with the minor refinements noted above)—there is quite simply no substance to the District Court's view that the text of TECDA demonstrates that the legislature

intended to eliminate altogether the contractual rights created by the prior iterations of Colorado's fair-dismissal law.

Moreover, there is affirmative evidence from the text of TECDA that the 1990 legislature did *not* intend to eliminate contractual or property rights in continued employment for non-probationary teachers—evidence that was presented to the District Court (ROA p. 160) but was not addressed in the court's decision. In TECDA, the legislature added a requirement that school districts provide a *probationary* teacher whose contract is not renewed with a statement of reasons for the non-renewal. Colo. Rev. Stat. §22-63-203(4)(b)(I) (2009). With that requirement, the legislature included the following proviso:

> It is the intent of the general assembly that the provision to a probationary teacher of the reasons for contract nonrenewal not create any property right or contract right, express or implied. … If a state appellate court or a federal court determines that such a property right has been created and the time for all appeals has passed, this paragraph (b) shall be repealed. [Colo. Rev. Stat. §22-63-203(4)(b)(II) (2009).]

This proviso shows that when the legislature intends to prevent the creation of contractual or property rights, it certainly knows how to do so in clear and explicit terms—something that it certainly did not do with respect to the fair-dismissal protections for *non-probationary* teachers. Furthermore, under standard principles of statutory construction, the fact that the legislature explicitly foreswore

any intention to create contractual or property rights for *probationary* teachers—while stating no such legislative intent with respect to *non-probationary* teachers—affirmatively demonstrates that it did *not* intend to curtail the well-recognized contractual and property rights for non-probationary teachers: "When a statute specifies a particular application in a specific instance, it is ordinarily to be construed as excluding from its operation all other situations not specified." *In re Marriage of Van Inwegen*, 757 P.2d 1118, 1120 (Colo.App 1988).[5]

Finally, the District Court's holding that TECDA creates no contractual rights also cannot be squared with this Court's decision in *Feldewerth v. Joint School District 28-J of Counties of Adams & Arapahoe ex rel. Hartenbach*, 3 P.3d 467 (Colo. App. 1999). There, this Court held that TECDA protects "a non-probationary teacher" from dismissal for reasons other than the causes delineated in the statute and thereby "grants to such a teacher a legitimate claim to continued employment." *Id.* at 471. To be sure, *Feldewerth* was a due process case, and thus the Court's holding addressed the *property* right in continued employment created by TECDA's for-cause dismissal provision—which, as discussed further below, is

[5] The same holds true for a similar proviso that the legislature added to a TECDA provision concerning layoff priority. In requiring that first-year probationary teachers be laid off before second- or third-year probationary teachers, the 1990 legislature took care to state that "[t]he provisions of this subsection … shall not create any property right or contract right, express or implied, for second-year and third-year probationary teachers." Colo. Rev. Stat. § 22-63-202(3) (2009).

protected by the Due Process Clause. But the Court's conclusion that non-probationary teachers have a property right in their continued employment is a further demonstration that the substantive protections of the fair-dismissal law remained in TECDA, and it is entirely inconsistent with the District Court's conclusion that TECDA eliminated the contractual expectation of continued employment established by prior iterations of the fair-dismissal law. If the District Court were right, the teacher in *Feldewerth* would have had no property interest in her continued employment.

## III. THE AMENDED COMPLAINT STATES A CLAIM UNDER THE DUE PROCESS CLAUSE

The Due Process Clause requires state and local governments to provide an opportunity for a hearing before depriving a person of a protected property interest, and "a law creates a property interest in continued employment" protected by the Due Process Clause "when it places restrictions on the grounds under which an employee may be discharged." *Ellis v. City of Lakewood*, 789 P.2d 449, 452 (Colo. Ct. App. 1989). *See also Cleveland Bd. of Educ. v. Loudermill*. 470 U.S. 532, 539 (1985) (statute providing that teacher "may not be dismissed 'except ... for ... misfeasance, malfeasance, or nonfeasance in office,' …. plainly supports the conclusion … that respondents possessed property rights in continued employment").

The District Court dismissed the Teachers' claim that the District violated the Due Process Clause when it placed them on indefinite unpaid leave, without cause or any hearing, pursuant to the challenged provisions, and that the challenged provisions, by mandating that outcome, facially violate the Due Process Clause. That dismissal rested on two alternative theories: First, the court held that, for the same reasons it had found that the legislature had eliminated contractual rights created by prior versions of the fair-dismissal law, the legislature in 1990 had also eliminated the reasonable expectation of continued employment created by those earlier statutes. Second, the court held in the alternative that even if TECDA does create a reasonable expectation of continued employment—and thus a property interest protected by the Due Process Clause—the challenged provisions do not violate the Teachers' due process rights because, in the court's view, being placed on unpaid leave does not amount to "dismissal" or "discharge" and thus is not a deprivation of that protected property interest. (ROA pp. 11-13.) The District Court is wrong on each score.

### A. The Legislature Did Not Eliminate Non-Probationary Teachers' Property Rights in Continued Employment When it Amended Colorado's Fair-Dismissal Law in 1990

The District Court's primary ground for dismissing the Teachers' Due Process claim is the same as its ground for dismissing the Teachers' Contract Clause claim, and it fails for the same reasons. Notwithstanding that TECDA's

fair-dismissal protections clearly "place[] restrictions on the grounds under which an employee may be discharged," *Ellis*, 789 P, 2d at 452, and that this Court has held that TECDA's for-cause dismissal provision "grants to [a non-probationary] teacher a legitimate claim to continued employment," *Feldewerth*, 3 P.3d at 471, the District Court ruled that TECDA in fact eliminated the reasonable expectation of continued employment created by earlier versions of Colorado's fair-dismissal statute.

As discussed, TECDA carried forward the robust dismissal-for-cause protections form earlier iterations of the fair-dismissal law, and the District Court's conclusion about the legislative intent evinced in the removal of the age-discriminatory provision is wrong. More fundamentally, this Court's binding decision in *Feldewerth*—which squarely held that TECDA's for-cause dismissal standard "grants to [a non-probationary] teacher a legitimate claim to continued employment," and thus that "the due process clause of the Fourteenth Amendment requires that that teacher be given notice and hearing before any dismissal may take place," *Feldewerth*, 3 P.3d at 471—is fatal to the District Court's holding, without the need for any further analysis.

That conclusion is confirmed by first principles. The question of whether an employment statute creates a property right in continued employment is answered by examining the *substance* of the rights conferred on public employees: "[A] law

creates a property interest in continued employment when it places restrictions on the grounds under which an employee may be discharged." *Ellis v. City of Lakewood*, 789 P.2d 449, 452 (Colo. Ct. App. 1989). *See also Cleveland Bd. of Educ. v. Loudermill*. 470 U.S. 532, 5339 (1985) (statute providing that teacher "may not be dismissed 'except ... for ... misfeasance, malfeasance, or nonfeasance in office,' …. plainly supports the conclusion … that respondents possessed property rights in continued employment"); *Perry v. Sinderman*, 408 U.S. 593, 602-03 (1972) (holding that even in the absence of tenure statute, a "legitimate claim of entitlement to continued employment" may be established through "rules and understandings" showing that employment continues "absent 'sufficient cause'"). Because, as we have seen, TECDA plainly establishes a for-cause dismissal standard for non-probationary teachers, the District Court's primary ground for dismissal is meritless even aside from *Feldewerth*'s holding.

### B. Involuntary Placement on Indefinite Unpaid Leave Constitutes a Deprivation of Non-Probationary Teachers' Property Interest in Continued Employment

The District Court's alternative ground for dismissing the Teachers' Due Process Claim is equally meritless. In the District Court's view, involuntary placement on unpaid leave without a hearing, as authorized by the challenged provisions, does not violate the Due Process Clause because unpaid leave does not

amount to "dismissal" as that term is used in the statute. (ROA pp. 10-11.) Each and every step of the District Court's reasoning is flawed.

First, the District Court erred by focusing on the semantic question of whether or not it is appropriate to equate the placement of teachers on indefinite unpaid leave with "dismissal," as that term is used in TECDA. Although, as the District Court acknowledged, "the ultimate result of displacement followed by unpaid leave may be comparable to dismissal," this fixation on semantics misses the point of the due process analysis. The proper question is not whether placement on unpaid leave does or does not amount to "dismissal" but instead is whether the Teachers have been deprived of their "property right in continued employment" when placed on indefinite unpaid leave. *Frey v. Adams Cnty. Sch. Dist. No. 14*, 804 P.2d 851, 855 (Colo. 1991).

With the correct question thus framed, and mindful that the expectation of continued employment "*and the right to compensation which accompanies it*, rises to the level of a constitutionally protected interest," *Lockhart*, 735 P.2d at 918 (emphasis added), it is clear that the placement of non-probationary teachers on unpaid leave is sufficiently serious to constitute a deprivation of that protected interest, as this Court has previously held. *See Babi v. Colo. High Sch. Activities Ass'n*, 77 P.3d 916, 923 (Colo. App. 2003).

Once a teacher is placed on unpaid leave, the teacher performs no work for the district and receives no pay or benefits. The only consolation is that if such a teacher does manage to secure a "mutual consent" position with the same school district, the teacher will return to his or her former pay rate. Colo. Rev. Stat. § 22-63-202(2)(c.5)(IV). That hardly makes up for the fact that such a teacher has lost income, critical benefits, and career capital in the interim. Moreover, in practice, as the allegations of the Amended Complaint make clear, the District's placement of five of the Teachers on unpaid leave under the challenged provisions has led to extended periods of unemployment, notwithstanding their diligent efforts to secure re-employment, and has forced some to accept lower paying jobs with other school districts, which are *not* required to pay teachers at their former salary and benefits levels. (ROA pp. 69-70.)

It is thus unsurprising that this Court and courts in other jurisdictions have held that the relegation of a public employee to unpaid status constitutes a deprivation of the employee's property right in continued employment. In *Babi*, this Court held that because a "hearing is constitutionally required before the discharge of an employee who has a constitutionally protected property interest in his or her employment," a suspension without pay triggers the Due Process Clause. 77 P.3d at 923. Case law from other jurisdictions also holds that unpaid suspension or leave triggers due process protections. *See, e.g.*, *Martin v. Itasca*

*Cnty.*, 448 N.W.2d 368, 370 (Minn. 1989) (holding that placing an employee on unpaid leave for four months "subjected him to a financial loss of a magnitude sufficient to constitute a deprivation of a property interest which invokes the procedural protection afforded by the fourteenth amendment to the United States Constitution"); *Thurston v. Dekle*, 531 F.2d 1264, 1272 (5th Cir. 1976) (holding that city's "suspension process [w]as no more than a façade" because "in reality, 'suspension' under the present state of facts ... is in the functional equivalent of permanent discharge subject to the condition subsequent that an employee may be reinstated with backpay upon successful appeal" (quotation marks omitted)), *vacated on other grounds*, 438 U.S. 901 (1978); *Bostean v. Los Angeles Unified Sch. Dist.*, 63 Cal. App. 4th 95, 111 (1998) (finding that a public employee "had a protectable property interest in maintaining his job, which was impaired when he was involuntarily placed on an illness leave of absence without pay"); *Ceko v. Martin*, 753 F. Supp. 1418, 1422-23 (N.D. Ill. 1990) ("While it is true that Ceko was not removed from employment in the strict sense of the term, he was effectively deprived of his salary when he was placed on involuntary leave of absence. …. Having acquired a property interest in his continued employment, Ceko has a legitimate claim of entitlement to the benefits associated with that protected interest—*i.e.*, his salary."). As the court in *Ceko* cogently reasoned, distinguishing between involuntary leave without pay and dismissal—as the

District Court did here—is untenable because "[t]he interest in continued employment would be hollow indeed if it did not secure payment, the primary benefit of being employed." *Id.* at 1423.

The District Court's error is all the more apparent when one examines the Colorado Supreme Court's decision in *Howell v. Woodlin School Dist. R-104*, 596 P.2d 56 (Colo. 1979). *Howell* involved a tenured teacher who was terminated without a hearing pursuant to the layoff provision of the 1967 Tenure Act, which provided that "'[a] board may cancel an employment contract with a teacher on continuous tenure without penalty to the school district when there is a justifiable decrease in the number of teaching positions.'" 596 P.2d at 58. (quoting Colo. Rev. Stat. § 22-63-112(3) (1973)). As the Court acknowledged, the provisions of the tenure law relating to "dismissal" did "not address Howell's situation" inasmuch as the layoff raised "no questions as to his efficiency and good behavior." *Id.* at 60. Because of this, just as is the case here, nothing in the statute guaranteed a right to a hearing in the case of a layoff.[6]

[6] This anomaly resulted from a change to the tenure law made by the 1967 Act. Layoffs fell within the ambit of the 1953 Tenure Act's hearing provision because that Act had included "a justifiable reduction in the number of teaching positions" among the causes justifying dismissal. *See* Colo. Rev. Stat. § 123-18-7 (1953). The 1967 Act, however, deleted that ground from the list of causes for dismissal, enacted the free-standing provision that a teacher's contract may be cancelled by reason of a "justifiable decrease in the number of teaching positions" involved in *Howell* (Colo. Rev. Stat. § 22-63-112(3) (1973), and at the same time defined

The Court held that even though the statute did not require a hearing because a layoff was not the same as "dismissal," the Due Process Clause nonetheless required a hearing because the "grant of tenure by its nature engenders a reasonable and objective expectancy of continued employment." *Id.* Rejecting the contention that no hearing was required because "the statute justifies dismissal when enrollment decreases," the Court reasoned that "even when fiscal exigencies are the apparent reason for a layoff, the tenured teacher whose expectations of continued employment have been disappointed, has a right to a hearing in which the teacher may show that the purported reasons for the layoff were not the actual ones or that the layoff was effected in an arbitrary or unreasonable fashion." *Id.* The Court concluded its opinion thus: "We therefore hold section 22-63-112(3), C.R.S. 1973 unconstitutional when applied without granting a hearing at which questions as to reasonableness and preference, as well as factual issues, may be determined." *Id.*

*Howell*'s holding is directly analogous here. Just as in *Howell*, the 1967 Tenure Act provided that teachers could be laid off without a hearing due to a "justifiable reduction in the number of teaching positions," so, too, the challenged provisions here purport to allow school districts to "remove" non-probationary

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"dismissal" to *exclude* terminations resulting from such layoffs (*id.* Colo. Rev. Stat. § 22-63-102(3) (1973)).

teachers from their positions by reason of "a drop in enrollment; turnaround; phase-out; reduction in program; or reduction in building, including closure, consolidation, or reconstitution, and then place them on indefinite unpaid leave if they fail to secure an alternative "mutual consent" position within twelve months or two hiring cycles—all without providing any hearing. *See* Colo. Rev. Stat. §§ 22-63-202(2)(c.5)(VII), 22-63-202(2)(c.5)(II)(B). At the same time, just as in *Howell* the fair-dismissal protections of the 1967 Act "engender[ed] a reasonable and objective expectancy of continued employment," 596 P.2d at 60, here, the legislature left in place the fair-dismissal provisions of TECDA, which also create a reasonable expectation of continued employment, and thus a property right for due process purposes.

By thus purporting to authorize an end-run around the property interest created by TECDA, the challenged provisions run afoul of the Due Process Clause in the same way as the layoff provision in *Howell* did. And *Howell* itself reflects the fundamental due process principles stated in *Loudermill*:

> The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. [470 U.S. at 541 (quotation marks omitted).]

All this being so, there is no merit to the District Court's conclusion that the legislature eliminated non-probationary teachers' protected property interest in continued employment or that involuntary placement on indefinite unpaid leave is not a deprivation of the Teachers' protected property interest.

## CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's Order dismissing the Amended Complaint and remand for further proceedings.

DATED this 12th day of December, 2014.

Respectfully submitted,

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