BEFORE THE
TEACHER STANDARDS AND PRACTICES COMMISSION
STATE OF OREGON

IN THE MATTER OF:	) **FINAL ORDER**
	)
JOSEPH DEE HAGLER	) OAH Case No.: 1102306

This matter came before the Teacher Standards and Practices Commission to consider the Proposed Order issued by Administrative Law Judge John Mann on March 15, 2012. Ralph E. Wiser, Attorney at Law, on behalf of Joseph Hagler filed exceptions to the Proposed Order on March 26, 2012.

On April 27, 2012, the Commission considered Joseph Hagler's written exception to the Proposed Order. After consideration of the records and files herein, the Commission finds that Licensee's exceptions are not persuasive and hereby adopts in its entirety the Findings of Fact, Conclusions of Law and Order contained in the attached Proposed Order as the Final Order.

Now therefore, the Commission suspends Joseph Dee Hagler's Standard Teaching License for six (6) months from the effective date of this order.

It is so Ordered this 8th day of May 2012.

Victoria Chamberlain, Executive Director
Teacher Standards and Practices Commission

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provision of ORS 183.482 to the Oregon Court of Appeals.

CERTIFICATE OF MAILING

On May 9th, 2012, I mailed the foregoing Final Order in OAH Case No. 1102306 to:

By: First Class Mail and email

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Melodie Hanson

Melody Hanson
Director of Professional Practices

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
JOSEPH D. HAGLER	) OAH Case No.: 1102306
	)

HISTORY OF THE CASE

On January 31, 2011, the Teacher Standards and Practices Commission (TSPC) issued a Notice of Opportunity for Hearing (Notice) to Joseph D. Hagler. On February 1, 2011, Ralph E. Wiser, attorney at law, requested a hearing on Mr. Hagler's behalf.

On April 11, 2011, TSPC referred Mr. Hagler's hearing request to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) John Mann was assigned to preside at hearing.

ALJ Mann held a prehearing conference on June 28, 2011. Mr. Wiser represented Mr. Hagler at the conference. Assistant Attorney General Judith Anderson represented TSPC. The parties agreed to hold the hearing on October 5 and 6, 2011.

ALJ Mann held the hearing, as scheduled, on October 5 and 6, 2011 at the OAH offices in Tualatin, Oregon. Mr. Wiser represented Mr. Hagler. Ms. Anderson represented TSPC. TSPC presented testimony from Mr. Hagler, Cally McKenzie, Kelly Rasmussen, and George Finch. Mr. Hagler testified on his own behalf and also presented testimony from Bradford Jones, Jeffrey Van Laanen, Elizabeth McKanna, and Jan Harrell, Ph.D. The record closed on November 29, 2011, after the parties submitted post-hearing briefs.

ISSUES

1. Whether Mr. Hagler committed gross neglect of duty by failing to use appropriate professional judgment, and by demonstrating a lack of skill in the supervision of students, when he allowed his cousin to use a school weight room when students were present. ORS 342.175(1)(b), OAR 584-020-0010(5), and OAR 584-020-0020(2)(d).

2. Whether Mr. Hagler committed gross neglect of duty by giving false and misleading answers to questions from a school district administrator and a TSPC investigator regarding his cousin's use of the school weight room. ORS 342.175(1)(b) and OAR 584-020-0040(4)(c).

3. Whether Mr. Hagler committed gross neglect of duty by failing to use and maintain student records as required by federal and state law and by school district policies and

procedures by submitting student transcripts to TSPC without prior written consent from the students or their legal guardians. ORS 342.175(1)(b) and OAR 584-020-0025(2)(c).

4. If any of the above violations are established, what is the appropriate sanction?

EVIDENTIARY RULING

Exhibits A1 through A4, offered by TSPC, were admitted into the record without objection. Mr. Hagler offered Exhibits R1 through R48. Exhibits R1, R5 through R17, R24, R28 through R34, R39 through R42, R44, R46 and R47 were admitted into the record without objection. Mr. Hagler withdrew Exhibits R20, R23, R25 through R27, R35, and R43.

TSPC objected to Exhibits R1 through R4, and Exhibit R36 as irrelevant. The objection was sustained as to Exhibit R36, and that Exhibit was not admitted into evidence. The objections were overruled with regard to Exhibits R1 through R4 and those Exhibits were admitted into evidence.

TSPC also objected to Exhibits R18 and R19 as irrelevant. Those objections were taken under advisement. The exhibits are copies of Circuit Court complaints involving litigation against the Phoenix-Talent School District. Mr. Hagler offered the exhibits, along with testimony from the attorney who filed the complaints, in support of his contention that the School District retaliated against him for cooperating in those lawsuits. However, Mr. Hagler presented no evidence to demonstrate that the School District was aware of his involvement in those cases. Mr. Hagler was not a party to the lawsuits and his name does not appear in the pleadings. TSPC's objections are sustained and Exhibits R18 and R19 are not admitted into evidence.

TSPC also objected to Exhibits R38 and R39 as irrelevant. Those objections were taken under advisement. Exhibit R38 is a letter, dated September 17, 2010, from Mr. Hagler's optometrist regarding an eye condition. Exhibit R39 is a letter from a co-worker vouching for Mr. Hagler's honesty and judgment. However, the letter states that the co-worker was not familiar with the facts of the allegations against Mr. Hagler. Neither letter is relevant to the present case. The objections are therefore sustained and Exhibits R38 and R39 are not admitted into evidence.

FINDINGS OF FACT

1. Joseph Hagler has been a licensed Oregon teacher since 1979. Since that time, he has taught at Phoenix High School in Phoenix, Oregon. Throughout his career, he has taught physical education, health and American history. He has also served as a coach for school wrestling, football, and baseball teams. (Ex. R1 at 1; test. of Hagler.)

2. On September 25, 2007, Mr. Hagler filed four complaints with the TSPC concerning the conduct of four Phoenix-Talent School District administrators in connection with the school's football and wrestling programs. Mr. Hagler alleged that the school district had allowed academically ineligible students to participate in both wrestling and football. In addition, he

alleged that the wrestling coach had encouraged players to use techniques that included grabbing the crotch and anus of opponents to gain an advantage. Mr. Hagler considered these techniques to be a form of sexual abuse. (Test. of Hagler; Ex. R21.)

3. TSPC maintains a complaint form on its website to allow individuals to file complaints against licensed school personnel. The form asks the person filing the complaint to attach a "list of relevant evidence" and to "[e]nclose documentation if available." (Ex. R24.)

4. When Mr. Hagler filed his complaints on September 25, 2007, he enclosed a copy of four student transcripts that, he asserted, demonstrated that the students were academically ineligible to participate in school athletic programs. Mr. Hagler did not get permission from the students or their legal guardians before submitting the transcripts to TSPC. (Test. of Hagler.)

5. Kelly Rasmussen is a prominent business man and civic leader in Medford, Oregon. Mr. Rasmussen is also Mr. Hagler's cousin. Although the two gentlemen had a close relationship as children, as of November 2008 they had not seen each other for several years. Mr. Hagler, who served as Mr. Rasmussen's best man at his wedding, was upset that Mr. Rasmussen had left his wife and was seeking a divorce. As a result, in 2008 Mr. Hagler did not want any contact with Mr. Rasmussen. (Test. of Hagler; test. of Rasmussen.)

6. Mr. Rasmussen was arrested on October 21, 2008 and was charged with multiple felonies, including charges of online sexual corruption of a child, in violation of ORS 163.432 and 163.433, and luring a minor, in violation of ORS 167.057. The charges stemmed from allegations that Mr. Rasmussen had been communicating with two individuals who described themselves as young girls, one age 11 and the other age 13. Law enforcement also alleged that Mr. Rasmussen had traveled to Clackamas County, Oregon with the intent to meet the girls. Both girls, however, were fictitious identities used by law enforcement personnel who were conducting a sting operation to identify potential online sexual predators. As a result of the sting operation, law enforcement arrested Mr. Rasmussen at the location where he had arranged to meet the fictitious 13-year-old girl. (Ex. A3.)

7. Mr. Rasmussen's arrest received significant media attention. The arrest was covered on local television and news websites. (Test. of McKenzie.) It was also the subject of a front-page story in the Medford Mail Tribune, the local newspaper. The story included a prominently displayed photograph of Mr. Rasmussen. (Test. of Hagler.)

8. On the first day that the story about Mr. Rasmussen's arrest was published, a colleague handed a copy of the newspaper to Mr. Hagler as they passed one another in the hall. The colleague told Mr. Hagler that he should see the story. Based on the colleague's expression, Mr. Hagler could tell that the story was bad news. (Test. of Hagler.)

9. Mr. Hagler subscribes to the Medford Mail Tribune, but typically retrieves it from his mailbox after he gets home from work. He generally avoids reading anything in the paper other than the sports section. Mr. Hagler does not watch television news, other than "Sportscenter" on ESPN. In 2008, Mr. Hagler did not have a personal computer in his home and did not read news websites. Mr. Hagler does not socialize much with adults. He attends a large church, but

generally sits alone and does not talk about issues other than those related to the church. (Test. of Hagler.)

10. Approximately two weeks after his arrest, Mr. Rasmussen sent out a text to approximately 50 people, including Mr. Hagler. The text did not refer to his arrest, but stated something to the effect that "all is well." (Test. of Rasmussen.) Mr. Hagler responded to the text and the two men spoke on the phone shortly afterward. Mr. Rasmussen did not discuss his arrest or his legal problems and Mr. Hagler did not ask him about those issues. (*Id.*) Mr. Hagler believed that Mr. Rasmussen sounded depressed. Mr. Hagler told Mr. Rasmussen that he should exercise and offered to help him with a workout routine. They also discussed attending a high-school football game together. Mr. Hagler asked Mr. Rasmussen if that would be permissible. Mr. Rasmussen asked Mr. Hagler why he was asking the question. Mr. Hagler told him that he had seen his picture in the paper and thought there could be a problem. Mr. Rasmussen told Mr. Hagler that his only restriction was that he could not be around a computer. Mr. Hagler then invited Mr. Rasmussen to work out at the school weight room after school hours. Mr. Rasmussen accepted the offer. (Test. of Hagler.)

11. Mr. Rasmussen went to Phoenix High School on November 10, 2008 to work out with Mr. Hagler. After arriving, Mr. Rasmussen began walking to the weight room and was met along the way by Mr. Hagler. Mr. Hagler unlocked the door to let them both in to the room. There were several students present in the room, but no other adults. The door to the weight room is always locked and students may only enter if let in by a teacher. Students are normally not allowed to exercise in the room without adult supervision. After entering the room, Mr. Hagler assisted Mr. Rasmussen with his work out, and also observed and supervised students in the room. Mr. Hagler never left the room while Mr. Rasmussen was present, but occasionally left him alone at an exercise station so that Mr. Hagler could observe and assist students. (Test. of Hagler.)

12. Mr. Rasmussen was in the weight room for approximately 20 to 40 minutes. He left, alone, through a door that took him outside near a running track and then walked to his car. As he left, he saw Brent Barry, a friend and school administrator, in the parking lot. The two men acknowledged each other, but did not have a conversation. Mr. Rasmussen then got into his car and left the school grounds. (Test. of Rasmussen.)

13. Shortly after Mr. Rasmussen left the school, Mr. Barry sent an e-mail to District administrators to let them know that Mr. Rasmussen had been there. (Ex. R29.)

14. Cally McKenzie, the District's human resource director, interviewed Mr. Hagler on November 12, 2008 regarding Mr. Rasmussen's presence in the weight room. (Ex. A1.) Bradford Jones accompanied Mr. Hagler as a representative of the Oregon Education Association. Mr. Jones and Mr. Hagler did not talk about the incident with Mr. Rasmussen prior to the meeting. (Test. of Jones.) Ms. McKenzie made an audio recording of the interview and later had it transcribed. (Exs. A1 (transcript) and R47 (audio recording).)

15. Early in the interview, Ms. McKenzie asked Mr. Hagler if he was aware of the allegations against Mr. Rasmussen. The following exchange then took place:

MR. HAGLER: I am aware of, kind of what the paper said, yeah. I didn't read all of it, but I did read enough to know that he's gotten himself in trouble.

MS. MCKENZIE: Okay, so you know that that includes in engaging [*sic*] in sexual explicit online communications with what he believed was an 11-year-old girl and a 13-year-old girl and he made arrangements to meet them in Portland and –

MR. HAGLER: [Interposing] That's not what I've heard. I just heard that he arranged to meet with them and that's all. There wasn't anything about the conversation that went on between them.

MS. MCKENZIE: Okay, but you know that these charges that he was arrested for allegedly trying to meet with an 11-year-old girl and a 13-year-old girl in Portland. He was arrested and arranged and –

MR. HAGLER: [Interposing] Yes, yes.

MS. MCKENZIE: -- that's all pending and all that kind of stuff.

MR. HAGLER: Yes.

(Ex. A1 at 2.)

16. Later in the interview, Mr. Hagler acknowledged that he allowed Mr. Rasmussen to work out in the school weight room when students were present. Mr. Hagler stated that another teacher was in the weight room when he first entered, but that she left shortly afterward, leaving approximately six students in the room with Mr. Hagler and Mr. Rasmussen. (Ex. A1 at 3-4.) Ms. McKenzie then questioned Mr. Hagler as follows:

MS. MCKENZIE: Considering the charges that are pending against him, that you're aware of, and I realize they have not been resolved, but there are some pretty intense bad charges and they are specifically against children, sexual crimes against children. Did you think it was a good idea to allow him in the weight room when our students are in there?

MR. HAGLER: I was not aware of those charges, I just thought it was computer stuff that –

* * * * *

MS. MCKENZIE: [Interposing] But, I'm talking about at a school, our school with our students, I'm asking you – so you're saying to me you didn't know these were sexual crimes against kids that you missed everything in the media and the news and the newspaper and –

[Crosstalk]

> MR. HAGLER: -- anything said anything about sexual things. Like I said, I just know that he went to somebody's house and some policeman had picked him up there. Now whether he, you know, he said he didn't do anything. He said, you know, this is something that he was in Portland, he had flown to Portland or you know, I'm not really sure. I just know that he was in a real bad way and I would never do anything to endanger any student of mine.

(*Id.* at 4-5.)

17. On November 26, 2008, Ms. McKenzie issued a written reprimand to Mr. Hagler for allowing Mr. Rasmussen to work out in the school weight room with students present. The reprimand also stated that Mr. Hagler had not been forthright in the answers he gave during the November 12, 2008 interview. (Ex. A2.)

18. On October 5, 2010, TSPC investigator Jeffrey Van Laanen interviewed Mr. Hagler at the TSPC offices in Salem, Oregon. Mr. Hagler was accompanied by his attorney. During the interview, Mr. Hagler stated that, prior to November 10, 2008, he had seen Mr. Rasmussen's photograph on the front page of the newspaper and had scanned the first paragraph. He also stated that he knew from the article that Mr. Rasmussen was in trouble with the law and that it involved computers. He stated that he did not remember if he knew at that time that the allegations involved teenage girls and thought that it might have involved Mr. Rasmussen's use of computers in connection with his travel agency business. He denied knowing that Mr. Rasmussen had been accused of a sex crime or that he should not be allowed on school grounds. Mr. Hagler stated that the first time he learned that Mr. Rasmussen had been accused of sexual misconduct with minors was during the interview with Ms. McKenzie. (Ex. R44.)

CONCLUSIONS OF LAW

1. Mr. Hagler committed gross neglect of duty by failing to use appropriate professional judgment, and by demonstrating a lack of skill in the supervision of students, when he allowed his cousin to use a school weight room when students were present. ORS 342.175(1)(b), OAR 584-020-0010(5), and OAR 584-020-0020(2)(d).

2. Mr. Hagler committed gross neglect of duty by giving false and misleading answers to questions from a school district administrator and a TSPC investigator regarding his cousin's use of the school weight room. ORS 342.175(1)(b) and OAR 584-020-0040(4)(c).

3. Mr. Hagler committed gross neglect of duty by failing to use and maintain student records as required by federal and state law and by school district policies and procedures by submitting student transcripts to TSPC without prior written consent from the students or their legal guardians. ORS 342.175(1)(b) and OAR 584-020-0025(2)(c).

4. Mr. Hagler's teaching license should be suspended for six months.

OPINION

TSPC has proposed a six-month suspension of Mr. Hagler's teaching license for gross negelect of duty in violation of ORS 342.175(1)(b) as defined by TSPC rules. TSPC must prove its allegations by a preponderance of the evidence, and it must also establish that the proposed penalty is appropriate. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

ORS 342.175(1)(b) authorizes the TSPC to impose discipline, including license suspension, on a teacher for "gross neglect of duty." TSPC has adopted a rule to define gross neglect of duty. OAR 584-020-0040(4) provides, in pertinent part:

> (4) Gross neglect of duty is any serious and material inattention to or breach of professional responsibilities. The following may be admissible as evidence of gross neglect of duty. Consideration may include but is not limited to:
>
> * * * * *
>
> (c) Knowing falsification of any document or knowing misrepresentation directly related to licensure, employment, or professional duties;
>
> * * * * *
>
> (n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030[.]
>
> TSPC's standards of competency include OAR 584-020-0010(5), which provides:
>
> The Competent Educator
>
> The educator demonstrates a commitment to:
>
> * * * * *
>
> (5) Use professional judgment[.]

(Emphasis in original.)

In addition, OAR 584-020-0020(2)(d) provides:

> (2) The competent teacher demonstrates:
>
> * * * * *
>
> (d) Skill in the supervision of students[.]

Finally, OAR 584-020-0025 provides, in relevant part:

> (1) The competent educator is a person who understands students and is able to relate to them in constructive and culturally competent ways. The competent educator establishes and maintains good rapport. The competent educator maintains and uses records as required, and as needed to assist the growth of students.
>
> (2) The competent teacher demonstrates skills in:
>
> * * * * *
>
> (c) Using and maintaining student records as required by federal and state law and district policies and procedures;
>
> * * * * *
>
> (e) Using district lawful and reasonable rules and regulations.

The Notice on appeal contains three separate allegations of gross neglect of duty. First, TSPC alleged that Mr. Hagler committed gross neglect of duty by allowing Mr. Rasmussen to use the school weight room in November 2008. Second, TSPC alleged that Mr. Hagler committed gross neglect of duty by giving conflicting answers in response to interview questions by a school administrator, Ms. McKenzie, and a TSPC investigator, Jeffrey Van Laanen. Third, TSPC alleged that Mr. Hagler committed gross neglect of duty by submitting student transcripts to TSPC without first obtaining the prior consent of the students or their legal guardians.

1. Allowing Mr. Rasmussen into the School Weight Room

Mr. Hagler conceded that he allowed Mr. Rasmussen to use the school weight room on November 10, 2008 while students were present. His sole contention is that he was unaware at the time that Mr. Rasmussen was then facing criminal charges based on allegations that he had traveled to Portland to meet two minor girls that he met online. Mr. Hagler contends that if he had known of the charges, he would not have allowed Mr. Rasmussen to use the weight room.

Mr. Rasmussen is a prominent Medford business man and civic leader. His arrest in October 2008 was widely reported and was the subject of numerous newspaper, television, and internet reports. Mr. Hagler (who is Mr. Rasmussen's cousin) admits that he had at least two

copies of a newspaper in his possession that included a front-page story about Mr. Rasmussen's arrest. However, Mr. Hagler asserts that he did not read the story in either paper, prior to allowing Mr. Rasmussen to use the weight room, because he was upset with Mr. Rasmussen due to apparently unrelated family issues. Mr. Hagler further asserts that he lives a "hermit-like" existence, with little exposure to local news or internet reports.

Mr. Hagler's assertions were not credible. First, it is implausible that he would be handed a copy of a newspaper article prominently featuring his cousin, and not at least glance at the headline. It is also implausible that he would receive the same newspaper at home and completely avoid understanding, as least in broad terms, the significance of the article, even if he did not read it in detail. Second, Mr. Hagler testified that, in a phone call prior to November 10, 2008, he asked his cousin if he had any restrictions that would prevent him from attending a high school football game. Such a question would be absurd unless Mr. Hagler had some notion that Mr. Rasmussen might be under some suspicion related to his involvement with minors. Third, if, as he asserted, he did not learn of his cousin's legal problems until after he allowed him into the weight room, it is likely he would have disclosed that fact to Ms. McKenzie during the November 12, 2008 interview. The focus of that interview was squarely on why Mr. Hagler let his cousin into the weight room. Although Mr. Hagler repeatedly downplayed his knowledge of the specific charges, he admitted that he had read a newspaper account and was aware that his cousin had flown to Portland to meet two young girls.

At the hearing, Mr. Hagler asserted that he read the newspaper article *after* he had allowed Mr. Rasmussen to use the weight room, but *before* his meeting with Ms. McKenzie. That assertion was also not credible. During an interview with Mr. Van Laanen in October 2010, Mr. Hagler stated that he first learned of the nature of the charges against his cousin *during* the interview with Ms. McKenzie. In both interviews he admitted to reading at least some portion of the newspaper article. If, as he now contends, he did not do so until after he allowed his cousin to use the weight room, it is likely that he would have mentioned that to Ms. McKenzie and Mr. Van Laanen, both of whom were asking him why he would let his cousin onto school property given the nature of the charges against him.

Mr. Hagler asserted that he felt pressure and anxiety during his interview with Ms. McKenzie. Because of that anxiety, Mr. Hagler contended that he had almost no memory of the interview after he left the room. Mr. Hagler also offered testimony and a report from his psychologist to suggest that Ms. McKenzie's interview techniques were prosecutorial and not objective.

However, the audio recording of the interview is inconsistent with Mr. Hagler's assertions. During the course of the interview, Mr. Hagler's voice is calm and measured; this was in marked contrast to Mr. Hagler's behavior during his testimony in this case. At the hearing, he was emotional and sometimes had difficulty maintaining his composure; he appeared and sounded extremely nervous and pressured. However, in the audio recording his voice sounded strong and confident. When he disagreed with Ms. McKenzie's statements or questions, he clearly, calmly, and forcefully expressed his opinions. Ms. McKenzie, while clearly concerned about the allegations, did not sound accusatory or vindictive. Given her knowledge that a person accused of a sex crime against a minor was present on school grounds, her concern

and need for information was appropriate. Early in the interview, Ms. McKenzie stated that she assumed that Mr. Hagler knew of the charges against his cousin. He admitted that he had read a newspaper account. Shortly afterward, Ms. McKenzie asked Mr. Hagler why he allowed Mr. Rasmussen on to school property. Her questions were direct and straight-forward. She did not badger him or attempt to coerce him. Mr. Hagler's responses were cogent and his tone of voice was measured and calm.

The evidence established, more likely than not, that Mr. Hagler knew his cousin was facing criminal charges related to minors when he allowed Mr. Rasmussen to use the weight room on November 10, 2008. Although there is no evidence to suggest that Mr. Hagler knew the precise nature or of the details relating to the charges, he had enough information to cause a reasonable person to inquire further before allowing Mr. Rasmussen on to school property when students were present. His conduct demonstrated a failure to use professional judgment, in violation of OAR 584-020-0010(5). Furthermore, by allowing Mr. Rasmussen into the weight room in the presence of high school students, Mr. Hagler demonstrated a lack of skill in the supervision of those students in violation of OAR 584-020-0020(2)(d). This amounted to gross neglect of duty under ORS 342.175(1)(b).

2. Conflicting Answers During Interviews

TSPC alleged that Mr. Hagler gave conflicting answers regarding his knowledge of Mr. Rasmussen's legal problems when he was interviewed by Ms. McKenzie and, later, by Mr. Van Laanen. The evidence supports that allegation.

Mr. Hagler's answers to Mr. Van Laanen were not consistent with the answers he gave to Ms. McKenzie. In both interviews Mr. Hagler downplayed his knowledge of the charges against Mr. Rasmussen. However, in his interview with Ms. McKenzie Mr. Hagler, in his own words, acknowledged knowing that Mr. Rasmussen had flown to Portland to meet someone and was, instead, met by a policeman. He also affirmed Ms. McKenzie's assertion that Mr. Rasmussen had been accused of trying to meet two young girls and acknowledged having read enough of a newspaper account to know that his cousin had gotten in trouble. Furthermore, he asserted that he had "heard" that Mr. Rasmussen arranged to meet with young girls and that "there wasn't anything about the conversation that went on between them." Mr. Hagler's statements imply that he had either read or heard about the nature of the charges against his cousin and had read or heard enough that he could assert that the source of his information did not include anything about the nature of Mr. Rasmussen's conversations with the two minors. This statement is inconsistent with a brief scan of a portion of an article.

In contrast, Mr. Hagler told Mr. Van Laanen that he had merely scanned one paragraph of the newspaper and understood that the allegations were related to computers. He told Mr. Van Laanen that he initially thought the allegations might be related to Mr. Rasmussen's use of computers as part of his work as a travel agent and that he first learned that the crimes involved allegations of sexual misconduct during his interview with Ms. McKenzie.

Mr. Hagler's assertion that he did know the nature of the charges against his cousin at the time of his interview with Ms. McKenzie was inconsistent with his testimony at the hearing. At

the hearing, he claimed that he read the newspaper article reporting his cousin's arrest *before* the interview. At the very least, a reasonable person reading an article about an adult man being arrested for flying to another city to meet two minor girls would understand that the allegations likely involved sexual misconduct, even if the article did not include a detailed account of the online conversations. His assertions that he did not understand that his cousin had been accused of sexual impropriety, both to Ms. McKenzie and to Mr. Van Laanen, were not plausible. The evidence established, more likely than not, that Mr. Hagler knew of the nature of the charges against his cousin and knew that they involved sexual misconduct against minors.

OAR 584-020-0040(4)(c) defines gross neglect of duty to include "knowing misrepresentation directly related to licensure, employment, or professional duties." Mr. Hagler knowingly gave false answers to Ms. McKenzie and to Mr. Van Lannen when he said that he was unaware that the charges against his cousin involved allegations of sexual misconduct against minors. His statements to Ms. McKenzie were related to employment. His statements to Mr. Van Laanen were related to licensure. On both occasions, Mr. Hagler violated ORS 342.175(1)(b), as defined by OAR 584-020-0040(4)(c).

3. Submitting Student Transcripts to TSPC without Prior Consent.

In September 2007, Mr. Hagler filed complaints with TSPC against four district administrators alleging that the district had allowed four students to participate in the school football program when they were academically ineligible to do so. Mr. Hagler submitted transcripts for all four students to demonstrate that they did not meet academic eligibility requirements. He did not have permission from the students, or their legal guardians, to release those transcripts.

TSPC alleges that Mr. Hagler's release of the transcripts violated OAR 584-020-0025(2)(c), which requires competent educators to use and maintain student records as required by federal and state law and by school district policies and procedures. Specifically, TSPC alleges that Mr. Hagler's disclosure violated the federal Family Educational Rights Privacy Act (FERPA), 20 U.S.C. §1232g.

FERPA does not regulate school districts or teachers directly. Rather, the statute prevents the federal Department of Education from providing federal funding to school districts that violate its provisions. With a few specifically enumerated exceptions (none of which apply to this case), the statute generally prohibits school districts that receive federal funding from disclosing a student's educational records without advance written consent from the student's parents. 20 U.S.C. §1232g(b).

Mr. Hagler argues that FERPA applies solely to educational agencies (such as a school district) and not to individual teachers. As such, he contends, FERPA imposed no restrictions on his disclosure of student transcripts to TSPC. Because he, as a teacher, was not restricted by FERPA, he contends, his release of the transcripts did not violate OAR 584-020-0025(2)(c). In that respect, Mr. Hagler is incorrect.

While FERPA explicitly applies solely to educational agencies, its protections would be meaningless unless they reached the conduct of individual educators and school administrators. As a matter of common sense, a school district is incapable of acting other than through individual employees and officers. If the school district were to allow individual teachers to ignore FERPA privacy protections, the district would be in violation of FERPA and would likely lose eligibility for federal funding.

More importantly, however, TSPC is not seeking to impose discipline on Mr. Hagler for violating FERPA itself. Rather, TSPC contends that Mr. Hagler's release of the transcripts violated OAR 584-020-0025(2)(c), which required Mr. Hagler to use and maintain student records in a manner consistent with federal law. Thus, under TSPC's rule, Mr. Hagler could not ignore FERPA protections, even if he would not face personal liability for a violation of the federal statute. Mr. Hagler's release of student transcripts without parental consent was not consistent with federal law and constituted a violation of OAR 584-020-0025(2)(c).[1]

Even if Mr. Hagler's release of the transcripts amounted to a violation of TSPC rules, however, Mr. Hagler asserts, on various grounds, that discipline is not warranted in this case.

a. Equitable Estoppel and/or Invited Error

Mr. Hagler asserts that TSPC, in essence, requested that he provide the transcripts at issue. Mr. Hagler correctly notes that TSPC's complaint form includes an instruction that the complainant should enclose relevant documentation if it is available. Mr. Hagler further notes that nothing in the complaint form cautions against enclosing student transcripts. Mr. Hagler therefore asserts that TSPC should not be allowed to impose discipline against him under the theory of equitable estoppel, or under the "invited error" doctrine. Mr. Hagler is incorrect on both theories.

First, the doctrine of invited error has no application to the facts of this case. As noted in *State v. Kammeyer,* 226 Or App 210,. 214 (2009), the invited error doctrine "is generally applicable when a party has invited the trial court to rule in a particular way under circumstances that suggest that the party will be bound by the ruling or will not later seek a reversal on the basis of that ruling." The doctrine does not apply outside of the context of litigation. Rather, as noted by the court in *Kammeyer,* the doctrine merely prevents a party to litigation from asserting an error by a trial court where that party requested the allegedly erroneous ruling.

[1] Mr. Hagler also notes that documents provided to TSPC in connection with an investigation are confidential pursuant to ORS 342.176(4)(a). However, Mr. Hagler does not explain how such confidentiality is relevant to the alleged violation. To the extent that Mr. Hagler believes that such confidentiality excuses a failure to safeguard student records under FERPA, he has offered no authority for such a proposition. Nothing in 20 U.S.C. §1232g suggests that a school district may release documents to a state agency so long as the state agency will not disclose the documents to third parties. Similarly, Mr. Hagler argues that TSPC would have obtained the student transcripts eventually as part of its investigation of Mr. Hagler's four complaints. Such an observation, even if true, would not excuse Mr. Hagler's failure to maintain the confidentiality of student records under FERPA.

Nevertheless, even if the invited error doctrine could apply outside of litigation, the facts would not support its application in this case. The generic request on TSPC's complaint form to enclose "relevant documentation" did not amount to an invitation to Mr. Hagler to provide student transcripts or to otherwise disclose confidential information.

As correctly noted by Mr. Hagler, equitable estoppel may be applied against a state agency, but "only if it is shown that the person asserting it was misled by the agency and justifiably and detrimentally relied on the misleading conduct." *Employment Division v. Western Graphics Corp.*, 76 Or App 608, 612-13 (1985). In this case, TSPC's form instructed Mr. Hagler to attach relevant documentation. The form did not direct Mr. Hagler to enclose a student transcript or to violate student confidentiality. There is no reason to suspect that TSPC, in drafting the form, used the term "relevant documentation" to refer to student transcripts. Indeed, given the generic nature of the form, relevant documentation could include any number of types of documentary evidence. Nothing on the form affirmatively misled Mr. Hagler into believing that he could ignore applicable confidentiality laws.

b. Failure to Investigate

ORS 342.176(1) provides, in pertinent part:

> (1) The Teacher Standards and Practices Commission shall promptly undertake an investigation upon receipt of a complaint or information that may constitute grounds for:
>
> * * * * *
>
> (b) Suspension or revocation of a license or registration, discipline of a person holding a license or registration, or suspension or revocation of the right to apply for a license or registration, as provided under ORS 342.175[.]

Mr. Hagler contends that TSPC failed to investigate this allegation and thus may not impose discipline against Mr. Hagler. In support of this contention, Mr. Hagler notes that Mr. Van Laanen did not question him about the transcripts. Nor is there any record that TSPC interviewed any other person about the matter.

TSPC, however, asserts that its statutory duty to investigate complaints does not necessarily require interviewing witnesses. Rather, TSPC notes, an investigation can consist solely of a review of available records. In that respect, TSPC is correct. Nothing in ORS 342.176(1) requires TSPC to interview witnesses, or the licensee who is the subject of the complaint. Where a violation may be demonstrated through documentary evidence, it may not be necessary to interview witnesses as part of the investigatory process.

Nevertheless, in this case it does not appear that TSPC conducted even a cursory investigation. TSPC did not submit any documentary evidence in support of this allegation and presented no testimony describing the alleged records review. Rather, it appears that at the time

it issued the Notice on appeal, TSPC relied solely on its receipt of the transcripts at issue. In fact, other than Mr. Hagler's testimony at the hearing, it appears that TSPC had no evidence (documentary or otherwise) with which to determine that Mr. Hagler released the transcripts without advance written authorization. Thus, the "investigation" appears to have consisted of the receipt of the transcripts and a conclusion that such disclosure, by itself, constituted a violation of OAR 584-020-0025(2)(c).

However, ORS 342.176(1) does not provide that a failure to investigate (however that term is defined) is a bar to imposing discipline. Rather, the statute is most naturally interpreted as imposing an affirmative duty on TSPC to investigate allegations of teacher misconduct as part of its duty to protect the interests of children and the public. When a complaint is filed, or when TSPC receives information concerning potential teacher misconduct, ORS 342.176(1) requires TSPC to take action; it may not simply ignore the complaint or information. However, that does not impose a duty to perform an ideal investigation as a prerequisite to imposing discipline. If TSPC fails to conduct an adequate investigation, it bears the risk that it might not be able to establish a violation at a contested case hearing. But it does not prevent TSPC from imposing discipline if adequate evidence is produced at such a hearing to support an alleged violation.

c. Lack of Knowledge

Mr. Hagler asserted that he did not know that his release of student transcripts may have violated FERPA. He also notes that TSPC's Legal Liaison testified that TSPC staff were initially unaware that the release may have been contrary to FERPA. However, Mr. Hagler fails to articulate how his failure to understand FERPA affects the allegations in this case. OAR 584-020-0025(2)(c) requires competent educators to use and maintain student records as required by federal law. This imposes an affirmative duty on the educator to have at least a general understanding of any legal restrictions on the release of confidential student records; ignorance of the law is no excuse.

Mr. Hagler also failed to articulate how TSPC staff's alleged failure to understand FERPA confidentiality requirements is relevant to this case. While it may have been preferable for TSPC to act sooner, TSPC is not foreclosed from imposing discipline based on an alleged staff failure to recognize the violation in 2007.

d. Whistleblowing

Mr. Hagler argues that his release of student transcripts "was either analogous to whistleblowing activity or was outright whistleblowing activity." (Hagler Post Hearing Brief at 9.) As such, Mr. Hagler asserts, TSPC is precluded from imposing discipline for engaging in such activity.

Mr. Hagler provided no authority for that proposition. He cited to *Huber v. Oregon Dept. of Education,* 235 Or App 230 (2010), in which the Oregon Court of Appeals reversed the trial court's grant of summary judgment to the Oregon Department of Education for alleged retaliation against an employee who had threatened to report alleged unlawful activity. The employee alleged that the Department of Education fired him in retaliation for his threat and in

so doing violated ORS 659A.203. The Court of Appeals held that the issue should have been submitted to the jury and remanded the case for trial. ORS 659A.203, however, does not offer blanket protection for whistleblowing activity. Rather, it prohibits public *employers* from retaliating against *employees* for engaging in protected whistleblowing activity. Because Mr. Hagler was not an employee of TSPC, ORS 659A.203 is inapplicable.

Mr. Hagler also cited to *Love v. Polk County Fire District,* 209 Or App 474 (2006) and *De Bay v. Wild Oats Market*, 244 Or App 443 (2011)[2] in support of his whistleblower retaliation argument. However, both of those cases involved common law claims for unlawful discharge. Specifically, the plaintiffs in those cases alleged that they had been unlawfully discharged for fulfilling an important public duty, namely complaining about, and potentially exposing, certain improper conduct on the part of their respective employers. Again, however, the court extended whistleblower protections solely to employees who are subject to retaliation by their employers. Mr. Hagler cited no authority that applied such protections against a licensing body acting in its regulatory capacity.

Nevertheless, Mr. Hagler contends that TSPC acted "as a surrogate for the [Phoenix-Talent School] District in retaliating against Mr. Hagler" for filing the four complaints in September 2007. (Hagler Post Hearing Brief at 9.) The evidence does not support such an assertion. Mr. Hagler provided no evidence that would suggest that TSPC had an interest in protecting the School District against Mr. Hagler's complaints. Nor did he offer any evidence to suggest that the District and TSPC worked in concert to punish Mr. Hagler for filing the complaints. Indeed, the long delay between Mr. Hagler filing his complaint and TSPC taking action against him belies such a link. Thus, as a matter of law, Mr. Hagler has presented no authority for the proposition that whistleblower protections extend beyond the employment context. Furthermore, Mr. Hagler did not present evidence to establish that TSPC is seeking to impose discipline in retaliation for his alleged whistleblower activity.

4. Sanction

TSPC has proposed that Mr. Hagler's license be suspended for six months for the violations at issue. ORS 342.177(3)(c) grants the Commission the authority to suspend a teaching license for a period of up to one year. TSPC has adopted an administrative rule setting forth the factors it considers when imposing a sanction. OAR 584-020-0045 provides:

> **Factors for Imposing Disciplinary Sanctions**
>
> The Commission *may* consider *one or more* of the following factors, as it deems appropriate, in its determination of what sanction or sanctions, if any, should be imposed upon a finding that an educator has violated any standard set forth in OAR 584-020-0040:

[2] Mr. Hagler's citation for *De Bay v. Wild Oats Market* referred only to the Circuit Court case number. However, he noted the date of the decision as July 20, 2011 which was the date that the Court of Appeals issued its opinion. I assume that Mr. Hagler intended to cite to the Court of Appeals case and not a trial court decision.

(1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series of incidents;

(2) The likelihood of a recurrence of the misconduct or violation;

(3) The educator's past performance;

(4) The extent, severity, and imminence of any danger to students, other educators, or the public;

(5) If the misconduct was open and notorious or had negative effects on the public image of the school;

(6) The educator's state of mind at the time of the misconduct and afterwards;

(7) The danger that students will imitate the educator's behavior or use it as a model;

(8) The age and level of maturity of the students served by the educator;

(9) Any extenuating circumstances or other factors bearing on the appropriate nature of a disciplinary sanction; or

(10) To deter similar misconduct by the educator or other educators.

(Emphasis added.)

Under the above rule, the Commission may, but is not required to, consider the listed factors when imposing discipline. Further, as explained by the rule, the Commission need not consider all of the factors, but only those that the Commission deems appropriate.

Mr. Hagler argued that consideration of the above factors weighed against a suspension. Specifically, Mr. Hagler noted that he has been a teacher for more than 30 years and has never previously been disciplined. He asserted that the charges in this case constituted an isolated instance in an otherwise unblemished career. He also noted that he has been popular with students and has been recognized as an outstanding coach. Furthermore, Mr. Hagler notes that no one was harmed by his conduct and that he acted without knowledge of the charges that were pending against Mr. Rasmussen when he allowed him to use the weight room. Finally, Mr. Hagler notes that a suspension will likely result in the loss of his job and will, most likely, prevent him from working as a teacher in the future.

A suspension of a professional license is unquestionably a severe sanction. The suspension alone will likely cause some economic stress. Although the impact of a suspension on Mr. Hagler's career is largely a matter of speculation, it is reasonable to assume that it could be damaging to his future employment opportunities. Nevertheless, the proposed sanction is

within the range of the Commission's discretion and is reasonable under the factors set forth in OAR 584-020-0045.

Although Mr. Hagler has not previously been disciplined, his conduct was not an isolated instance. The violations with regard to Mr. Rasmussen included not only allowing him onto school grounds when students were present, but extended to false and misleading statements made to a school district administrator and a TSPC investigator. His actions and subsequent statements thus formed a pattern of conduct that occurred over the course of two years.

There is no evidence that students were placed in serious risk, but given the nature of the charges pending against Mr. Rasmussen, it was a serious lapse in judgment to allow him to work out in close proximity to high school girls. Although it does not appear that Mr. Hagler's actions led to any public notoriety beyond the school itself, his actions were, nonetheless, open and notorious. At least one other staff member saw Mr. Rasmussen and immediately understood the ramifications of having him on school property. Furthermore, there were several students present in the weight room who also saw Mr. Rasmussen. Given the widespread publicity of Mr. Rasmussen's arrest, there was a strong possibility that at least some of the students were aware that an accused sex offender was on school property apparently with Mr. Hagler's knowledge and approval.

Mr. Hagler asserted that he did not know of the charges against Mr. Rasmussen and thus his state of mind weighs against a significant sanction. As explained earlier in this opinion, that assertion is not credible. Mr. Hagler admitted to Ms. McKenzie and Mr. Van Laanen that he had read at least a portion of a news account of Mr. Rasmussen's arrest. He further admitted that he knew enough to question his cousin as to whether he could be around students at a high school football game.

There is little likelihood that students would imitate Mr. Hagler's conduct in this case, or treat it as a model. There is also no reason to suspect that Mr. Hagler will engage in similar conduct in the future. Nor is there any reason to believe that a suspension would be necessary to deter similar misconduct by Mr. Hagler in the future. Whether or not a suspension in this case would deter other educators from similar misconduct is a matter of speculation.

Nevertheless, Mr. Hagler's actions in connection with Mr. Rasmsussen constituted a serious and substantial lapse of professional judgment. He allowed an accused sex offender onto school property in close proximity to minor students. He did so despite widespread publicity about Mr. Rasmussen's arrest. When questioned about the incident, on two occasions, he gave false, misleading, self-serving, and conflicting answers. Under these circumstances, a six-month suspension is appropriate.

Mr. Hagler also committed gross neglect of duty by violating 584-020-0025(2)(c) when he disclosed student transcripts without written permission from the students' parents. However, he did so in connection with complaints against four school administrators and made those disclosures to the TSPC. The evidence established that he acted in the good faith belief that his conduct was proper. Were that the only violation, a substantial sanction would not be warranted.

However, given the serious nature of the additional violations, TSPC's proposed sanction is reasonable and consistent with its statutory authority.

ORDER

I propose the Teacher Standards and Practices Commission issue the following order:

Joseph D. Hagler's teaching license shall be suspended for six months for gross neglect of duty in violation of ORS 342.175(1)(b) and as defined by OAR 584-020-0010(5), OAR 584-020-0020(2)(d), OAR 584-020-0025(2)(c), and OAR 584-020-0040(4)(c).

John Mann
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this proposed order, you may file written objections, called "exceptions," to the proposed order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the proposed order** with the:

Teacher Standards and Practices Commission
250 Division Street NE
Salem OR 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the Commissioners in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.

CERTIFICATE OF MAILING

On March 15, 2012, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1102306.

By: First Class and Certified Mail
Certified Mail Receipt #7010 2780 0000 2132 8724

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