



# CERTIFICATE OF MAILING

On September 25<sup>th</sup>, 2014, I mailed the foregoing Final Order and Proposed Order to:


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MAR 07 2014

Teacher Standards &  
Practices Commission

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON

for the

TEACHER STANDARDS AND PRACTICES COMMISSION

IN THE MATTER OF THE TEACHING ) PROPOSED ORDER  
LICENSE OF: )  
 ) OAH Case No.: 1303184  
NAOMI D. LEAVITT )

HISTORY OF THE CASE

On September 12, 2012, the Oregon Teacher Standards and Practices Commission (Commission) issued a Notice of Opportunity for Hearing to Naomi D. Leavitt (Respondent). The notice alleged that Respondent committed gross neglect of duty and sought to impose discipline against her. Respondent filed a timely request for hearing on or about September 18, 2012.

The Commission referred the case to the Office of Administrative Hearings (OAH) on March 8, 2013. The case was assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton.

A telephone pre-hearing conference was held on May 28, 2013. Attorney Adam S. Arms represented Respondent. Senior Assistant Attorney General (AAG) Raul Ramirez represented the Commission. A hearing was scheduled to begin October 9, 2013.

On July 31, 2013, the OAH received notice that Attorney Elizabeth A. McKanna would be representing Respondent instead of Mr. Arms.

On September 30, 2014, the Commission requested to postpone the hearing. Ms. McKanna had no objection to the request. The hearing was rescheduled to begin January 30, 2014.

A hearing was held in Salem, Oregon, on January 30 and 31, 2014. Ms. McKanna and Attorney Jennifer Sung represented Respondent. Senior AAG Ramirez represented the Commission.

The following witnesses testified for the Commission: Respondent; Joseph Duran, Cleveland High School (CHS) teacher/coach; S■■ P■■■, former CHS student; R■■ C■■■ former CHS student; M■■■ M■■■ former CHS student; J■■ B■■■ former CHS student; and Susan Nisbet, private investigator. The following witnesses testified for Respondent: Scot Leavitt, Respondent's husband; Karla Urbanowicz, parent of former CHS student; Eric Levine, CHS teacher; Meira Spivak, youth group director and acquaintance of Respondent's; and Lori

Brocker, parent of former CHS students and acquaintance of Respondent's. Respondent also testified on her own behalf.

Oral closing argument was held by telephone on February 7, 2014. Ms. McKanna represented Respondent. Mr. Ramirez represented the Commission.

The record closed on February 7, 2014, and the matter was taken under advisement.

### ISSUES

(1) Whether Respondent committed gross neglect of duty by inappropriately communicating with a male high school student, in violation of ORS 342.175(1)(b) and one or more of the following administrative rules:

(a) OAR 584-020-0040(4)(n) (substantial deviation from professional standards of competency) as it incorporates OAR 584-020-0010(1) (recognizing the worth and dignity of all persons and respect for each individual) and OAR 584-020-0010(5) (use of professional judgment).

(b) OAR 584-020-0040(4)(o) (substantial deviation from professional standards of ethics) as it incorporates OAR 584-020-0035(1)(c)(D) (maintaining an appropriate professional student-teacher relationship by honoring appropriate adult boundaries with students in conduct and conversations at all times).

(c) OAR 584-020-0040(4)(f) (sexual conduct with a student) as that term is defined in OAR 584-020-0005(5).

(2) Whether Respondent committed gross neglect of duty by engaging in sexual relations with a male high school student, in violation of ORS 342.175(1)(b) and one or more of the following administrative rules:

(a) OAR 584-020-0040(4)(n) (substantial deviation from professional standards of competency) as it incorporates OAR 584-020-0010(1) (recognize the worth and dignity of all persons and respect for each individual) and OAR 584-020-0010(5) (use of professional judgment).

(b) OAR 584-020-0040(4)(o) (substantial deviation from professional standards of ethics) as it incorporates OAR 584-020-0035(1)(c)(D) (maintaining an appropriate professional student-teacher relationship by honoring appropriate adult boundaries with students in conduct and conversations at all times).

(c) OAR 584-020-0040(4)(f) (sexual conduct with a student) as that term is defined in OAR 584-020-0005(5).

(3) If Respondent committed a violation, what discipline should be imposed? ORS 342.177(3), OAR 584-020-0040, and OAR 584-020-0045.

### **EVIDENTIARY RULINGS**

Exhibits A1 through A3, A5, A6 through A8, and A11, offered by the Commission, were admitted into evidence without objection. Exhibit A4 was admitted into evidence over Respondent's objection as to lack of foundation. Exhibit A9 was admitted into evidence over Respondent's objection as to lack of relevance. The Commission did not offer Exhibit A10.

Exhibits R2, R4, R5, R7, R8, R10, R13 through R16, and R18, offered by Respondent, were admitted into evidence without objection. Exhibits R1, R6 and R9 were admitted into evidence over the Commission's objection as to lack of relevance. Exhibit R3 was admitted evidence without objection, after the names of parents and students, initially identified by their initials only, were disclosed as set forth on Exhibit A11. Exhibit R11 was excluded from evidence based on the Commission's objection as to lack of relevance. Exhibit R17 was excluded from evidence based on the Commission's objection as to lack of foundation. Respondent did not offer Exhibit R12.

Pleadings P1 through P10 were also made a part of the record.

### **FINDINGS OF FACT**

(1) Respondent is 33 years old. (Test. of Respondent.) She graduated from the University of Oregon in 2002 with a bachelor of arts degree. She graduated from George Fox University in 2007 with a master of arts in teaching. She did her student teaching in the Portland Public Schools (PPS) system in 2006 and 2007. (Ex. R5; Test. of Respondent.)

(2) Respondent was hired by PPS as a full-time teacher at Cleveland High School (CHS) in southeast Portland, starting in the fall of 2007. CHS is a four-year high school with approximately 1,400 to 1,500 students. (Test. of Respondent.) Respondent taught at CHS until she submitted her resignation on September 28, 2011, effective October 31, 2011. (Ex. A7; Test. of Respondent.)

(3) Respondent married Scot Leavitt in August 2003. They have two children, ages four and two and one-half. Mr. Leavitt is a math instructor at Portland Community College. (Test. of Scot Leavitt.) Respondent and her husband have lived in southwest Portland since 2007. (Test. of Respondent.) It took Respondent approximately 20 minutes to drive from her home to CHS in light traffic, and between 30 and 50 minutes to make the drive in heavy traffic. (Test. of Respondent, Scot Leavitt.)

(4) Respondent taught a variety of classes during her tenure at CHS, including Spanish, global social studies, U.S. History, and international baccalaureate history. She also was a faculty advisor to various clubs at CHS, including sophomore class cabinet, food club, the Jewish Student Union, and the girls club. She allowed students to use her classroom during the lunch hour for their various club meetings, and to play video games. When Respondent was not participating in the club meeting activities as an advisor, she ate lunch or graded papers and worked on lesson plans in another part of her classroom as students met or played video games. The CHS administration did not prohibit teachers from letting students gather or meet in teachers' classrooms during the lunch hour. Respondent knew that many students at CHS considered her a "cool" teacher. (Test. of Respondent.)

(5) Respondent had a personal Facebook page in 2008 which she used to communicate with students. In late 2008 or early 2009, after some other teachers had raised concerns about her Facebook page, CHS's vice principal talked to Respondent about communicating with students on Facebook. The vice principal looked at Respondent's Facebook page and saw what she believed was an unusually high number of communications between Respondent and male students. (Ex. A9 at 1.) CHS administration officials talked to Respondent in late February 2009 about the importance of maintaining professional student/teacher boundaries with students. (*Id.* at 2.) Respondent subsequently changed her Facebook page to not allow current students to communicate with her on her page. (Test. of Respondent.)

(6) S■■■■ P■■■■, born March 18, 1993, attended CHS from his freshman year through his senior year. He graduated from CHS in June 2011. He lived with his parents approximately five blocks from the school, and usually walked to and from school. He played varsity baseball all four years at CHS and was the team's starting catcher. (Test. of P■■■■) Casey Dyer was the varsity baseball coach. Joseph Duran was the junior varsity baseball coach. The varsity and junior varsity teams practiced together. (Test. of Duran, P■■■■)

(7) S■■■■ was a student in Respondent's U.S. History class during his junior year, the 2009-2010 school year. Respondent, as well as other teachers at CHS, utilized students as teaching assistants (TAs) in their classes. Respondent required students to complete an

application to be a TA in her class. The applicant had to have taken her class previously, and the student's parents had to approve their selection. (Test. of Respondent.)

(8) School days at CHS started at 8:15 a.m. and ended at 3:15 p.m. During the 2010-2011 school year, Respondent had seven class periods. Each period lasted 52 minutes. She taught several classes of U.S. History and international baccalaureate history during the school day. She had study hall duty one period during the morning. Seventh period, the last period of the day, was her prep period. (Test. of Respondent.)

(9) S ■ applied for and was accepted by Respondent to be a TA during her third-period U.S. History class for the 2010-2011 school year. H ■ He ■, one of S ■'s close friends, was also a TA in Respondent's third period class. Respondent had a total of four other TAs in her other classes that year. All of the TAs were male athletes. Respondent had the cell phone numbers of each of her TAs, and they had her cell phone number, so they could communicate with each other about classroom tasks. (Test. of Respondent.)

(10) S ■ turned 18 years of age on March 18, 2011. (Test. of P ■.) Respondent knew during the spring of 2011 that he had turned 18. (Test. of Respondent.)

(11) In the early spring of 2011, Respondent drove S ■ to a Starbucks near CHS either during or right after school to get him a hot chocolate. Respondent took him to Starbucks to console him after he had received an admissions rejection letter from his first-choice college. (Test. of Respondent.)

(12) Shortly after the trip to Starbucks, Respondent drove S ■ during or right after school to a nearby convenience store to let him buy a soft drink. (Test. of P ■)

(13) S ■ did not have a class during seventh period in the spring of 2011. Baseball practice started shortly after 3:15 p.m. One day, sometime after spring break in late March, Respondent walked with S ■ to baseball practice. She whispered in his ear that she thought about him when she had sex with her husband. S ■ was taken aback by her comment, but continued walking with her to practice. Later, Respondent texted him that she hoped her comment did not scare him. He texted back that he was not scared. (Test. of P ■)

(14) After the whispered comment incident, Respondent and S ■ texted each other frequently, often about sexual topics. S ■ sensed that Respondent wanted their relationship to be more than a teacher/student one. (Test. of P ■; Ex. R14.)

(15) Within a week or two after the incident when Respondent whispered in S█'s ear, she drove him in her car during seventh period to a parking lot several blocks from CHS. (Test. of P█.) Respondent's car was a 1999 four-door, tan or beige, Toyota Camry. The car has bucket front seats, with a console between the seats. The gear shift is on the console. The emergency brake is located between the front seats, and is the type that is pulled up to set and lowered to release. (Test. of Respondent; *See also* Ex. R7.)

(16) After Respondent parked the car, she and S█ kissed, and then she performed oral sex on him. He was in the passenger front seat. Respondent was in the driver's seat. Unbeknownst to Respondent, S█ video recorded the encounter on his cell phone. He recorded the incident, in part, because he did not think his friends would believe him when he told them what had happened. He held the phone to record his face, then positioned the phone to record the top of Respondent's head and the profile of the side of her head as she performed oral sex on him. After the encounter, Respondent drove them back to school. S█ then either went to baseball practice or to a game. (Test. of P█)

(17) S█ showed the video to one or two of his close friends and to Coach Dyer shortly after the encounter. A few days after Dyer saw the video, he had dinner with Coach Duran. Dyer told Duran that he had seen a video of Respondent performing oral sex on S█. Dyer instructed Duran not to tell anyone else. (Test. of Duran; Ex. A2 at 1.)

(18) Shortly after learning about the incident from Dyer, Duran was on hall-monitor duty during third period. He saw S█ walking late to Respondent's class on a baseball game day. He confronted S█ about being late for class on a game day. S█ told him it was okay because Respondent did not care if he was late for class. When Duran quizzed him about his special status, S█ responded, "Miss Leavitt sucked my dick." Duran cautioned S█ about saying such things. S█ then showed Duran the video on his cell phone of Respondent performing oral sex on him in her car. Duran saw S█'s face on the video. He observed a female, face down on S█'s lap, performing oral sex on him. Although he could not see the front of the female's face, he could see the side profile of her face and her ear, her hair color, hair length, and hair style. Duran identified Respondent as the female in the video. Duran and Respondent both taught in the social studies department at CHS, and he was familiar with her physical appearance. He also noted that the interior of the car appeared similar to Respondent's car. Duran lived in southwest Portland, close to where Respondent lived. She had given him a ride to or from work on a couple of occasions in the past. Duran decided not to report what S█ had told or shown him to anyone in CHS's administration, in part, because he liked Respondent and knew that she was married and had a young child. (Test. of Duran; Exs. A1, A2.)



(19) S█ showed the video to several male and female classmates over the following weeks. (Test. of P█, B█, C█ and M█; Ex. R14.)

(20) Between the oral sex incident in the car and the end of the school year in mid-June 2011, Respondent and S█ texted each other and talked numerous times about sexual topics. S█'s parents were out of town for a few days in late May or early June on a trip to Las Vegas, Nevada. While the parents were gone, Respondent went to S█'s house on one occasion where they engaged in sexual intercourse in the basement. (Test. of P█; Ex. R14.) Respondent remained at the house between one and two hours. (Ex. R14 at approx. 21:18.) Coach Duran also was in Las Vegas at the same time as S█'s parents, and happened to have run into them in the airport. (Test. of Duran; Ex. R13 at 4.)

(21) June 14, 2011 was the final day of school for students for the school year. By early June, rumors were circulating around school about the relationship between Respondent and S█. Comments had been posted on Facebook and individuals were texting one another. A former student of Respondent's texted her on June 10, 2011 that he had heard rumors about Respondent and a student. (Test. of Respondent.)

(22) CHS administrators informed Respondent on June 10, 2011, not to talk about her alleged relationship with S█ with anyone, and scheduled a meeting with her for June 14, 2011. (Test. of Respondent.)

(23) R█ C█ graduated from CHS in 2010. He was a pitcher on CHS's baseball team and teammate of S█s. He had taken Spanish classes from Respondent during his years at CHS. He returned to CHS during the spring of 2011 on one occasion to throw batting practice to the team before a playoff game. While he and S█ were in the locker room, S█ showed him the video. R█ saw S█'s face on the video. He also saw S█'s penis and a female performing oral sex on him. Although he could not see the front of the female's face, he could see the side profile of her head and recognized the hair and side facial features as appearing to be Respondent's. S█ told him it was Respondent. (Test. of C█)

(24) R█ had noted in the past that Respondent's relationship with her students appeared different from the typical teacher-student relationship. He observed that she often acted more like a peer than a teacher. On one occasion, Respondent attended a baseball game in which he played, and held up a sign that read, "We love R█." R█'s mother later told him that she found the sign "inappropriate." (Test. of C█)

(25) M■■■■ M■■■■ graduated from CHS in 2011. She took classes from Respondent in her freshman and senior years. She had been good friends with S■■■■ during part of their high school years. (Test. of M■■■■.)

(26) J■■■■ B■■■■ graduated from CHS in 2010. She is a senior at Northwestern University, in Evanston, Illinois. Although she had not taken a class from Respondent, she knew her from a Spanish immersion course. J■■■■ did not know S■■■■ in high school. M■■■■ and J■■■■ were good friends. (Test. of B■■■■.)

(27) When J■■■■ was home on break after the 2010-2011 school year, she heard about the rumor of Respondent and S■■■■ having a sexual relationship and about a video. She asked M■■■■ about the rumor and the video. (Test. of B■■■■.) M■■■■ had not heard about the rumor or the video. M■■■■ texted S■■■■ to ask him about the truth of the allegations. He texted back that the allegations were true. M■■■■ and J■■■■ then drove to S■■■■'s house. S■■■■ came outside and showed them the video. M■■■■ saw S■■■■'s face on the video, and saw the head and side facial profile of a female performing oral sex on him. She was "85 percent sure" the female was Respondent, based on her familiarity with Respondent's physical appearance. (Test. of M■■■■.)

(28) Although J■■■■ had not known S■■■■ in high school, she recognized his face in the video that day. She saw a female giving him a "blowjob" while he was seated in the front passenger seat of a car. (Test. of B■■■■.) Even though she could not see the front of the female's face, she could see the side facial profile and hair and was sure Respondent was the female in the video, based on her familiarity with Respondent's physical appearance. (*Id.*)

(29) CHS administrators investigated the rumors about the relationship between S■■■■ and Respondent during the summer of 2011. The administration hired Susan Nisbet, a private investigator and former investigator for the Commission, to investigate the allegations. Ms. Nisbet questioned a number of teachers, students and former students regarding the allegations. (Test. of Nisbet.)

(30) Ms. Nisbet talked to Coach Duran on August 1, 2011. He told her about the incident when S■■■■ was late for class during the early spring, and when S■■■■ told him about the incident of oral sex in the car and showed him the video. Among other things, he also told Ms. Nisbet that in late May 2011, while he was serving as hall monitor during third period, he again saw S■■■■ in the hall when he should have been in class. When he asked S■■■■ where he was going and why he was late, S■■■■ told him, "I fucked Miss Leavitt." (Ex. A2 at 1.) S■■■■ went on to explain that the sexual intercourse occurred when Respondent came to his house while his parents were out of town. Duran knew that S■■■■'s parents had been in Las Vegas about that time because he had seen them in the Las Vegas airport. (Ex. R13 at 4.)

(31) During the spring of 2011, PPS investigated Duran for alleged inappropriate physical contact and boundary violations with students and staff. Those allegations did not involve Respondent or S█. (Test. of Duran; Ex. R9.) PPS placed Duran on paid administrative leave on June 7, 2011. (Ex. R8.) Ms. Nisbet coincidentally also investigated the allegations against Duran during the summer of 2011. (Test. of Nisbet.) On August 22, 2011, CHS's principal, Paul Cook, issued a letter of reprimand and final warning to Duran for making inappropriate comments, many of them with sexual overtones, to students and to at least one staff person. (Ex. R10.) The Commission took no disciplinary action against Duran. (Test. of Duran.)

(32) Ms. Nisbet first talked to S█ about his alleged relationship with Respondent on August 8, 2011, with Coach Dyer present. Dyer had arranged the meeting. S█ assumed the meeting had something to do with baseball. He was caught off guard by Ms. Nisbet's questions about the relationship. He acted nervous, upset and defensive during the interview. He denied having any sexual contact or sexual relationship with Respondent. During a break in the interview, Dyer and S█ left the room and talked privately. Dyer told S█ that the administration already had evidence of the relationship, and encouraged S█ to tell Ms. Nisbet the truth. After the break, S█ returned to the room and continued to deny any inappropriate relationship. (Test. of Nisbet; Ex. R18.)

(33) The next day, August 9, 2011, S█ telephoned Ms. Nisbet. He apologized for not telling her the truth the previous day. He then explained how his relationship with Respondent had started, with them talking and texting each other about sexual matters, how the relationship progressed to the two of them having sexual contact, including the episode of oral sex in her car that he video recorded, and the sexual encounter in his house while his parents were in Las Vegas. S█ told Ms. Nisbet that they "didn't go all the way" in his house, because he felt "queasy" about Respondent being pregnant. (Ex. A3 at 1.) S█ explained that he ended the relationship just before the school year ended, in part, because he had gotten a girlfriend. He told Ms. Nisbet that Respondent was upset because he had gotten a girlfriend and wanted to end their relationship. (Test. of Nisbet; Ex. A3 at 1.)

(34) On August 11, 2011, Ms. Nisbet provided PPS with a summary of her investigation regarding Respondent. In her summary, she stated that her investigation established that Respondent had engaged in a pattern of sexual conduct with S█ that began in April of 2011 and ended in June of 2011. She concluded that the conduct consisted of "inappropriate verbal direct communication, telephone communication, text communication, including texting; and intentional physical conduct, including kissing, oral genital contact, manual genital contact and genital to genital contact." (Ex. A4.)

(35) On August 15, 2011, PPS notified Respondent by letter that she was placed on paid administrative leave. (Ex. A5.)

(36) On August 24, 2011, PPS provided a report to the Commission that stated the district had information that it believed Respondent had engaged in sexual misconduct. (Ex. R13 at 1.)

(37) Respondent and her attorney met with PPS and CHS officials on August 29, 2011. Respondent agreed to resign her position. She signed a resignation agreement on September 28, 2011, to be effective October 31, 2011. (Ex. A7.) Respondent decided not to contest the allegations, in part, because she had recently given birth to her child. She did not want to jeopardize her health or be distracted from caring for her baby by continuing to deal with the allegations. (Test. of Respondent.) Upon signing the resignation agreement, PPS ceased investigating the allegations against Respondent. As part of the settlement agreement, PPS agreed, if asked in the future whether Respondent's employment included any misconduct or sexual misconduct, to respond that "there was an investigation into allegations of sexual misconduct that [Respondent] denied, but no findings were made and [Respondent] resigned before the conclusion of the investigation." (Ex. A7 at 2.)

(38) On May 21, 2012, S ■ met with Commission investigators and gave them a recorded oral statement about his relationship with Respondent. (Ex. R14.) In addition to describing the incident when Respondent whispered in his ear that she thought about him when she had sex with her husband, the texting and conversation about sexual matters, the episode of oral sex in her car that he video recorded, and the incident of sexual intercourse in his home when his parents were out of town, S ■ mentioned there was a second occurrence when Respondent performed oral sex on him in her car. (*Id.* at approx. 15:58.) He also told the investigators that the incident of sexual intercourse in his home occurred on a weekend, and that he did not use "protection." (*Id.* at approx. 21:04, 29:11.)

(39) On May 29 and 31, 2012, Commission investigators interviewed Coach Dyer. He explained that S ■ had tried to show him a video, but that he turned away because he did not want to see it. He explained that he had a pretty good idea what was on the video because of rumors going around school about S ■ and Respondent. He also acknowledged that he should have reported what he knew to the school's administration, and that he would do so in the future if a similar incident occurred. (Ex. R13 at 4.)

(40) Respondent denied telling S ■ that she thought about him when she had sex with her husband. She denied texting him or talking to him about sexual topics. She denied

performing oral sex on him. She denied having sexual intercourse with him. (Test. of Respondent.)

(41) Respondent is approximately 5 feet 9 inches tall. Her normal weight is approximately 142 pounds. She weighed between 165 and 170 pounds in May 2011 due to her pregnancy. Her child was born September 20, 2011. (Test. of Respondent.)

(42) Respondent received positive performance evaluations during her tenure at CHS. (Ex. R2(b).) She received numerous notes and letters from students and parents commenting favorably about her dedication as a teacher and her enthusiasm in the classroom. (Ex. R3.) Respondent was acknowledged by PPS's superintendent in May 2008 as an outstanding teacher in the district. (Ex. R2(a).)

(43) S ■■■ had a reputation at CHS of being sexually active. (Test. of Nisbet, Duran.) Respondent believes that S ■■■ made up the story about their relationship to impress his friends. She opined that the female in the video performing oral sex on S ■■■ was his girlfriend, another female student, or even another female teacher at CHS. (Test. of Respondent; See Ex. R6.)

#### CONCLUSIONS OF LAW

(1)(a) Respondent committed gross neglect of duty that was a substantial deviation from professional standards of competency by failing to recognize the worth and dignity of a student and by failing to use professional judgment, when she inappropriately communicated with a male student about sexual topics.

(1)(b) Respondent committed gross neglect of duty that was a substantial deviation from professional standards of ethics by failing to maintain an appropriate professional student-teacher relationship by failing to honor appropriate adult boundaries with a student, when she communicated with a male student about sexual topics.

(1)(c) Respondent committed gross neglect of duty by engaging in sexual conduct with a student by having sexual relations with the student.

(2)(a) Respondent committed gross neglect of duty that was a substantial deviation from professional standards of competency and a failure to recognize the worth and dignity of a student by engaging in sexual relations with the student.

(2)(b) Respondent committed gross neglect of duty that was a substantial deviation from professional standards of ethics by failing to maintain an appropriate professional student-teacher

relationship by failing to honor appropriate adult boundaries with a student, when she engaged in sexual relations with the student.

(2)(c) Respondent committed gross neglect of duty by engaging in sexual conduct with a student by having sexual relations with the student.

(3) The Commission should revoke Respondent's teaching license or registration.

### OPINION

The Commission has alleged that Respondent committed gross neglect of duty and seeks to revoke her license or registration. The Commission has the burden of proof to establish its allegations. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982). The allegations must be proven by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

ORS 342.175(1)(b) gives the Commission the authority to discipline an educator if the educator has committed "gross neglect of duty."

"Gross neglect of duty" is defined in OAR 584-020-0040(4) as, "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:

\* \* \* \* \*

(f) Any sexual conduct with a student;

\* \* \* \* \*

(n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030; [or]

(o) Substantial deviation from professional standards of ethics set forth in OAR 584-020-0035[.]"

OAR 584-020-0010(1) states that the “competent educator” “recognizes the worth and dignity of all persons and respect for each individual.”

OAR 584-020-0010(5) states that the “competent educator” demonstrates a commitment to the “use of professional judgment.”

OAR 584-020-0035 sets forth the standards for the “ethical educator” as follows:

(1) The ethical educator, in fulfilling obligations to the student, will:

\* \* \* \* \*

(c) Maintain an appropriate professional student-teacher relationship by:

\* \* \* \* \*

(D) Honoring appropriate adult boundaries with students in conduct and conversations at all times.

“Sexual conduct” is defined as:

Any conduct with a student which includes but is not limited to:

(a) The intentional touching of the breast or sexual or other intimate parts of a student;

(b) Causing, encouraging, or permitting a student to touch the breast or sexual or other intimate parts of the educator;

(c) Sexual advances or requests for sexual favors directed towards a student;

(d) Verbal or physical conduct of a sexual nature when directed toward a student or when such conduct has the effect of unreasonably interfering with a student’s educational performance or creates an intimidating, hostile or offensive educational environment; or

(e) Verbal or physical conduct which has the effect of unreasonably interfering with a student’s educational performance or creates an intimidating, hostile or offensive educational environment.

OAR 584-020-0005(5).

*(1) and (2)The allegations.*

Specifically, the Commission has alleged that Respondent committed gross neglect of duty by inappropriately communicating with S█ about sexual topics, and by engaging in sexual conduct with him.

Respondent has denied that she committed gross neglect of duty in any of the ways the Commission has alleged.

S█ testified about the incident of Respondent performing oral sex on him in the front seat of her car. He video recorded the encounter without Respondent's knowledge. Two teacher/coaches, Dyer and Duran, saw the video and identified Respondent as the female performing the sexual act. Duran testified that Respondent was the female in the video. Duran also recognized the interior of the car as Respondent's. He had ridden in the car a couple of times in the past. Three former students testified that they saw the video of a female performing oral sex on S█. Each of them identified Respondent as the female. They all had had prior contact with Respondent at CHS and were familiar with her physical appearance.

To believe Respondent's denial about being the female in the video would require rejection of S█'s testimony and the testimony and statements of five witnesses. Respondent presented no persuasive evidence why the testimony and statements of those witnesses should be disbelieved.

Respondent contends that S█ made up the story about a sexual relationship with her to impress his friends. S█ had a reputation at CHS of being sexual active. In support of her claim, Respondent pointed out that S█ at first denied to Ms. Nisbet that he and Respondent had had a sexual relationship. Respondent also pointed to inconsistencies in different statements that S█ had made.

S█ did not know on August 8, 2011 why Coach Dyer had called into a meeting at the school. He thought it had something to do with baseball. He was understandably surprised when Ms. Nisbet confronted him with the allegations. His natural reaction was just to deny everything. He still liked Respondent and did not want to see her get into trouble. Ms. Nisbet testified that S█ acted nervous and upset about the questions. He telephoned Ms. Nisbet the following day and apologized for not being truthful in their first meeting. He then gave her a statement about their sexual relationship that was consistent as to its main features with his testimony at the



hearing, that was consistent with what he told his two coaches, that was consistent with what he told classmates, and that was consistent with what he later told the Commission's investigators.

Although S█ told Ms. Nisbet on August 9, 2011 that he and Respondent did not "go all the way" in their encounter in his parents' home, because he felt "queasy" about her being pregnant, he told Coach Duran that he and Respondent had sexual intercourse at his house (*i.e.*, "I fucked Miss Leavitt"). He told the Commission's investigators that they had sexual intercourse in the basement of the house, and that he did not use "protection." He testified at the hearing that they had sexual intercourse. Given the events leading up to the incident in the house, and given all the circumstances in this matter, it is unlikely that S█ and Respondent stopped short of having sexual intercourse in his parents' home. Even if they did not actually have sexual intercourse, Respondent's conduct would still have constituted sexual conduct. The touching of sexual or other intimate parts of the student or causing the student to touch the sexual or other intimate parts of the educator constitutes sexual conduct under OAR 584-020-0005(5).

Respondent challenged Coach Duran's testimony and the statements he gave because, while Respondent's investigation was under way, he was also under investigation by PPS and CHS for inappropriate conduct toward students and staff. Although Duran was under investigation, his investigation was unrelated to the allegations against Respondent. He was given a written warning by CHS for his conduct. The Commission took no disciplinary action against him. Respondent has not shown that Duran's statements or his testimony should be disbelieved because he was under investigation and subsequently disciplined by the school.

Respondent points out that in May of 2012 Coach Dyer denied to the Commission's investigators that he actually viewed the video of Respondent performing oral sex. He told the investigators that S█ tried to show him the video, but that he turned away. He admitted that he probably knew what was on the video. Dyer acknowledged to investigators that he probably should have reported what he knew at the time to CHS administrators. Dyer's statement to the investigators differed from what Duran testified Dyer told him shortly after the video surfaced. Duran testified that Dyer told him he had seen the video of Respondent performing oral sex on S█. Between seeing the video and talking to the Commission's investigators, Dyer may have concluded that any discipline he might face for not promptly reporting what he knew might be lessened if he claimed that he had not actually seen the video. In any event, given all the evidence in this matter, whether Dyer actually saw the video in the spring of 2011 does not change the outcome of the case.

Respondent challenged the testimony of former CHS students R█ C█ J█ B█ and M█ M█, who identified Respondent as the female in the video performing oral sex on S█. Respondent posited that the female the witnesses saw in the video was S█'s

girlfriend, a female student at CHS, or another female teacher at the school. All three former students were familiar with Respondent's physical appearance. Respondent presented no evidence why any of them had a reason to fabricate testimony against Respondent, or that they were mistaken in their identification. While there may have been some minor differences between their testimony and statements they made in the past about the incident, each of them testified they were sure that Respondent was the female in the video.

In sum, the Commission presented persuasive evidence that, more likely than not, Respondent was the female in the video performing oral sex on S█.

S█ testified about the texts and conversation between himself and Respondent about sexually inappropriate topics, and about the act of sexual intercourse in his home. While no other witnesses testified that they saw or heard the circumstances surrounding those allegations, S█'s testimony regarding the main features of those allegations was consistent with what he told Dyer and Duran, what he told other students, what he told private investigator Nisbet, and what he told the Commission's investigators. Respondent presented no persuasive evidence that S█'s testimony about those events should be disbelieved.

Respondent argued that given her physical size in May 2011 during her pregnancy, and the cramped quarters in her the front seat area of her car, it would have been impossible for her to have been the female in the video recording performing oral sex on S█.

At Respondent's request, the ALJ and the parties viewed the interior of Respondent's Toyota Camry. Putting aside for the moment S█'s testimony and the testimony of the other individuals who identified Respondent as the female in the video, and the coach who identified the interior of the car as hers, the front seats can be raised or lowered and pushed back to create more room inside the front passenger area in the car. The emergency brake can be released and lowered to be even with or below the front seats. Much of the console is even with or below the level of the seats. See Exhibit R7. There was ample room for Respondent and S█ to have accomplished the feat they performed in the front seat of her car. Respondent's argument that it would have been impossible for her to have performed oral sex on S█ in the front seat area of her car is not convincing.

The Commission has presented evidence that, more likely than not, Respondent committed gross neglect of duty by inappropriately communicating with a student and by engaging in sexual conduct with a student, in violation of ORS 342.175(1)(b) and OAR 584-020-0040(4)(f), (n), and (o), and OAR 584-020-0010(1) and (5), 584-020-0035(1)(c)(D), and 584-020-0005(5).

(3) *What discipline should be imposed?*

ORS 342.177(3) sets forth the disciplinary action the Commission may take against the person charged if the Commission decides that the charge described in ORS 342.175(1) has been proven:

- (a) Issue a public reprimand.
- (b) Place the person on probation for a period not to exceed four years and subject to such conditions as the commission considers necessary.
- (c) Suspend the license or registration of the teacher or administrator for a period not to exceed one year.
- (d) Revoke the license or registration of the teacher or administrator.
- (e) Revoke the privilege to apply for a license or registration.

The Commission seeks to revoke Respondent's teaching license or registration. In determining the appropriate discipline to impose under OAR 584-020-0040, the Commission may consider the factors set forth in OAR 584-020-0045.<sup>1</sup>

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<sup>1</sup> (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;

Upon examining the factors in OAR 584-020-0045, Respondent's violations were a continuing pattern and a series of incidents. Given the nature of the conduct, it is reasonable to infer that her conduct likely would have continued if S█ had not broken off their relationship. Respondent was upset when he ended the relationship at the end of the 2010-2011 school year. Respondent's conduct posed a serious danger to students. Word about the relationship had spread throughout the school and community. Her conduct and the attendant publicity likely had a negative effect on the public image of CHS and PPS. There is some risk that other students might try to use Respondent's behavior as a model for their own conduct. Finally, the discipline needs to be severe enough to deter similar misconduct by Respondent or other educators.

Any discipline less than revoking Respondent's license or registration would be inappropriate.

#### **ORDER**

I propose the Commission issue the following order:

Revoke Respondent Naomi D. Leavitt's teaching license or registration.

**Ken L. Betterton**

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Senior Administrative Law Judge  
Office of Administrative Hearings

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

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

## 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, N.E.  
Salem, Oregon 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 6, 2014, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1303184.

By: First Class and Certified Mail

Certified Mail Receipt #7012 2920 0000 1688 7346

Elizabeth McKanna  
McKanna Bishop Joffe  
1635 NW Johnson St  
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By: First Class Mail

Jeff Van Laanen  
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