

**BEFORE THE
COMMISSION ON TEACHER CREDENTIALING
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

MICHAEL NEELY COLEN, Respondent

Agency Case No. 2-35355040

OAH No. 2021070055

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on November 30 and December 1, 2021, from Sacramento, California.

Brent O. Jex, Deputy Attorney General, represented complainant Mary Vixie Sandy, Ed.D, Executive Director of the California Commission on Teacher Credentialing (Commission).

Kena C. Cador, Attorney at Law, Beeson, Tayer & Bodine represented Michael Neely Colen (respondent).

Evidence was received, the record closed, and the matter submitted for decision on December 1, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 12, 2016, the Commission issued to respondent a Preliminary Single Subject Teaching Credential (credential). The credential expired on February 1, 2021.¹

2. Respondent previously held the following credentials:

(a) 30-day Substitute Teaching Permit, issued January 4, 2016, and expired on February 1, 2017;

(b) Intern Single Subject Teaching Credential, issued on December 5, 2013, and expired on January 1, 2016;

(c) 30-day Substitute Teaching Permit, issued on October 1, 2013, and expired on October 1, 2014;

(d) 30-day Substitute Teaching Permit, issued on September 13, 2012, and expired on October 1, 2013;

(e) 30-day Substitute Teaching Permit, issued on August 25, 2011, and expired on September 1, 2012;

¹ The expiration of any credential does not deprive the Commission of instituting a disciplinary proceeding, issuing an order revoking the credential, or issuing a public reproof or private admonition against the credential holder. (Bus. & Prof. Code, § 44440, subd. (b).)

(f) 30-day Substitute Teaching Permit, issued on May 7, 2010, and expired on June 1, 2011;

(g) 30-day Substitute Teaching Permit, issued on February 1, 2009, and expired on February 1, 2010; and,

(h) 30-day Substitute Teaching Permit, issued on January 8, 2008, and expired on February 1, 2009.

3. On May 21, 2021, complainant signed and thereafter filed the instant Accusation against respondent, alleging causes to revoke all credentials, certificates, and authorizations issued to respondent based on: (1) unprofessional conduct; (2) evident unfitness for service; (3) immoral conduct; and (4) acts of moral turpitude.

In aggravation, complainant alleged that a greater degree of adverse action is needed to protect the public, schoolchildren, or the profession because respondent's misconduct: (1) evidences multiple acts of wrongdoing, demonstrating a pattern of misconduct; (2) was surrounded or followed by bad faith, dishonesty or other violation of the law governing educators; (3) significantly harmed a child trusted to his care, the public, or educational system; and (4) demonstrated an indifference toward the consequences of his misconduct, and had prior notice, warnings or reprimands for similar conduct.

Complainant's Evidence

4. Complainant offered several disciplinary documents issued to respondent by the District. The documents were admitted as direct evidence.

SEPTEMBER 18, 2015 FORMAL LETTER OF REPRIMAND

5. On August 24, 2015, student AB, who was a student in respondent's math class at Rio Cazadero High School (RCHS), reported to the Elk Grove Unified School District (District) that on August 21, 2015, she stayed after class to erase the board after respondent asked her to do so. After erasing the board, respondent drew AB's body close to his and gave her a "side hug." While hugging AB, respondent told her "good job" and tapped her buttocks with his hand. Uncomfortable, AB left the classroom. AB then requested that the District remove her permanently from respondent's class. AB also reported to the District that respondent touched the buttocks of female student RB.

6. The District interviewed respondent on September 3, 2015, regarding AB's allegations. Respondent admitted he was alone with AB in his classroom after class, he gave AB a "side hug," and placed his arm on AB's "lower waist." He told AB to have a "good day," then tapped her on the lower back in a "friendly and encouraging" way. Respondent denied touching RB's buttocks, advised the District that RB was his student from 2012 to 2014, that RB confided in him about personal matters, and that RB told him she was going to jail. Respondent told RB that she was a "beautiful Black queen" in an attempt to make her feel better. Respondent admitted that this was a "typical" statement he made to students.

7. The District's investigation could not confirm that respondent touched the buttocks of AB and RB, but determined that respondent used poor judgment while interacting with female students, especially when he was alone and one-on-one with them. The District also determined that the "tapping" of AB's lower back reasonably could have been perceived by AB as inappropriate touching.

8. On September 18, 2015, the District issued a formal letter of reprimand to respondent for his conduct with AB and RB. The letter set forth the following directives:

1. Do not engage in conduct that may result in inappropriate or unwanted physical contact with students, employees, or other individuals.
2. Refrain from commenting on female students' appearance[s].
3. Review and comply with the [policies and regulations] prohibiting sexual harassment.
4. Exercise good judgment and act professionally in your interactions with students, especially if alone with a female student one-on-one.
5. Consider the consequences of your behavior before you act.
6. Ask for guidance if you have any questions regarding what constitutes appropriate conduct with students or the District's expectations for professional conduct.
7. Do not retaliate against any individual for reporting or cooperating in the District's investigation regarding your conduct.

8. Obey all District and school policies, procedures, and protocols.

9. Perform your job duties as required by your job description and District policies, procedures, and protocols.

10. Follow any and all directives issued to you by any District administrator.

FEBRUARY 4, 2016 FORMAL LETTER OF STUDENT CONCERN

9. On February 2, 2016, student LW1 reported to RCHS's principal, Doug Wendle, that on one or more occasions, respondent placed his hand on her body and touched her side and lower back when he talked to her in class. Respondent did this when she entered the classroom. LW1 emphasized that he placed his hand on her "lower side" rather than on her shoulder, like other teachers might do. Respondent's conduct made LW1 feel uncomfortable. Respondent also stared at LW1 "up and down" when she spoke with respondent.

10. On February 4, 2016, Mr. Wendle issued a formal letter of student concern to respondent for his behavior towards LW1. When interviewed, respondent could not recall any interactions with LW1. Respondent was directed to follow the same directives in the September 18, 2015 formal letter of reprimand.

JUNE 30, 2019 RESIGNATION IN LIEU OF TERMINATION

11. On March 19, 2019, respondent entered into a Settlement Agreement with the District, agreeing to resign from his employment with the District in lieu of termination effective June 30, 2019. The underlying circumstances of respondent's

proposed termination by the District were determined during the District's investigation in November 2018.

Respondent's Conduct with Student LW2

12. On September 26, 2018, student LW2 reported to the District that on September 14, 2018, she wore a gold and yellow outfit to respondent's class, and that respondent stared at her body in a prolonged manner, walked over to her, and asked "Are you cold?" LW2 had a "weird feeling" after respondent stared at her and made the comment. About the same time, respondent approached LW2 and held the palm of his hand up in the air, signaling that he wanted to high-five LW2. LW2 raised her hand to reciprocate, and respondent wrapped both hands around LW2's hand, holding it for a prolonged period of time, making LW2 uncomfortable. LW2 also reported that on more than one occasion, respondent flirted with her. He placed his mouth close to her ear and whispered softly that she was "awesome." On more than one occasion respondent whispered in LW2's ear to ask her what she was doing for the weekend. LW2 felt uncomfortable and weird around respondent.

13. RCHS Principal Doug Wendle interviewed respondent on September 27, 2018. Respondent admitted giving LW2 a high-five, stating, "obviously someone was uncomfortable." He apologized for making anyone uncomfortable in his class. The District placed him on paid administrative leave on October 4, 2018. Upon being notified, respondent stated, "this is ridiculous."

14. The District's Director of Human Resources, Keri Van de Star, interviewed respondent on November 8, 2018, regarding the students' allegations. Respondent stated: (1) he "may" have whispered in a female student's ear, and that he previously gave a female student a side hug and placed his hand "too low" on her back; (2) LW2

wore a “yellow outfit” to class, and he asked her if she was cold, stating, “she drew me towards her”; (3) LW2 called him by his first name “Mike”; (4) he was on “autopilot” with female students, and he cannot help if they think he is flirting with them; (5) LW2 raised her hand a lot, and he gave her extra help; (6) when asked if he acted “weird” around LW2, respondent stated that he was “not sure,” and he would “think about it”; (7) he was a rap artist, and his students follow his music and look him up online.

Respondent’s Rap Music

15. During his November 8, 2018 interview with Ms. Van de Star, respondent asserted that his rap music “[did] not contain inappropriate lyrics,” and did not contain any content regarding “girls.” Ms. Van de Star and her team conducted a Google search of “Michael Colen rap,” which revealed that respondent performed under the name “First Degree the D.E.” His biography on Amazon.com stated that he has “independently released over 80 albums, and he has sold over 100,000 units.”

16. Ms. Van de Star and her team found rap music albums and tracks credited to respondent which were readily available online and through streaming services. They found lyrics that were explicit, and included topics such as sexual intercourse, description of genitalia, drugs, alcohol, prostitution, stripping, profanity, violence, weapons, and murder. Respondent’s albums included: Gang Wars; Sactown Bloods and Crips; Damn That DE!; Fahrenheit Collectibles, Brotha Lynch Hun and First D.E.; and Southbound. It was not clear when the tracks were produced and released, and whether the tracks were made during respondent’s time as a teacher.

17. Ms. Van de Star found that respondent was featured on an album released on July 13, 2018, titled “E-40 and First Degree The D.E. – Be My Stripper.” The album cover featured the buttocks of a woman wearing a black thong while \$100 bills

are floating in the air near the woman's buttocks. Rap lyrics from the track "Be My Stripper" include:

I said, you done fucked around and gotten all grown up.
Where you been sweetheart, I ain't seen you in years. How'd
you get that big ass? Look at your tits, look at your hips,
look at the way you dancin', why you keep grabbin' my dick
and my balls . . . with all of that flirting and teasing and
switching, licking and dipping like you want some of this
donkey up in your kitten, I'm trippin' you think I'm trippin',
I'm not. I know what you about, freaky horny and sneaky,
that ecstasy and weed get your kitty sweaty and drippy and
sticky make you wanna give me a hickey up on my prickly,
I'm trippin', you think I'm trippin', I'm not, you know what
I'm about, paper route'n and flossin' . . . there's plenty fish
in the river, the world is bigger than my block, and you ain't
had none 'til you had some Southern cock.

LETTER OF EXPLANATION REGARDING ALLEGATIONS BY STUDENTS AB AND LW2

18. Respondent wrote several letters in response to the District's allegations. In one undated, unsigned letter, respondent stated that he received his credential and master's degree in 2012 and chose RCHS because he felt it was his "responsibility to do the District's toughest jobs." He was dismayed at students being "allowed to cuss freely," students being "instructed to call teachers by their first name," and the dress code "never enforced." He described student AB as "not the best student" who "misbehaved routinely," "she waited after class to give me a hug," "the following week

I had to remove her out of class and she retaliated by complaining about the hug” even though she said that respondent was her favorite teacher. Regarding student LW2, respondent explained that she was a “teacher’s pet seeking my attention.” He further explained:

She called on me frequently for help and I felt compelled to respond. One day, I had to remove her from class for misbehavior. While venting to her friend, a teacher overheard and made the report of me giving her too much attention, even though the student later said it wasn’t a problem and that nothing should happen to me. She was only in my class for a month and a half or so. When she returned to my class, everything was fine.

Respondent characterized the incidents with students AB and LW2 as “relatively insignificant.”

LETTER OF EXPLANATION REGARDING RAP MUSIC

19. In a another undated, signed letter of explanation to the District’s Board, respondent explained that the involved students only knew him for a month, and that the students had “misguided perceptions.” Respondent further explained that he “made music with some extreme artists” in the mid-1990s, and that he is “much wiser” now that he is 44 years old. He further stated:

It was hurtful to see that the District quoted so many lyrics, from so long ago, that were not my own, in the charges. In fact, the majority of the lyrics in the charges against me are not mine at all. Students never knew or discussed the 90’s

controversial music that [the District] has dug up on its own. There were a few students that were aware of my music, but only the positive, comical, clean music of the last 15 years. I am committed to be a 100% teacher and remove the controversial material from Spotify, iTunes, and other streaming services.

With regard to the song "Be My Stripper," respondent explained that he "made a mistake by associating [him]self with this song." It was his life-long dream to collaborate with his idol, and respondent had "no control over the title or content." Respondent asserted that he would be taking down the song from streaming services and apologized to the District. He assured the District that his students did not know about the song, and that the District quoted lyrics that were not his.

LETTER OF EXPLANATION DATED MARCH 20, 2020

20. In his letter of explanation to the District dated March 20, 2020, respondent asserted that he has "taught for 12 years, at over 65 schools, 60 of them in the [District]." In addition, in his six "years as a credentialed teacher, [he] has won Teacher of the Year award three times, twice with Elk Grove, and once with National University." Respondent characterized RCHS as a "challenging environment" where students came from "impoverished and broken homes, had been removed from comprehensive high schools, and had many other issues . . . " He observed the "systemic treatment of minority students," and his role was challenging as an African American teacher. He "strived to be a role model and aimed to bring relief to the students that didn't like being disrespected by [RCHS] teachers."

Respondent described AB and RB as girls who “were constant distractions for the rest of the class.” Looking to improve AB’s behavior, he allowed AB to clean the whiteboard as a reward for a good day. “Afterwards we hugged, and I told her ‘good job today.’” He asserted that AB made the complaint against him “because she was angry at me for disciplining her” when he removed her from class for poor behavior one day. Respondent “quickly moved on from this event,” and a few weeks later, AB asked to return to respondent’s class.

Respondent believed RB “was simply supporting her friend AB “and was not truthful.” Respondent added, “as an example of her character, she was arrested for a home invasion a few days later.”

Respondent described student LW2 as “constantly request[ing] [his] attention to answer her questions.” He removed LW2 one day after being disrespectful in class. LW2 “vented” about respondent outside of class, and a teacher overheard her. When interviewed later by school officials, LW2 complained that respondent gave her too much attention. Respondent asserted that LW2 was “constantly seeking.” Respondent further stated:

The school didn’t enforce a dress code and the student was not wearing adequate clothing. The heater in my class was very old and I asked her if she was cold because I thought she might need something else to wear. It’s unfortunate that the student misunderstood my comment.

Respondent clarified that he called African American females “queens” and “gave them attention because I knew they were being called ‘bitches’ and ‘niggas’ by teachers a few classrooms over.” Respondent “tried to let [new students] know that

[he] was there to support them and create a safe environment." Respondent regretted that his "personal approach was misunderstood by these new students." He ensured that he would be "much more careful of student perceptions and the position I am put into."

Respondent also clarified that co-worker BV is a friend who texted him after he was placed on administrative leave. Respondent told BV that he "was being let go," and BV was "upset by that." She confronted the principal about respondent's pending dismissal, and the principal "misrepresented the situation to the District" that he "bothered a coworker after being put on administrative leave."

Regarding his involvement in rap music in his early years, respondent repeated most of the statements made in his second letter of explanation and added that he recognized as a public school teacher "it is not appropriate for me to be associated with these other artists and the type of music they produce." Furthermore, he asserted that RCHS students "never knew or discussed the controversial music that [the District] dug up from the 90's on the internet." He asserted that some students knew of his "positive, comical, clean music of the last 15 years." He added that during the majority of his time at RCHS, "students didn't know anything about my music," but a few students learned of his music in his last couple of years at RCHS. He asserted that during his 25 years of tutoring and teaching, his "music was never an issue." He has removed the "controversial music quoted by [the District] from public distribution on Spotify, iTunes, etc."

Respondent explained that his involvement with the song "Be My Stripper" was "a chance to appear on a song with my idol, E-40." The song was a "remix," or an old song that was remade. Respondent asserted again that he had no control over the title or content. He was confident that students did not know about his involvement in the

song. The District quoted lyrics that were not his, but rather E-40's lyrics. He believed that it was unfair for the District "to characterize [his] 12 years of teaching service with the District referencing another person's words." He also assured that the song has been removed from Spotify and iTunes.

Respondent denied that he promoted his music with his students, and "hated when the few students found out about my music." Respondent stated, "If I was self-serving, I would have been telling students about my music for years."

TESTIMONY OF DOUG WENDLE, RCHS PRINCIPAL

21. Mr. Wendle has been employed by the District for 26 years, and has been principal for the past 16 years. He hired respondent to teach math at RCHS "several years ago." Mr. Wendle testified consistent with his February 4, 2016 letter of student concern and interview of respondent on September 27, 2018, described above. He added that respondent denied touching a student on the buttocks, and that he discussed with respondent the District's directives contained in the District's September 18, 2015 letter of reprimand. Respondent agreed to comply with the directives. Mr. Wendle also asked respondent about the incident with LW2. Respondent denied: looking at LW2; making her feel uncomfortable about how she was dressed; asking her if she was feeling cold; or asking her what she was doing on the weekend.

22. Mr. Wendle described respondent as "a very good teacher." Respondent has a "way of explaining and helping students understand math." Mr. Wendle explained that many of his school's students have not been successful in math at other schools, that that respondent created new ways to help students become successful in math. Mr. Wendle added that respondent was twice selected by top graduating

students for the Honored Educator Award. Mr. Wendle also learned that National University recognized respondent as Teacher of the Year.

23. Mr. Wendle read in the paper that respondent was knowledgeable about the music scene in Sacramento. The news article did not state anything negative about respondent. Mr. Wendle did not go online to find respondent's music.

TESTIMONY OF KERI VAN DE STAR, DISTRICT HUMAN RESOURCES DIRECTOR

24. Ms. Van de Star is currently the Human Resources Director for the San Ramon Valley Unified School District. At the time of her investigation into respondent's conduct, she was the District's Human Resources Director. Ms. Van de Star testified consistent with her November 8, 2018 interview with respondent. Her team conducted an internet search of respondent's rap music, and found albums, and rap music tracks attributed to respondent. She recalled the lyrics to the song "Be My Stripper" and found them to be disturbing and very inappropriate for children. She asserted that students were aware of the lyrics because the song was easy to find online. As an educator for 12 years and administrator for the past 15 years, she understands the role of an educator, and how the educator can affect the lives of children. She explained that respondent worked at RCHS, which is a continuation high school. Students attending RCHS "have struggled in classrooms, are at-risk, and vulnerable." She asserted that teachers must conduct themselves "with the very best conduct," and that respondent's "Be My Stripper" lyrics do not reflect exemplary conduct expected of a teacher.

Respondent's Evidence

RESPONDENT'S TESTIMONY

25. Respondent is from Sacramento, California, and began working at Visions Unlimited, a mental health center, at age 19. He also tutored in the G Parkway area of south Sacramento. He began substitute teaching for the District, then taught math at RCHS for six years. After leaving RCHS, respondent began working for the Natomas Unified School District at Bannon Creek School where he taught seventh and eighth grade math. He also served as the girls basketball coach, and the boys football and soccer coach. He served as an advisor for school clubs to encourage students' interest in engineering and coding. He does not currently teach at Natomas Middle School due to this case.

26. Respondent has received awards for his teaching in 2013, 2016, and 2018. He characterized the awards as being "Teacher of the Year." In support of the awards, respondent submitted the following: (1) a Certificates of Recognition issued by the District in 2015 and 2018 for "Significantly Influencing Educational Success" of one female and one male student, respectively; and (2) a photo of respondent receiving a National University Teacher Excellence Award in 2016. Respondent explained that the District's awards were determined by a vote by the top students of the student body.

27. Respondent's testimony mirrored his letters of explanation to the District and the Commission. Respondent explained that student AB was removed from another school and was placed in his class for approximately two weeks. He denied touching AB on the buttocks. He became aware that she complained about his conduct towards her. He stated, "we talked about it, I apologized, and got through it . .

. she was begging to get back into my class." AB left his class after she made her complaint about respondent.

28. Respondent stated that he "only saw [RB] two or three times," and that she "was in my class for a couple of months." He described RB as "very disruptive," and she used terms such as "niggers and bitches." Respondent tried to create a positive environment by calling African American females "queens," and males "kings." Reference to students as queens and kings as positive reinforcement came from his experience as a teacher and community activist. He received no complaints.

29. Respondent admitted that he made a mistake by touching student LW1 "on her lower side" while escorting students outside his class. He knew that the District's policy was to direct students by touching them on the shoulders, not at their side. He denied staring at LW1 "up and down," explaining that it is "never appropriate to do this." He was aware that LW1 complained about his conduct. He apologized to LW1 and "we got through it."

30. Respondent explained that student LW2 was in his class for three weeks. She needed affirmation and craved his attention. One day, she came into class with headphones "acting a fool," and he had to remove her. He admitted staring at LW2's body, but not as she described. At the end of class, she came back into his classroom with a yellow bikini-type of top. LW2's outfit was "inappropriate for school," RCHS administration did not enforce the school's dress code, and respondent felt uncomfortable enforcing the dress code because of the "culture of the school and abundance of caution." Respondent did not want to be misunderstood if he told LW2 that her outfit was inappropriate.

On another occasion, LW2 called respondent to her desk. He walked over and gave LW2 a "high-five" where two people slap each other's open palms with arms raised. Respondent demonstrated the high-five he gave to LW2 by clasping his hands. He believed it was appropriate to give high-fives to students as an emphasis of pride and an "exclamation point" to their progress. Respondent also leaned in close to LW2 and whispered in her ear that she did a good job. He became aware that LW2 complained about him after he had kicked her out of his class for the seventh time. He asserted that he apologized to LW2 and "everything was great."

31. Addressing his rap music, respondent explained that "D.E." in his rap name is short for "degree." He emphasized that the lyrics from the "Be My Stripper" song were not his, a guest artist on his album from 1999 wrote the lyrics, he later bought the licensing for the song and put a verse in the song, and he eventually removed the song and album, as well as the "Planet Zero" album from official distribution. Respondent did not attempt to sell his music to students and did not tell students about his rap career. Respondent currently owns a record label called Fahrenheit Records.

32. Regarding the "Be My Stripper" album cover, respondent explained that he was not involved with the cover design. However, he conceded that he approved the release of the album cover.

33. Respondent admitted that the albums identified by the District are his albums: Gang Wars; Damn that D.E.; Planet Zero; Fahrenheit Collectibles, Brotha Lynch Hung and First D.E.; and Southbound. Not all songs contain his lyrics. For instance, the lyrics from the song "Blackula" on the album Planet Zero were written by Kevin Mann, and that any listener can determine who wrote or sang the song by viewing the credits and recognizing their voice.

34. Respondent asserted that his students at RCHS never brought up his rap music in class. Respondent never played his music in the classroom. He did not recall having to tell students to stop playing his music in the classroom, but near the end of his time at RCHS, teachers told him to stop playing his music, so "someone might have played his music in the classroom."

LETTERS OF RECOMMENDATION

35. Respondent submitted 12 letters of recommendation, dated from December 2018 through September 2021, reflecting his professionalism and competency as a teacher, dedication to students, and contributions to his community. A sampling of the letters is as follows:

(a) Brittany Ross, a Lead Instructional Analyst at Bannon Creek School, worked with respondent in his seventh and eighth grade classes for four years. She observed respondent provide an interactive, positive, and nurturing learning environment, and did not know of respondent's rap career. She attributed respondent's involvement in rap to doing "questionable things" when he was a young man.

(b) Coletha E. Browning, MBA, is a special education teacher that worked with respondent at Bannon Creek School beginning in Fall 2019. She has observed respondent perform after school activities such coding club facilitator, and basketball, football, and soccer coach. Respondent has inspired students through math and sports participation. He also inspired and coached Ms. Browning to play basketball in a scrimmage with the students, giving her a first-hand experience of what it was like to be one of his students. The school needs him as a role model to struggling and underprivileged students.

(c) Ashley Garcia is a coworker and good friend of respondent. She described respondent as a "wonderful teacher," who can "easily drop some of his rap into his teaching, relate to kids even more, and be their favorite." However, respondent chose not to "mix his two worlds or have the students have any knowledge of his past music," making "great strides to ensure that they do not know about or hear his music." Ms. Garcia was surprised to learn that respondent had been "hiding this huge part of his life from all of us." Ms. Garcia did not observe rap music or its influence enter respondent's classroom. He strictly teaches math and ensures students are on track. Her students do not have any idea of respondent's rap music background. Most students describe respondent as a "bald and cool teacher who makes math fun."

(d) Kyle Noland is a seventh and eighth grade English Language Arts teacher at Bannon Creek, who has observed respondent to be "an incredibly effective math teacher who has great rapport with his students." Mr. Noland stated that respondent's "former music life has never been a factor in the classroom and students benefit tremendously from his teaching." He has observed respondent's positivity when he greets students at the door, stating they are "going to have a great day today." He has also observed respondent's commitment to his students by working diligently and helping "them to grow into responsible and thriving members of society."

TESTIMONY OF JONATHAN LEE

36. Jonathan Lee is a Special Education Program Specialist for the District. He testified consistently with the contents of his letter of recommendation. In 2013, he worked at RCHS as an education specialist for five years. He has known respondent since Fall 2013 as respondent's coworker at RCHS. Mr. Lee is aware of the District's allegations. Mr. Lee observed respondent have positive interactions with his students outside of class in the quad. He did not see or hear anything inappropriate between

respondent and his students. Mr. Lee is aware of respondent's rap career, which he found "pretty cool." Mr. Lee did not see respondent sharing explicit rap lyrics of music with his students. When shown the lyrics attributed to respondent, Mr. Lee agreed that the lyrics were inappropriate.

TESTIMONY OF STEPHANIE ANN SCHULZKUMP

37. Stephanie Schulzkump is the International Baccalaureate Coordinator for Bannon Creek School. She testified consistently with the contents of her letter of recommendation. She met respondent in the 2018-2019 school year. Ms. Schulzkump has observed respondent teaching "about a dozen times." She observed respondent's relationship with students as he greeted them at the door, welcomed them to his classroom, and interacted with them during math lessons. She saw him constantly encouraging his students. His students miss him and are always asking when he will come back to school. Ms. Schulzkump is not fully aware of the District's allegations. She was never aware of respondent's alleged inappropriate conduct with female students, and never saw respondent exhibit inappropriate behavior in this regard. She was not aware until recently that respondent had a rap career. She "would be naïve in thinking that students have not heard respondent's music," because "in today's society, students have access to lots of things" online. She would not want explicit rap music being played in the classroom.

TESTIMONY OF LEONARD BAETA

38. Leonard Baeta has been a sixth grade teacher at Bannon Creek School for the past five years, and has worked in education for 26 years. He has known respondent for approximately four years, since respondent began working on campus. He observed respondent teaching in the classroom. He believes respondent is a good

teacher, in that respondent has the ability to instruct in accordance with California standards, uses good communication, inspires students to do better, and exhibits courage by “step[ping] out and taking a risk.”

39. Mr. Baeta has worked with respondent as a coach, and has seen respondent interact with students outside of the classroom. As in the classroom, respondent communicates with and inspires students on the basketball court. He has a positive demeanor and rapport with students. Mr. Baeta is aware of the District’s allegations, and never saw or heard respondent being inappropriate with female students. On the contrary, he encourages students.

40. Mr. Baeta is aware that respondent has a side career as a rap musician, but has “never heard his art.” Respondent did not share his rap music with Mr. Baeta.

TESTIMONY OF COLETHA BROWNING

41. Ms. Browning testified consistently with the contents of her letter of recommendation. She added that she observed respondent teach before he left Bannan Creek School, and the students were quiet, engaged, and attentive. She described respondent’s class as “fun.” As Athletic Director, Ms. Browning described respondent as “the one teacher I could rely on to coach every sport.” Respondent coached and encouraged “kids that did not have a lot of athletic ability or courage or faith in themselves as an athlete.” The little girls’ basketball team, which was on a losing streak, began winning because respondent was their coach.

42. Ms. Browning worked with respondent, who took on the coding club facilitator role. The students “love Mr. Michael,” who “made us all laugh.” She described respondent as a teacher that knows how to relate to children.

43. Ms. Browning was not aware of the District's allegations of respondent's inappropriate conduct with female students. She did not observe inappropriate behavior by respondent toward female students, as his interactions were "very appropriate." She added that the little girls in the coding club "love him."

44. Ms. Browning knew that respondent maintained a career as a rapper, as he shared this with her towards the end of the 2021 school year. She was shocked because respondent did not strike her as the type of person that would be a rapper. She did not hear any explicit rap lyrics from him and did not see or hear him use rap in the classroom. She did not hear any derogatory statements towards students in the classroom.

Analysis

45. As a teacher, respondent is held to a high standard of conduct and is a role model for children. A teacher is regarded as a role model for students, as noted by several courts:

The calling (of a teacher) is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment . . . His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. (*Board of Education*

of San Francisco Unified School District v. Weiland (1960) 179 Cal.App.2d 808, 4 Cal.Rptr. 286, citing from *Goldsmith v. Board of Education*, 66 Cal.App. 157, 168, 225 P. 783.)

There are certain professions which impose upon persons attracted to them responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category.

As between a teacher and his student, "(a)n important part of the education . . . is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept." (*Johnson v. Taft School Dist.*, 19 Cal.App.2d 405, 408, 65 P.2d 912.) And as our Supreme Court said in *Board of Education v. Swan*, 41 Cal.2d 546, at 552, 261 P.2d 261, at 265, "A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the (students) coming under (his) care and protection."

(*Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 824-825; see also *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463-1464.)

46. Respondent repeatedly violated the high standard of conduct required of him as a teacher. He was repeatedly reprimanded, warned, and ultimately resigned pending discipline for his behavior towards female students.

47. The evidence, including respondent's own admissions, established that he: (1) was alone with AB in his classroom after class, gave AB a "side hug," placed his arm on her lower waist, and tapped her on the lower back; (2) told RB that she was a "beautiful Black queen"; (3) gave student LW2 a high-five and made her feel uncomfortable as he did so; (4) "may" have whispered in LW2's ear, gave her a "side hug," and placed his hand "too low" on her back; (5) recalled that LW2 wore a yellow outfit to class and asked LW2 if she was cold; (6) was on a first name basis with LW2; (7) was on "autopilot" with female students and could not help it if they thought he flirted with them; (8) was unsure if he acted "weird" around LW2; (9) is a rap artist and that some of his students follow his music and look him up online; (10) approved the album cover for the "Be My Stripper" album; (11) bought the licensing for the song "Be My Stripper"; and (12) is the owner/producer of the albums Gang Wars, Damn that D.E.!, Planet Zero, Fahrenheit Collectibles, Brotha Lynch Hung and First D.E., and Southbound. Although the District found that many different rap albums and songs were attributed to respondent, the evidence was not clear when they were produced and released. Respondent credibly testified that most of his albums and songs were made in the 1990s. It was not established that the majority of respondent's songs and albums were made during respondent's time as a teacher, and are thus given little weight. However, respondent was featured in June 2018 on the "Be My Stripper" album and song. His claims to have no control over the title, content, and album cover were unpersuasive. He was credited with the album and song, and approved the album cover. Respondent's attempt to minimize his involvement with the album and song "Be My Stripper" was given little weight.

48. Respondent's witnesses spoke highly of his passion, dedication, and talent for teaching math. Most if not all of the witnesses were familiar with the District's allegations, and their positive opinions of his teaching have not changed. Only one witness, Mr. Lee, provided observations of respondent's conduct at or about the time of the allegations made by the female students at RCHS. Mr. Lee's observations and opinion of respondent's conduct with female students were positive, and he found respondent's rap career "pretty cool," but conceded that the lyrics attributed to respondent were inappropriate, as did the rest of respondent's witnesses. None of the witnesses saw or heard respondent act inappropriately with female students. However, the interactions took place while respondent was alone with these female students. Moreover, none of the witnesses expressed knowledge of the District's 2015 formal letter of reprimand requiring respondent to follow its directives related to respondent's conduct towards female students. Respondent's witnesses did not and could not testify regarding his conduct with female students while respondent was alone with them, which is an essential issue in this matter. For this reason, their testimony is given little weight with respect to respondent's past or likely future conduct when alone with female students.

49. Many of the authors of respondent's character reference provided insight into respondent's conduct at Bannon Creek School (Bannon). He is dedicated to his students and he took on additional roles as a coach and coding club facilitator. Their unwavering support for respondent has not changed. None of the authors expressed any knowledge of the allegations involving respondent's inappropriate conduct with female students at RCHS, the circumstances, or the frequency of the incidents. For these reasons, the letters are given minimal weight.

50. Respondent testified in a forthright manner, but he has not taken any meaningful responsibility for his actions. When interacting with the females involved, he stated that he was on “autopilot” and could not help it if female students flirted with him. However, as the sole adult in the classroom, respondent knew to exercise extreme diligence and caution when interacting with female students, particularly after receiving the District’s formal letter of reprimand. Instead of following the directives contained therein, he repeatedly disregarded them. In addition, he placed fault on his female students, rather than acknowledging his own behavior. He characterized student AB as “not the best student” who “misbehaved routinely,” and “very disruptive,” AB and RB as “constant distractions for the rest of the class,” RB as “very disruptive,” using the terms “niggers and bitches,” LW2 as “teacher’s pet seeking my attention,” and “acting a fool.” Such blame shifting demonstrates a lack of rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940 [“[f]ully acknowledging the wrongfulness of [one’s] actions is an essential step towards rehabilitation.”].)

51. Respondent further attempted to shift blame to others when he claimed that the lyrics in the song “Be My Stripper” was written by another artist. However, the song was on his album, he has the licensing for the song “Be My Stripper,” and he approved the release of the album cover for the “Be My Stripper” album.

52. Respondent is to be commended for his teaching awards such as certificates of recognition issued by the District and National University’s Teacher Excellence Award. His skills as a math teacher were highly regarded at RCHS and Bannon. At Bannon, he took on additional roles as the basketball, football, and soccer coach, and coding club facilitator. Despite respondent’s exemplary conduct at Bannon, it is concerning that respondent repeatedly disregarded the District’s directives over

three years and repeated the same offenses involving female students. The fact that respondent attempted to shift or attribute blame to the female students demonstrates that he does not acknowledge and appreciate the seriousness of his conduct. Moreover, respondent's "Be My Stripper" album and song contains topics such as sexual intercourse, descriptions of genitalia, stripping, and profanity. The songs on the album were available online and through music streaming services for easy access to students.

MORRISON FACTORS

53. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235 (*Morrison*), the California Supreme Court held that "an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." The court concluded that a **teacher's conduct cannot abstractly be characterized as "immoral," "unprofessional," or "involving moral turpitude" unless the conduct indicated that a teacher is unfit to teach.** (*Id.* at p. 229.) (Bold added.) The court set forth the following guidelines, which have since been enumerated in California Code of Regulations, title 5, section 80302, subdivision (a):

The Committee, in conducting its investigation, shall determine the relationship between the alleged misconduct and the applicant's or holder's fitness, competence, or ability to effectively perform the duties authorized by the credential. Such relationship may be based on facts which include, but are not limited to, the following:

- (1) The likelihood that the conduct may have adversely affected students, fellow teachers, or the educational community, and the degree of such adversity anticipated;
- (2) The proximity or remoteness in time of the conduct;
- (3) The type of credential held or applied for by the person involved;
- (4) The extenuating or aggravating circumstances surrounding the conduct;
- (5) The praiseworthiness or blameworthiness of the motives resulting in the conduct;
- (6) The likelihood of the recurrence of the questioned conduct;
- (7) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the person involved, or other certified persons;
- (8) The publicity or notoriety given to the conduct.

In evaluating the *Morrison* factors, only the pertinent factors need to be analyzed. (*Broney v. California Com. on Teacher Credentialing* (2010) 108 Cal.App.4th 462, 476.) In addition, the reviewing body is not bound by "rigid procedure." Rather, it may apply the *Morrison* factors in the aggregate, and consider the totality of a teacher's offensive conduct. (*Woodland Joint Unified School Dist. v. Commission on*

Professional Competence (1992) 2 Cal.App.4th 1429, 1457 [Commission does not have to show that "every charge in the series would independently justify" adverse action].)

ADVERSE EFFECT ON OTHERS:

54. Respondent's inappropriate and unprofessional conduct had an adverse effect on the female students involved. Student AB was sufficiently affected by respondent's conduct that she asked to be permanently removed from his class. Student LW1 understandably felt uncomfortable when he looked her "up and down." Student LW2 felt uncomfortable and weird around respondent because of his conduct toward her, including asking her if she was cold and whispering in her ear that she is "awesome." They reported respondent's conduct towards them, and administrators at RCHS and the District spent substantial time and resources over the course of three years addressing respondent's misconduct.

55. Respondent's second career as a rap artist was established, as was his June 2018 involvement in the album and song "Be My Stripper." During his November 8, 2018 interview with the District, respondent admitted that some of his students follow his music and look him up online. As an exemplar, his words and actions "are likely to be followed by the (students) coming under (his) care and protection." (*Board of Educ. of the City of Los Angeles v. Swan* (1953), *supra*, 41 Cal.2d 546, 552.)

56. The fact that he uses a pseudonym for his online activities as a rap artist does not excuse his actions. For example, the court upheld a teacher's dismissal for posting a sexually explicit personal online advertisement despite the advertisement being placed anonymously on an age-restricted site with no mention of the teacher's profession or employer. (*San Diego Unified School District v. Commission on Professional Competence*, *supra*, 194 Cal.App.4th 1454 at p. 1458.) Courts have also

upheld the dismissal of credential holders for online activities that were not sexual in nature, but still found to constitute “immoral conduct” with a substantial adverse effect on students. For example, the court upheld a teacher’s dismissal for making social media comments about students who took part in a protest supporting immigration. (*Crawford v. Commission on Professional Competence of the Jurupa Unified School District* (2020), 53 Cal.App.5th 327.)

PROXIMITY OR REMOTENESS IN TIME:

57. Respondent resigned from his employment with the District in 2019, for misconduct which occurred in 2015, 2016, and 2018. The District reported his change in employment status thereafter. These incidents are not remote in time. Complainant did not delay filing the Accusation against respondent.

TYPE OF CREDENTIAL HELD:

58. On January 12, 2016, the Commission issued a Preliminary Single Subject Teaching Credential to respondent. The evidence established that respondent engaged in unprofessional conduct towards his female students almost immediately after being issued his credential. His misconduct would have affected his ability to teach at RCHS.

EXTENUATING OR AGGRAVATING CIRCUMSTANCES

59. California Code of Regulations, title 5, section 80300, subdivision (b), states:

An “aggravating factor” is an event or circumstance which demonstrates that a greater degree of adverse action for an act of professional misconduct is needed to adequately

protect the public, schoolchildren or the profession.

Aggravating factors may include, but are not limited to, the following:

[¶] ... [¶]

(2) that the misconduct evidences multiple acts of wrongdoing or demonstrate a pattern of misconduct;

[¶] ... [¶]

(4) that the misconduct significantly harmed a child entrusted to the care of a credential holder or applicant, significantly harmed the public or the educational system;

(5) that the holder or applicant demonstrated indifference toward the consequence of the misconduct, which includes failure to comply with known court orders.

[¶] ... [¶]

60. The evidence established that respondent engaged in multiple acts of wrongdoing towards multiple female students, who were negatively affected by his conduct and reported him. Despite receiving a formal letter of reprimand from the District regarding students AB and RB, he continued to engage in the same or similar behavior towards female students LW1 and LW2, leading to his resignation from employment pending discipline.

61. Respondent demonstrated indifference towards the consequences of his conduct. When informed of being placed on paid administrative leave, respondent

stated, "This is ridiculous." Rather than following the District's directives in its formal letter of reprimand, respondent stated that he could not help it if female students flirted with him. Given the seriousness of respondent's misconduct and his failure to accept any responsibility, there is a likelihood that respondent would repeat the same or similar misconduct. For these reasons, a high degree of discipline is necessary to protect the public, schoolchildren, and the profession.

62. In mitigation, respondent's witnesses and the authors of the letters of recommendation spoke and wrote of respondent as a competent and dedicated teacher. They had no issues or concerns with respondent's behavior towards female students or his rap career, other than agreeing that his lyrics were inappropriate. However, while the evidence reflects favorably upon respondent's skills as a teacher and coach, the evidence did not establish that respondent's misconduct was justified.

PRAISEWORTHINESS OR BLAMEWORTHINESS OF MOTIVES:

63. There is nothing praiseworthy about respondent's misconduct towards students AB, RB, LW1, and LW2. "The lack of praiseworthiness in [plaintiff's] conduct speaks for itself." (*Broney v. California Com. on Teacher Credentialing, supra*, 108 Cal.App.4th 462, 477.) In addition, although respondent asserted that his rap music was never mentioned or played in his classroom, there is no praiseworthiness in his motives.

LIKELIHOOD OF RECURRENCE:

64. Given the seriousness of respondent's misconduct and his failure to accept or recognize any responsibility, there is a substantial likelihood that respondent will again engage in the same or similar conduct. This likelihood is made more

concerning by the fact that respondent attributes his conduct with female students to a sort of “autopilot” with respect to his behavior.

EXTENT TO WHICH DISCIPLINARY ACTION MAY INFLICT ADVERSE IMPACT OR CHILLING EFFECT:

65. Discipline of respondent for the content and publication of his rap lyrics could have a chilling effect on his constitutional rights of free expression. However, the state’s interest in protecting children is sufficiently compelling to allow discipline in this instance and under these circumstances.

PUBLICITY OR NOTORIETY GIVEN TO THE CONDUCT:

66. Students followed respondent’s music and looked him up online. They have access to respondent’s albums containing sexually explicit and derogatory songs and lyrics. However, there was no evidence presented to establish that there was notoriety among students regarding respondent’s conduct with them.

Conclusion

67. When all the *Morrison* factors are weighed and balanced, the conduct in which respondent engaged shows that respondent is unfit to teach. His retention in the teaching profession would pose a significant danger of harm to students, the educational community, and the public. Specifically, the evidence established that respondent engaged in repeated acts of misconduct towards female students and publicly associated himself with lyrics in his rap album titled “Be My Stripper.” He demonstrated an unwillingness to follow the District’s directives. The Commission does not have adequate assurances that respondent will not commit the same misconduct again. As set forth in the Factual Findings and Legal Conclusions as a whole, the

evidence established that respondent demonstrated unprofessional conduct, evidence unfitness for service, immoral conduct, and committed acts of moral turpitude. Given the serious nature of respondent's misconduct and the potential for harm, application of the *Morrison* factors, and aggravating factors, the appropriate adverse action is revocation.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proof in this matter. The standard of proof is clear and convincing evidence. (See *Gardner v. Commission of Professional Competence* (1985) 164 Cal.App.3d 1035, 1039; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.) "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. It is a higher standard of proof than proof by a preponderance of the evidence. (See, BAJI No. 2.62.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

2. Pursuant to Education Code section 44421, the Commission shall:

[P]ublicly reprove, revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving the public school system, or for any cause that would have warranted the denial of an application for a

credential or the renewal thereof, or for evident unfitness for service.

Pursuant to Education Code section 44345, subdivision (e), the Commission may deny any application for a credential if the applicant has "committed any act involving moral turpitude."

3. An "adverse action" is the "denial of an application for a credential, a private admonition, or public reproof of a credential holder, or the suspension or revocation of a credential." (Ed. Code, § 44000.5.)

4. California Code of Regulations, title 5, section 80300, subdivision (b), provides that aggravating factors necessitate a greater degree of adverse action to adequately protect the public, schoolchildren, or the profession. Aggravating factors include: multiple acts of wrongdoing or pattern of misconduct; significant harm to a child entrusted to the teacher, or to the public or educational system; and indifference toward the consequences of the misconduct.

Causes for Adverse Action

UNPROFESSIONAL CONDUCT

5. Based on the Factual Findings as a whole, respondent's misconduct with his female students and his feature as a rapper on his "Be My Stripper" album and song in June 2018 constitutes unprofessional conduct. Cause exists for adverse action against respondent's credentials pursuant to Education Code section 44421.

6. "Evident unfitness for service" means a teacher is "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." (*Woodland Joint Unified School District v. Commission on*

Professional Competence (1992) 2 Cal.App.4th 1429, 1444.) "Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Ibid.*) The evidence established that respondent's conduct, as alleged and proven at hearing, and his failure to acknowledge his conduct, demonstrates that he is unsuitable for teaching due to a fixed character trait, not remediable merely on notice that his conduct failed to meet the District's expectations. Consequently, based on the Factual Findings as a whole, cause exists for adverse action against respondent's credentials for evident unfitness for service pursuant to Education Code section 44421.

IMMORAL CONDUCT

7. Pursuant to Education Code section 44932, subdivision (a)(1), a school district may discipline a permanent certificated employee for "immoral" conduct. In *San Diego Unified School District v. Commission on Professional Competence* (2011)194 Cal.App.4th 1454, 1466, the court explained that:

A teacher may . . . be dismissed for "[i]mmoral or unprofessional conduct." (§ 44932, subd. (a)(1).) "'The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes . . . an inconsiderate attitude toward good order and the public welfare.'" (Board of Education v. Weiland (1960) 179 Cal.App.2d 808, 811, 4 Cal.Rptr. 286.) Moreover, the definition of immoral or unprofessional conduct must be considered in conjunction with the unique

position of public school teachers, upon whom are imposed "responsibilities and limitations on freedom of action which do not exist in regard to other callings." (Board of Trustees v. Stubblefield, supra, 16 Cal.App.3d at p. 824, 94 Cal.Rptr.318.)

8. Based on the Factual Findings as a whole, respondent showed a moral indifference and an inconsiderate attitude toward good order and the public welfare. His conduct was inconsistent with the reasonable expectations society places upon teachers to model appropriate adult conduct to the students they teach, and to protect the safety of students and advance their educational welfare. Consequently, based on the Factual Findings as a whole, cause exists for adverse action against respondent's credentials for immoral conduct pursuant to Education Code section 44421.

ACTS OF MORAL TURPITUDE

9. "Moral turpitude" has been defined as "everything done contrary to justice, honesty, modesty or good morals." (*Rice v. Alcoholic Beverage Appeals Board* (1979) 89 Cal.App.3d 30, 36.) Based on the Factual Findings as a whole, respondent's conduct was contrary to justice, honesty, modesty or good morals. Cause exists for adverse action against respondent's credentials pursuant to Education Code sections 44421 and 44345, subdivision (e).

Conclusion

10. Application of the *Morrison* factors to the facts in this matter, on balance, indicate that respondent is unfit to teach. Adverse action against respondent is warranted, and such action must be balanced in light of the mitigating and

extenuating circumstances involved. The purpose of a disciplinary action such as this one is not to punish the licensee, but rather to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Revocation of respondent's credentials is necessary to protect students of California schools.

ORDER

The Preliminary Single Subject Teaching Credential and any other credentials, certificates, and authorizations issued to respondent Michael Neely Colen are hereby REVOKED.

DATE: January 25, 2022

Danette C. Brown

DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings