

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

**In the Consolidated Matter of the Accusation and Statement  
of Issues Against:**

**THOMAS GUTIERREZ, Respondent.**

**Agency Case No. 2-21933751**

**OAH Nos. 2021100517, 2021100518**

**PROPOSED DECISION**

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings, State of California, heard these consolidated matters on May 3, 4, and 5, 2022, by videoconference.

Deputy Attorney General Stephanie J. Lee represented Complainant Mary Vixie Sandy, Ed.D., in her official capacity as the Executive Director of the Commission on Teacher Credentialing (Commission). Attorney James Kosnett represented Respondent Thomas Gutierrez, who was present throughout the hearing.

Documents and testimony were received in evidence. The record was closed, and the matter submitted for decision on May 5, 2022.

## **Motion for Protective Order**

Complainant moved for a protective order to protect the identities of students involved in the matter. A list of the students' names is attached to the motion. Complainant subsequently amended the motion to add an additional name to the list of confidential names. Respondent did not oppose the original motion or its amendment.

Complainant's amended motion for a protective order is granted. The individuals named in the list will be identified by their initials only in any transcript of the hearing. The confidential names lists attached to Complainant's motion for a protective order and amended motion for a protective order are sealed.

## **Motion in Limine Rulings**

Complainant moved to exclude three of Respondent's exhibits, marked BBB, CCC, and IIII for identification, and any reference to the information therein during the hearing.

Exhibit BBB is a summary of an incident central to Complainant's allegations prepared by Rene Barrera, then a school police officer who was present during the incident. The summary includes a statement that two of the students were "girlfriends." The students in the summary are referenced by first name. In the motion, Complainant objects to the summary and to any testimony by Mr. Barrera (he is erroneously identified as Ms. Barrera in the motion) on grounds Exhibit BBB is hearsay, constitutes "improper" administrative hearsay, lacks foundation, Mr. Barrera lacks personal knowledge of the matters therein, its use may infringe privacy rights under federal and state law, it constitutes improper character evidence, and its probative value is outweighed by its prejudicial effect.

Complainant makes similar objections to Exhibits CCC, a summary from another school police officer, Sergeant Thomas Langston, who also testified at the hearing. Sergeant Langston's summary and part of his testimony referenced a statement he heard by one of the alleged student victims to the effect that she intends to retaliate against Respondent for cooperating with police to apprehend another student, her boyfriend at the time. Exhibit IIII is a subpoena ordering Respondent to appear at the boyfriend's criminal trial.

Under the relaxed evidentiary rules governing administrative hearings, hearsay may be admissible to the extent it explains or supplements direct evidence. (See Gov. Code, § 11513, subd. (d).) Here, Mr. Barrera testified at the hearing, laying an evidentiary foundation, including detailed information reflecting his knowledge of circumstances as an eyewitness. His testimony is direct evidence and his summary, prepared closer to the time of the incident, supplements the testimony. Both Mr. Barrera's summary and testimony make passing reference to a potentially romantic relationship between the students, also noted by one of the students herself during her testimony, as context for some of the developments Mr. Barrera witnessed. The students' privacy is protected by using first names or initials throughout the proceeding and that protection is extended by a protective order. The concern about the prejudicial effect of this information is not warranted.

The same analysis applies to Sergeant Langston's summary and testimony, including his recounting of a student's statement. Again, to protect privacy, the students referenced are identified only by first names or initials. Their specific identities are not at issue but, because this case involves charges based on the reports of one of them, evidence relevant to that student's potential motive to be untruthful or act in a retaliatory manner is relevant and more probative than prejudicial.

Exhibit IIII is a subpoena for Respondent to appear at a criminal case for one of the students, the boyfriend. As described above, this too is relevant to Respondent's defense regarding students' motive to be untruthful or retaliatory and excluding such evidence would imperil Respondent's right to a fair hearing.

Under these circumstances, Complainant's objections to Exhibits BBB, CCC, and IIII and the related objection to exclude testimony or argument involving the subject matters addressed in the exhibits are overruled. The exhibits are admitted and testimony and argument related to them is also admitted.

## **SUMMARY**

Complainant seeks to discipline Respondent's expired Clear Administrative Services Credential, Clear Multiple Subject Teaching Credential and Administrative Services Credential Certificate of Eligibility as well as to deny his application for a new Clear Administrative Services Credential and Clear Multiple Subject Teaching Credential. Complainant's position is based on allegations he sexually harassed students while serving as the assistant principal for operations at Jordan High School in the Los Angeles Unified School District (LAUSD). Complainant contended Respondent's actions constitute unprofessional conduct, immoral conduct, evident unfitness for service, and moral turpitude.

Complainant's case rested primarily on the testimony of two students, RM and LS. RM stated Respondent caused her distress and discomfort by, among other actions, placing his hand on her knee and then on an exposed part of her thigh, and grazing the top of her breast while placing his arm around her shoulder. LS stated Respondent frequently bumped fists and side-hugged her and asked about the placement of a sticker on her chest in an embarrassing and intrusive way. Other

students' reports, relayed through teachers to a school administrator and eventually to LAUSD and Commission investigators, involved descriptions of Respondent engaging in sexualized behavior, including leering at them, making comments referencing sexual matters, and generally making them uncomfortable.

Respondent denied all allegations of sexual or otherwise inappropriate behavior. He also presented evidence corroborating his testimony disputing the incidents of, or even opportunity for, the misconduct alleged and of his longstanding reputation as a skilled and ethical educator.

RM and LS testified credibly, particularly about their subjective perceptions and feelings after interactions with Respondent. RM, however, admitted the incidents as she remembers them occurred during periods when she was upset for unrelated reasons such that her perceptions could have been affected by these circumstances. Moreover, Respondent too was credible in his version of events, which he persuasively corroborated with other witnesses' testimony and evidence. Complainant attempted to corroborate the most serious allegations with administrative hearsay evidence, which was less persuasive.

Complainant has the burden of proof to prove the Accusation's allegations against Respondent's credentials and must do so by clear and convincing evidence. Respondent bears the burden of proof to establish his fitness for the new credentials he seeks and must do so by a preponderance of the evidence. Complainant failed to meet her burden. The direct evidence presented by Complainant through RM and LS's testimony is credible but rebutted by at least equally credible countervailing evidence. As such, it does not meet the clear and convincing standard. Therefore, no grounds for disciplining Respondent's existing credentials have been established and the charges must be dismissed.

In the absence of a finding of sexual misconduct and with affirmative evidence of competence as an educator, Respondent met his burden to establish his qualifications and suitability to be issued a new Clear Administrative Services Credential and Clear Multiple Subject Teaching Credential.

## **FACTUAL FINDINGS**

### **Background and Jurisdictional Matters**

1. During the 2017-2018 and 2018-2019 school years, Respondent was an assistant principal at LAUSD's Jordan High School (Jordan). In March 2019, reports that Respondent engaged in sexual misconduct reached Jordan's principal, Lucia Cerda. Principal Cerda immediately removed Respondent from his assistant principal position and reassigned him to LAUSD's school operations office pending investigation. She also reported the matter to LAUSD headquarters and the Los Angeles Police Department (LAPD).

2. On June 20, 2019, LAUSD reclassified Respondent to Elementary Teacher for the 2019-2020 school year, a demotion. On September 6, 2019, Respondent resigned from LAUSD while its investigation was pending. He commenced a new position as Assistant Principal of Ramona Middle School in the Bonita Unified School District. While at Ramona Middle School, Respondent discovered he could not renew his administrative and teaching credentials because LAUSD had referred the matter to the Commission. The Commission is responsible for issuing and disciplining teacher and administrator credentials for California public school educators and undertook its own investigation.

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3. On July 21, 2020, pursuant to its authority under Education Code sections 44242.5 and 44244 (further statutory cites are to the Education Code unless otherwise designated), the Commission's Committee of Credentials (Committee) found probable cause to commence a disciplinary action against Respondent. Respondent timely requested an administrative hearing to challenge the charges, triggering a requirement pursuant to section 44242.5 to file an Accusation initiating this adjudicatory hearing.

4. On November 25, 2019, Respondent signed and submitted applications to the Commission for a Clear Administrative Services Credential and a Clear Multiple Subject Teaching Credential. Based on the Committee's probable cause finding regarding Respondent's existing credentials, the Commission denied Respondent's applications. Respondent requested an administrative hearing to challenge the denials, also triggering a requirement pursuant to section 44242.5 to file a Statement of Issues, also signed and issued by Complainant.

### **Respondent's Credentials**

5. On April 22, 2015, the Commission issued a Clear Administrative Services Credential to Respondent, which expired on November 1, 2019, and has not been renewed. On October 27, 2004, the Commission issued a Clear Multiple Subject Teaching Credential, which expired on November 1, 2019, and has not been renewed. On January 2, 2008, the Commission issued an Administrative Services Credential, Certificate of Eligibility, which does not expire. The credentials were in force and effect at the times relevant to the charges brought in the Accusation.

6. Respondent held a Preliminary Administrative Services Credential from July 1, 2012 through August 1, 2017, a Preliminary Multiple Subject Teaching

Credential from August 6, 2003 through September 1, 2008, an Emergency Long Term Multiple Subject Teaching Permit from February 1, 2000 through March 1, 2001, and an Emergency Substitute Teaching Permit for Prospective Teachers from January 8, 1999 through February 1, 2000.

## **Reports of Misconduct and the LAUSD Investigation**

7. The chain of events leading to the instant matter began when Jordan teacher Javier Rodriguez, reported to its principal, Lucia Cerda, that he overheard a student, JC, state that she did not like Respondent because he was a “weirdo” and Respondent had touched her knee and rubbed her leg. In the same conversation, other female students stated Respondent made them uncomfortable. Student LS stated Respondent hugged her frequently and “checked her out.”

8. After Principal Cerda referred the matter to LAUSD, its Student Safety Investigation Team (SSIT) began its review. SSIT investigators interviewed Mr. Rodriguez. Mr. Rodriguez told SSIT investigators he overheard students calling Respondent “creepy,” and stating he leered at them and called them pet names such as baby girl and mama.

9. SSIT investigators interviewed Principal Cerda as well, who reported student LS had also told her Respondent side-hugged her frequently. The hugs always occurred in open places and other students saw them. Another student, CC, during the summer session between the 2017-2018 and 2018-2019 academic years, reported to Principal Cerda Respondent took her out of class and told her she should look up the meaning of a tattoo design she was wearing and asked her if she was a prostitute.

10. In addition to Mr. Rodriguez and Principal Cerda, another staff member interviewed by SSIT investigators reported being told Respondent stood close to the



legs of a student, RM, and made her feel cornered and that, on another occasion, Respondent stood "Captain Morgan style" with one foot up on a bench where she sat.

11. SSIT investigators also spoke directly to some of the students named as potential victims by Jordan faculty. "The complaints by the female students involved [Respondent] touching students inappropriately and staring at the chest area of female students." (Exh. 6, p. A121.) LR (names of students in the SSIT report were redacted to first initial or first and last initial; LS is sometimes identified as L) reported repeated unwanted hugs from Respondent and RM and JC reported Respondent had put his hand on their inner thigh.

12. The SSIT investigation noted the Los Angeles Police Department had been notified by school personnel and conducted its own investigation and that the matter was referred to the Los Angeles City Attorney's Office. A subsequent letter from the Los Angeles City Attorney's Office stated the matter had been closed without further action though the file would be kept open for one year.

13. SSIT investigators stated in the report that they obtained documents reflecting past disciplinary actions against Respondent. According to the report, Respondent's past disciplinary history consisted of the following:

[Respondent] was issued a Conference Memorandum dated May 20, 2011 at Parmalee Avenue School, from Principal Laurent Hernandez, regarding a complaint from a paraprofessional alleging that he made inappropriate comments to her regarding her marriage. The Memorandum also noted that this was not the first incident

where a Teacher Assistant complained about unprofessional comments by {Respondent}.

[Respondent] was issued a Conference Memorandum dated March 28, 2012 at Parmalee Avenue School from Principal Laurent Hernandez, regarding a formal Title IX complaint by a Teacher alleging that [Respondent] used his position as a Coordinator to get information from a Teacher Assistant about her. [Respondent] was also accused of spreading rumors about the Teacher and another staff member having a "feud" on Facebook. The Memorandum also directed [Respondent to refrain] from intimidating or taking any action considered retaliatory towards any student or others filing a complaint.

An interoffice correspondence dated February 7, 2014 was issued by Assistant Principal Jose Gonzalez regarding insubordinate behavior by [Respondent] during [Respondent's] tenure as Interim Principal at John Muir Middle School. [Respondent] alleged that [Respondent] created a hostile and untrustworthy environment among Administration and Certificated Staff. Mr. Gonzalez cited {Respondent} with lack of confidentiality of staff meeting information, defiance, and retaliation towards teachers in disagreement with him. Fourteen other complaints from staff were submitted against [Respondent] citing unprofessional behavior.

A complaint was filed on February 11, 2019 by Andres Fresquez, Special Education Teacher at Jordan High School on behalf of LG, Adaptive Behavior Physical Education Teacher and JB, Math Teacher.

(Exh. 6, pp. 130-131.)

No disciplinary memoranda or any other documentation of prior disciplinary actions were introduced into the record.

## **Commission Investigation**

14. The Commission undertook its own investigation. A substantial portion of the Commission report addresses a sexual harassment complaint made by a part-time teacher. Her complaint is not addressed by the operative pleadings in the instant matter and is therefore not considered as a possible ground for discipline here.

15. In the Commission report, a student identified as LS or S reported wearing breast cancer awareness stickers on her chest as part of a school health event and that Respondent questioned her about why the stickers were placed there. According to the report, when LS asked why he was looking at her body, he responded "they are just there, how could I not look?" (Exh. 7, p. A138.) LS also told the Commission investigators about the incident with CC, stating CC told her Respondent had asked about a tattoo she had and whether she was a student.

16. As addendum to the Commission report, is a bulletin entitled "Code of Conduct with Students – Distribution and Dissemination Requirement." The bulletin provides in pertinent part:

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the most important responsibility of all District employees is the safety of our students. While the District encourages the cultivation of positive relationships with students, employees and all individuals who work with or have contact with students are reminded that they must be mindful of the fine line drawn between being sensitive to and supportive of students and a possible or perceived breach of responsible, ethical behavior. Employees and all individuals who work with or have contact with students are expected to use good judgment and are cautioned to avoid the situations indicated in the "Code of Conduct with Students."

(Exh. 7, p. A147-148.)

The rest of the bulletin is devoted to directions regarding distribution requirements of the Code of Conduct with Students and to reporting obligations to which faculty and staff are subject. The Code of Conduct with Students is not attached to the bulletin and was not otherwise introduced into the record.

### **Student RM's Testimony**

17. Student RM came to Jordan as a transfer student in her sophomore year, 2017-2018. Although she was active in school activities, particularly sports, RM was unhappy during her time at Jordan. She candidly admitted to often leaving classes without permission and otherwise disobeying school rules.

18. RM knew Respondent as an assistant principal and director of discipline during her time as a Jordan student. RM stated Respondent did several things which

made her feel uncomfortable and unsafe: he called her by pet names such as mija (Spanish for "my daughter"), baby girl, and mama and she heard Respondent call other students by these names; during her sophomore year, on an occasion when RM "ditched" class and sat at an outdoor lunch table, Respondent joined her, putting a foot on the bench "Captain Morgan style," while bending his knee toward her, causing his groin area to come within inches of her head; on another occasion, Respondent approached her as she was crying and began to rub her back then dropped his hand lower to the top of her pants' waist band; during a disciplinary meeting, when RM lunged at another student and then walked out. Respondent followed her out and grabbed her shoulder, then wrapped his arm around her shoulders, his hand grazing the top of one of her breasts. A final incident involved Respondent approaching RM as she once again skipped class, rubbing her knee and then moving his hand up her thigh where it was exposed through her distressed jeans.

19. RM reported Respondent's actions to LAPD officers. The report was not introduced at the hearing.

20. RM also testified that she reported Respondent's actions to Principal Cerda and a teacher, Ms. Yates. Neither Principal Cerda nor Ms. Yates were called to testify at the hearing.

21. RM stated Respondent's actions caused her great distress though she also noted she could not remember all details about what transpired between them because she was often already extremely upset for unrelated reasons during their encounters. Asked how long Respondent kept his hand on her thigh, she stated that she was crying and too upset to notice. At the disciplinary meeting, she was also extremely upset and ran out of the office before the meeting was over.

## **Student LS's Testimony**

22. Student LS is currently 20 years old and a freshman in college with plans to become a mathematics teacher. She had been a transfer student into Jordan, entering as a sophomore in the 2016-2017 school year.

23. During the hearing, LS recounted an incident with Respondent when, as part of the school's leadership team, she was involved with a breast cancer awareness event. As part of the event, stickers were distributed. LS wore hers on her chest. Respondent asked her whether she did so to draw attention to her breasts. LS asked why Respondent was looking at that part of her body and he replied by asking how could he help it.

24. LS reported the incident to Ms. Yates, the Leadership Team adviser and Principal Cerda. At the hearing, LS stated another student, CM had been with LS when the sticker incident occurred. CM did not testify at the hearing.

## **Commission Expert**

25. Vince Carbino was called as Complainant's expert witness. Dr. Carbino holds an Associates of Science degree in law enforcement, a Bachelor's degree in public administration, a Master of Science degree in educational administration and counseling, and a Doctor of Education degree. He worked in law enforcement before becoming an educator and has been a school administrator for over 21 years. Dr. Carbino has written articles and participated in professional presentation with a particular focus on school safety, including adult sexual misconduct (ASM) prevention. He is currently the principal of City of Angels School, an independent study and online program specialty school.

26. Dr. Carbino stated ASM encompasses a wide range of behaviors including "grooming," meaning a gradual pattern of increasingly intimate contact between an adult and child intended to test the child's proclivity to remain silent about the abuse. Additional forms of ASM are staring or leering and physical touch that "push the boundaries" and cause students discomfort. According to Dr. Carbino, ASM does not have to be overtly sexual. Special or excessive attention on a particular student can qualify.

27. According to Dr. Carbino, the United States Department of Education's publication, "A Training Guide for Administrators and Educators on Addressing Adult Sexual Misconduct in the School Setting (ASM Training Guide)," is the definitive text on the subject of ASM and is used in teacher and administrators' periodic trainings to teach them about this issue and their responsibilities as educators.

28. Dr. Carbino opined that Respondent's conduct, as alleged, clearly constituted ASM and grooming. Dr. Carbino believes Respondent was trying out relatively innocuous touching such as patting a knee or placing his hand on a student's back, then gradually moving to more sexualized touching to see if the students tolerated his increasing levels of intimacy. He also stated Respondent's hugging of students violated their boundaries and represented conduct generally to be avoided unless a student initiated it. Regarding comments Respondent allegedly made to CC about whether she was a prostitute and the location of the breast cancer awareness stickers on LS's body, Dr. Carbino stated these were attempts to normalize sexual banter and to test the students' defenses and level of tolerance.

29. Dr. Carbino stated his opinions were based on a presumption of the veracity of the allegations against Respondent. He also stated he is comfortable

believing them because, in his experience, students do not make up allegations of this type.

## **ASM Training Guide**

30. Pertinent provisions of the ASM Training Guide are as follows:

Schools and school districts must demonstrate a strong commitment to elimination of behavior known as [ASM] by school personnel. Efforts to address ASM are strengthened by policies and procedures that describe appropriate, allowable behaviors, identify inappropriate and illegal actions, and outline methods for addressing allegations of ASM in schools.

It is important to note that ASM manifests in many ways, and the range of behaviors that may be considered inappropriate (from inappropriate to illegal) underlines the importance of clear policies and procedures that document the responsibilities of specific staff members for preventing ASM or the appearance of ASM. In many cases, behaviors that are considered ASM are subject to interpretation; therefore, these “grey areas” should be clearly spelled out in school and school district policies.

Clear policies on boundaries for interpersonal contact protects both students and staff members.

(Exh. 13, pp. A171-172.)



Hugging is listed among the “grey areas” subject to interpretation and needing clarification and direction by promulgating school policies. The publication does call out hugging “if the child is not receptive, if the staff member is hugging too often or for too long or if the contact is romanticized or sexually intimate” as examples of inappropriate conduct. (*Id.* at p. A176.)

## **Respondent’s Evidence**

31. Respondent testified at the hearing, stating he had had a lifelong interest in being an educator. His first administrative job was at John Muir Middle School in Pasadena. There he became versed in the alternate disciplinary system known as “restorative justice,” which stresses respectful interactions and mediation-influenced approaches to diffuse and resolve disputes and misconduct. He continued practicing its methods at Jordan where his duties included disciplining both students and teachers.

32. Respondent maintained he was equally aware of the need to approach his duties with care and his own safety in mind. This is because Respondent’s duties at Jordan and other schools included direct involvement with dispensing discipline, sometimes even reporting to and cooperating with law enforcement and he believed this sometimes prompted subjects to retaliate against him. To protect himself, he never met with students alone, never closed his office door when meeting with students there and never touched them except for giving them side-hugs, a physical display of comfort and support he felt could not be interpreted as sexual or overly familiar.

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33. Respondent further stated he generally knows students' names and if he does not know, he refers to them as "young man" or "young lady." He denied calling any students baby girl, mama or any similar terms.

34. Regarding the specific allegations, Respondent adamantly denied leering or staring at students, touching RM's knee or leg or rubbing or touching any part of her back, or standing "Captain Morgan style" in front of her.

35. Respondent has his own recollections of some of the specific incidents at issue. He recollects LS was one of the students he side-hugged, reiterating he does this with many students, both boys and girls. Respondent submitted pictures of himself with students, shoulders touching and Respondent's arm around to the student's far shoulder. (See Exh. MMMM.) Respondent also recalled commenting on the breast cancer stickers LS wore, but denied commenting on the stickers' placement on LS's body. He recalls asking LS where he could get his own sticker because he wanted to also show his support for the event. He recalled questioning CC about whether she understood the implications of the tattoo she had, a money bag with dollar bills seeming to fly out of it, because he knew it to be associated with sex trafficking and believed she may not have known that. For her own protection, he wanted her to look up its meaning and consider whether she should display it on her person.

36. Respondent did not have an independent recollection of particular instances involving speaking to RM as she sat at the lunch tables instead of going to class. He noted, however, this was not an uncommon occurrence at Jordan and it was his practice and his duty to approach students who failed to report to class. Consistent with his practices in other circumstances, though, he called for assistance from members of the security team who would join him while he addressed the situation.

37. Respondent recalled the disciplinary meeting with RM. As Respondent described it, he convened the meeting to address a conflict RM had with another student, V, with whom RM was in a dating relationship. RM had seen V with another student, G. RM understood V's interactions with G were also romantic and became angry and had a loud confrontation with V. Respondent, to diffuse the situation, had all the students involved come in his office along with members of his safety team. There he attempted to hold a "harm circle," a restorative justice exercise intended to help resolve such issues. The atmosphere only grew more heated, however, and at some point, RM lunged toward V. Respondent physically restrained RM by the shoulders but denied otherwise touching her.

38. Because Respondent was also responsible for disciplining teachers, he maintained that, despite his best efforts to approach his duties with equanimity and fairness, they too could become quite angry with him. Respondent recounted he had disciplined Teacher JR at least twice, once for wearing an inappropriate costume to school and once because he resisted allowing a student who had been disruptive back into the classroom.

39. Respondent introduced the testimony of Inga Garrett, Rene Isidro Barrera, and Thomas Langston, all members of Respondent's security team at Jordan. Ms. Garrett has been a security guard at Jordan for almost 35 years. Mr. Barrera recently resigned from the Orange County Sheriff's Department. Before that he was with the LAUSD police department, assigned to Jordan and worked with Respondent there. Thomas Langston is an LAUSD police sergeant assigned to Jordan where he worked with Respondent from fall 2018 to winter 2019.

40. The three witnesses corroborated Respondent's testimony regarding his practice of conducting student interviews with security team members present. Ms.

Garrett stated it is her practice to continually circle the campus and routinely helped Respondent retrieve wayward students. Sergeant Langston noted there are some 42 security cameras trained on many areas of the campus, including the lunch tables. In a letter submitted at the hearing, Jordan Plant Manager Clarence Lucky stated he met with Respondent in Respondent's office on a daily basis and, during these meetings, students routinely arrived. Respondent asked Mr. Lucky to stay in the office while he spoke to the students. (See Exh. NN.)

41. Mr. Barrera recalled being present for the disciplinary meeting involving RM, V, and G, including that RM lunged toward V during the meeting. Speaking of Respondent and himself, Mr. Barrera stated "We got between her and the others."

42. Mr. Barrera and Sergeant Langford corroborated Respondent's testimony regarding the retaliatory dynamic he experienced as the school's chief disciplinarian. Mr. Barrera stated RM was very close to V and blamed Respondent when, as a result of the altercation between them, V's mother removed V from Jordan. Sergeant Langston was present when Respondent assisted police in apprehending a student in the course of a criminal investigation. That student was known to be JC's boyfriend and Sergeant Langston heard her call out "I'm going to get you, Mr. G." as police took him away. Respondent was subsequently subpoenaed to testify at his trial. (Exh. III.)

43. Respondent presented extensive character and reputational evidence. His former supervisor at John Muir Middle School, Dr. Nisha Dugal, testified about his professionalism and capacity to handle students effectively and respectfully. Parent Educator Coach Cynthia Iglesias, also a former supervisor of Respondent's, testified about Respondent's talent as an educator and commitment to the profession. Both witnesses stated they were familiar with the charges against Respondent and both

stated the information did not change their position. Ms. Iglesias added she would not hesitate to leave her own daughter in the classroom with him.

44. Respondent presented 46 letters of support. Of those, 21 did not indicate knowledge of the charges and therefore were given little weight. Three others came from direct family members, Respondent's wife and two of his children. Though apparently sincere in their support, these writers' close relationship to Respondent necessarily diminish their objectivity and for that reason, the letters were discounted.

45. The remaining 22 letters, from all aspects of Respondent's professional and personal life, reflect knowledge of the pending charges and nonetheless demonstrate a nearly uniform pattern of support and unreserved belief in Respondent's integrity and commitment to his profession.

## **Analysis**

46. The charges against Respondent, particularly when considered in the aggregate, are extremely serious and disturbing. The evidence presented, however, definitively established only a subset of the allegations. Respondent admits to certain of the allegations, touching RM, though in the context of preventing her from potentially injuring another student, side-hugging LS and speaking to her about stickers related to a breast cancer awareness event, and asking whether CC understood the implications of her tattoo. In the students' version, these events and others to which Respondent does not admit, were infused with sexual intention and more pointed. In Respondent's version, the events were routine arms-length encounters and part of a work protocol intentionally designed to avoid impropriety. He expressly denies sexual touching and commentary. The students are credible but their views, perhaps tainted by the emotions of the situation, leave room for interpretation.

47. Complainant relies on the direct evidence presented by the testifying witnesses and reports documented in out-of-court statements in investigation reports. This hearsay evidence, especially in contrast with the direct evidence corroborating some of Respondent's version of key incidents (such as the disciplinary meeting involving RM), potential retaliatory motives behind some of the reporting Complainant has relied upon, and the protocol Respondent employed to avoid being alone with students, is insufficient to establish the disputed facts, which are by far the most serious of the allegations. And, as noted in the Legal Conclusions below, the undisputed facts generally do not constitute grounds for discipline as alleged in the Accusation or grounds to deny Respondent's applications for new credentials as set out in the Statement of Issues.

## **LEGAL CONCLUSIONS**

### **Jurisdiction**

1. Pursuant to Education Code section 44440, subdivision (b) (subsequent statutory cites are to the Education Code), suspension or expiration of Commission-issued credential does not deprive the Commission of jurisdiction to impose discipline, including suspending or revoking the credential or issuing a letter of public reproof or private admonition to the credential holder.

2. Section 44421 authorizes the Commission to take adverse action against an individual's teaching credential for, among many specified causes, immoral or unprofessional conduct, evident unfitness for service, or any cause which would warrant denial of an application for a credential. Section 44345, subdivision (e), allows

the Commission to deny an application by any applicant who has committed an act involving moral turpitude.

## **Burden and Standard of Proof**

3. Complainant has the burden of establishing by clear and convincing evidence to a reasonable certainty cause for adverse action against Respondent's credential and certificate, because they are considered professional licenses. (See *Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039; *Ettinger v. Bd of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.) Clear and convincing evidence is "of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

## **Causes for Adverse Action (Accusation)**

### **UNPROFESSIONAL CONDUCT**

4. Under section 44421, a licensee may subject his credentials to disciplinary actions for committing acts constituting unprofessional conduct. Unprofessional conduct in the teaching profession is defined as conduct violating the rules or ethical code of the profession or conduct unbecoming of a member of the profession in good standing. (*Bd of Ed. of City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553, overruled on other grounds by *Bekiaris v. Bd of Ed.* (1972) 6 Cal.3d 575.)

5. In this case, it is unclear what rules of the profession, if any, are at issue in the Commission's charges. There are references to a code of conduct in the bulletin attached to the Commission's report but the bulletin is about its distribution; the code

itself was never produced. (Factual Finding 16.) Indeed, no applicable rule or code was presented and therefore no finding of its violation can be made. Alternatively, the allegations, considered as a whole, can be reasonably determined to constitute 'conduct unbecoming,' in a common sense understanding of the phrase. Most of the allegations, however, were not proven. (Factual Findings 46 and 47.) Based on the direct evidence presented coupled with Respondent's admissions, clear and convincing evidence established Respondent physically restrained RM during a disciplinary meeting, side-hugged LS, and spoke to CC about her tattoo and LS about breast cancer awareness stickers, though the content of the conversations in the latter two is in dispute. These occurrences alone likely fall into the "gray zone" of conduct described in ASM Training Guide. The ASM Training Guide recognizes such gray zone behavior must be addressed through thoughtful policies promulgated in advance so educators have clear foreknowledge of acceptable behavior. (Factual Finding 30.) Here, Complainant has not demonstrated such policies exist, much less that Respondent violated them when he engaged in the undisputed conduct at issue.

6. Regarding other aspects of the allegations – touching RM's and other students' thighs, calling them by pet names, leering at them, asking whether CC is a prostitute, noting the placement of the breast awareness sticker on LS's chest – these, no doubt, constitute conduct unbecoming but have not been established. (Factual Findings 45 and 46.)

### **IMMORAL CONDUCT**

7. Under section 44421, a licensee may subject his credentials to disciplinary action for committing acts of immoral conduct. Immoral conduct has been defined generally as "that which is hostile to the welfare of the general public and contrary to good morals. [It] includes conduct inconsistent with rectitude, or indicative



of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." (*Board of Ed. of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811 [*Weiland*].) The conduct in question does not have to be related to a sexual offense. (*Ibid.*) *Weiland* addressed disciplining a teacher's credentials for falsifying attendance records to secure employment.

8. Given Complainant did not prove the majority of the allegations, and in particular, did not prove the overall pattern of inappropriate behavior, the record does not support a finding that Respondent engaged in immoral conduct as it is defined in the context of teacher and school administrator practice.

### **EVIDENT UNFITNESS FOR SERVICE**

9. Under section 44421, a licensee may subject his credential to disciplinary action by demonstrating evident unfitness for service. "Evident unfitness for service" means clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) "'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.*)

10. Again, here, the limited conduct proven under applicable standards does not constitute temperamental inadequacies. Respondent's affirmative reputational evidence establishes the contrary, namely temperament, skills, and work policies and procedures consistent with the practices of competent educators.

## **MORAL TURPITUDE**

11. Under section 44421 and 44345, subdivision (c), a licensee may subject his credentials to disciplinary action for committing acts of moral turpitude. Under section 44345, subdivision (e), license applications may be denied for committing acts of moral turpitude. "Moral turpitude" has been defined as "everything done contrary to justice, honesty, modesty or good morals." (*Rice v. Alcoholic Beverage etc. Appeals Bd.* (1979) 89 Cal.App.3d 30, 36.) As with the allegations of immoral conduct, nothing in the record supports such a finding.

## **ORDER**

1. Complainant's charges of unprofessional conduct, immoral conduct, unfitness for service, and moral turpitude against Respondent Thomas Gutierrez are dismissed as insufficient grounds to discipline his expired Clear Administrative Services Credential and Clear Multiple Subject Teaching Credential.

2. Respondent Thomas Gutierrez's applications for a Clear Administrative Services Credential and for a Clear Multiple Subject Teaching Credential are granted.

DATE: 06/06/2022

Deena R. Ghaly  
Deena R. Ghaly (Jun 6, 2022 16:43 PDT)

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearing