

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

In the Matter of the Accusation Against:

KEVIN ROBERTO HERNANDEZ, Respondent.

Agency Case No. 2-228272405

OAH No. 2022110077

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 20, 2023.

Lisa Miller, Deputy Attorney General, represented complainant Mary Vixie Sandy, Executive Director, California Commission on Teacher Credentialing (Commission).

Alec Rose, Esq., represented respondent Kevin Roberto Hernandez.

Oral and documentary evidence was received. After the hearing, the administrative law judge reopened the record for briefing on a jurisdictional issue. Complainant filed a brief on April 19, 2023, which was marked for identification as exhibit nine. Respondent was given the option to file a brief in response, but he did not file one.

The record was closed, and the matter was deemed submitted for decision on May 3, 2023.

SUMMARY

Complainant alleges respondent, a former high school teacher, touched a student's upper thigh through a rip in her jeans, rubbed students' backs, squeezed students' shoulders and arms, touched students' hair, and called students his "favorites." Based on the allegations, complainant charges respondent with unprofessional conduct, immoral conduct, and acts of moral turpitude justifying disciplinary action against his teaching credential. Respondent asserts he only touched the student's thigh accidentally while telling her the ripped jeans were a dress code violation. Respondent denies wrongdoing in that incident or in any other interaction with a student.

Complainant proved by clear and convincing evidence that respondent acted unprofessionally when he touched the student's thigh through a rip in her jeans. The student estimates the touch lasted about three seconds, which supports a finding it was not accidental. Before the incident, respondent also had a history of touching the student's shoulders, hugging her, and calling her his favorite that supports the conclusion his touching of the student was intentional and unprofessional.

While respondent acted unprofessionally, the evidence is not clear and convincing that he touched the student with a sexual motivation or for some other immoral purpose. Therefore, complainant did not prove respondent committed immoral conduct or acts of moral turpitude. Complainant also did not present sufficient evidence to prove any of the charges with respect to any other students. The

evidence about how respondent behaved toward other students is too sparse to prove those charges.

Considering just the proven charge of unprofessional conduct, a public reproof of respondent's credential is the appropriate disciplinary action.

FACTUAL FINDINGS

Background and Procedural History

1. On August 3, 2010, the Commission issued respondent a Clear Five-Year Single Subject Teaching Credential, which he has periodically renewed and kept in full force and effect. The credential will expire on September 1, 2025, unless further renewed. Respondent also previously held three other certification documents: (1) a Preliminary Single Subject Teaching Credential, which was originally issued on January 8, 2007, and expired on February 1, 2012; (2) an Intern Single Subject Teaching Credential, which was originally issued on September 5, 2006, and expired on October 1, 2008; and (3) multiple 30-Day Substitute Teaching Permits, which were originally issued on October 29, 2004, and expired on November 1, 2006. Respondent has no prior disciplinary history with the Commission.

2. In 2006, respondent began working as a teacher at Alliance Collins Family College-Ready High School (Collins), a public high school in Huntington Park, California. Collins is one of multiple charter schools operated by Alliance College-Ready Public Schools (Alliance) within the Los Angeles Unified School District. Respondent taught history and advanced placement world history at the school.

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3. In late October 2019, another teacher at Collins, Ms. Ortega, overheard a student, K.Z., telling a friend that respondent had touched K.Z.'s thigh that morning through a rip in her jeans. Respondent was K.Z.'s teacher for advisory period, a 30-minute period in the morning for teachers to advise small groups of students on academic and other school-related issues. Ortega discussed the incident with K.Z. and then reported it to Stephanie Lee, an assistant principal at Collins. Lee had K.Z. and other students write statements, and Lee then spoke to respondent about the report. Without identifying K.Z., Lee stated she had received reports of a couple of students feeling uncomfortable with some of respondent's physical contact with students. Respondent apologized and stated it was not his intent to make students uncomfortable, assuring Lee he would not have physical contact with students in the future.

4. On or about July 1, 2020, social media posts about alleged sexual misconduct at Collins began appearing online, one of which stated, "finally someone called out Hernandez he was a weirdo." (Exhibit 5, p. A62, all caps omitted.) On July 2, 2020, Collins Principal Robert Delfino received two complaints raising concerns of inappropriate conduct by respondent towards current Collins students. Delfino subsequently received additional complaints from former Collins students containing allegations of sexual harassment. Based on this information, Delfino forwarded the complaints to Alliance's Employee Relations Department, which hired Kleger-Heine Legal Solutions (Kleger-Heine), a third-party investigation firm, to assess them.

5. After investigating the complaints, Kleger-Heine determined respondent: (1) told a student "You're my favorite"; (2) touched a student's skin through a rip in her jeans; and (3) looked at students' bodies in a way that made them uncomfortable. On January 19, 2021, Delfino wrote to respondent that each form of conduct was a

boundary violation that violated Collins' Student/Staff Interaction Policy. Furthermore, respondent's conduct and violation of the policy led Delfino "to lose confidence in respondent's ability to be a teacher at Collins." (Exhibit 7, p. A69.) As a result, Delfino terminated respondent's employment, effective immediately.

6. On March 4, 2021, an Alliance vice president notified the Commission's Division of Professional Practices that Alliance had terminated respondent's employment at Collins due to allegations of misconduct. The Commission's Committee of Credentials investigated and found probable cause to discipline respondent's teaching credential. Respondent timely requested an administrative hearing, and complainant filed an Accusation on August 1, 2022, alleging respondent committed unprofessional conduct, immoral conduct, and acts of moral turpitude by touching K.Z.'s upper thigh through a rip in her jeans, rubbing students' backs, squeezing students' shoulders and arms, touching students' hair, and calling students his "favorites."

COMPLAINANT'S CASE

K.Z.

7. K.Z., who is now a college student, testified she arrived late for school on the day when respondent touched her thigh through a rip in her jeans. She believes it was during her junior year at Collins. When K.Z. arrived in advisory, she was wearing jeans with more than one rip in them, including one rip about four inches long on K.Z.'s inner thigh that was "pretty high up," although not as high as K.Z.'s private area. Wearing ripped jeans was a violation of the dress code at Collins.

8. Just after K.Z. sat down in the back of the classroom, respondent sat on the chair next to her, told her the jeans "aren't dress code," and touched K.Z.'s skin

through the rip on her upper thigh. K.Z. estimates the touch lasted “probably like three seconds,” and she thinks two of respondent’s fingers touched her skin. K.Z. testified she pushed her seat back and made a face, and respondent got up quickly and moved his hand, telling her “don’t wear those jeans again or you’ll get dress coded.” According to K.Z., he did not apologize for touching her.

9. K.Z. testified that before the incident, respondent was “kind of a handsy teacher” who put his hands on her shoulders in a way that made her uncomfortable. K.Z. did not tell respondent he made her uncomfortable; she did not know how to bring it up. Respondent also gave K.Z. “normal chest to chest hugs” that were neither long nor short. He gave other female students similar chest hugs or side-to-side hugs, and K.Z. testified she saw other female students making faces when respondent hugged them. K.Z. never saw respondent hug a male student. Before the incident, respondent would also tell K.Z. she was his favorite student.

10. K.Z. testified she did not want Ortega to report the incident. K.Z. stayed in respondent’s advisory period through her senior year, which transitioned to Zoom during the COVID-19 pandemic. Respondent did not touch K.Z. again or talk to her about the incident afterwards.

Robert Delfino

11. Delfino is now an Executive Director at Alliance, and he supports two Alliance schools. Delfino testified he worked together with respondent at Collins for about nine years. Respondent was a founding teacher at Collins and a department chair when Delfino became the principal of Collins in 2012.

12. Delfino testified respondent was part of the instructional leadership team at Collins, and the two had a positive relationship before the incident. Respondent was

a well-regarded teacher before then, and his evaluations were always satisfactory. Delfino did not become aware of the misconduct allegations against respondent until July 2020.

RESPONDENT'S CASE

13. Respondent testified he only touched K.Z. accidentally while pointing out that the ripped jeans were a dress code violation. He noticed her ripped jeans when she arrived late and sat down. K.Z. was sitting on top of a table, and respondent sat in a chair about one to two feet away. According to respondent, he reached out to point to the rip on her thigh and did not realize he would touch her. When he accidentally did, K.Z. made a face, and respondent testified he immediately backed away and apologized. K.Z. did not indicate any other discomfort after the incident, and she remained in his advisory class afterwards. Respondent testified he had no less interaction with her after the incident than before, and their interactions were the same as respondent's interactions with other students.

14. Furthermore, respondent testified that nobody mentioned the incident to him in the days or weeks after it happened. The next time respondent heard of it was about a year later, and it came as a surprise to him when he learned he was under investigation. Before that, Lee once had a conversation with respondent about him tapping students on the shoulder, but Lee did not mention respondent touching K.Z.

15. Respondent testified Collins was a close community, and when he touched students on the shoulder or hugged them it was "just a greeting." Other teachers also hugged students, and respondent never received any counseling that hugging students was inappropriate. It used to be accepted at Collins, and respondent

testified he hugged both male and female students, not just female students as K.Z. testified. He does not recall ever hugging K.Z.

16. Respondent testified he always received good evaluations at Collins, and he never targeted K.Z. or any other student for physical contact.

Analysis of Evidence

17. Considering the evidence, it is highly probable respondent intentionally touched K.Z.'s upper thigh through the rip in her jeans, despite his assertion it was accidental. K.Z. estimated the touch lasted about three seconds, which supports a finding it was deliberate. K.Z.'s testimony about the incident was detailed and believable, and she has no apparent reason to embellish the incident, while respondent has reason to downplay it. K.Z. also testified respondent had a history before the incident of touching her shoulders, hugging her, and calling her his favorite student. This testimony was also believable and supports a finding that respondent acted intentionally and inappropriately when he touched K.Z.'s thigh.

18. At the same time, the evidence does not prove to a high probability that respondent touched K.Z. with a sexual motivation or for some other immoral purpose. Respondent denies he did, and the details of the physical contact do not prove otherwise by clear and convincing evidence. The touch was brief and concerned a dress code violation, and it is unclear if respondent also had another motivation for it. Complainant also did not present sufficient evidence to prove any of the charges with respect to any other students. K.Z. was the only student who testified, and her testimony about how respondent interacted with other students is not enough to prove those charges. Complainant's exhibits also make only passing mention of

respondent's alleged misconduct toward other students, which is also insufficient to prove those charges.

LEGAL CONCLUSIONS

Legal Standards

1. The Commission "shall privately admonish, publicly reprove, revoke or suspend" the credential of a teacher for, among other things, "immoral or unprofessional conduct . . . or for any cause that would have warranted the denial of an application for a credential or the renewal thereof" (Ed. Code, § 44421.) One cause that may warrant the denial of an application is if the applicant "[h]as committed any act involving moral turpitude. " (Ed. Code, § 44345, subd. (e).)

2. "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 conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, 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. [Citation.]" (*Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740; see also *Board of Education of San Francisco Unified School Dist. v. Weiland* (1960) 179 Cal.App.2d 808, 811.) "Unprofessional conduct" has been described as "that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing." (*Board of Education of the City of Los Angeles v. Swan* (1953) 41 Cal.2d 546, 553, quoting 66 Corpus Juris 55, overruled in part on another ground in *Bekiaris v. Board of Education* (1972) 6 Cal.3d

575, 587, fn. 7.) "[T]he 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.' [Citation.]" (*San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1466 (*Lampedusa*).)

3. "Moral turpitude is a concept that 'defies exact description' [citation] and 'cannot be defined with precision' [citation]." (*In re Grant* (2014) 58 Cal.4th 469, 475-476.) "Our Supreme Court has defined moral turpitude as 'an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citation.] Moral turpitude has also been described as any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime. [Citation.] The definition depends on the state of public morals and may vary according to the community or the times, as well as on the degree of public harm produced by the act in question. [Citation.]" (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027; see also *Ricasa v. Office of Administrative Hearings* (2018) 31 Cal.App.5th 262, 281; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 185.) Moral turpitude has also been described as the "'general readiness to do evil.' [Citation.]" (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 458.)

4. For purposes of teacher discipline, conduct cannot be characterized as immoral, unprofessional, or involving moral turpitude unless it indicates a teacher is unfit to teach. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229 (*Morrison*).) In making this determination, the Commission may consider such matters as: "(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.” (Cal. Code Regs., tit. 5, § 80302, subd. (a); *Morrison, supra*, 1 Cal.3d at p. 229.) Not all *Morrison* factors need be examined, only the pertinent ones. (*West Valley – Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1777.)

Jurisdiction and Burden of Proof

5. The Commission acquires jurisdiction to commence an initial review of acts or omissions by a credential holder upon receipt of one of several enumerated documents. (Ed. Code, § 44242.5.) Included on the list of enumerated documents is an employer’s statement “notifying the commission that, as a result of an allegation of misconduct, or while an allegation of misconduct is pending, a credentialholder has been dismissed” (*Id.*, subd. (b)(3)(A).) The Commission received such a notice from Alliance in this case, and the Committee of Credentials found probable cause to discipline respondent’s teaching credential. Therefore, the Commission has jurisdiction to proceed. (*Earnest v. Commission on Teacher Credentialing* (2023) 50 Cal.App.5th 62.)

6. Complainant bears the burden of proving the alleged grounds for discipline by clear and convincing evidence to a reasonable certainty. (See *Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040

(Gardner); *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 (*Ettinger*). Clear and convincing evidence "requires a finding of high probability," and has been described as "requiring that the evidence be "'so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind.'" [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

Analysis

CAUSES FOR DISCIPLINE

7. The statement of charges requests disciplinary action for unprofessional conduct, immoral conduct, and acts of moral turpitude. As to unprofessional conduct, complainant proved by clear and convincing evidence that respondent acted unprofessionally when he touched the student's upper thigh through a rip in her jeans. It is highly probable respondent deliberately touched K.Z.'s thigh through the rip, despite his assertion it was accidental. K.Z.'s credible testimony also supports a finding that respondent had a history before the incident of touching her shoulders, hugging her, and calling her his favorite student. This evidence supports a conclusion that respondent acted in a manner "'unbecoming a member of a profession in good standing'" when he touched K.Z.'s thigh. (*Board of Education of the City of Los Angeles v. Swan*, supra, 41 Cal.2d at p. 553.)

8. Furthermore, analysis of the factors described in *Morrison* indicates respondent's conduct demonstrates an unfitness to teach and thus constitutes unprofessional conduct for purposes of disciplinary action under Education Code section 44421:

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(1) The likelihood that the conduct may have adversely affected students or fellow teachers, and the degree of such adversity anticipated.

Respondent's touching of K.Z. had an adverse effect on K.Z., who recoiled when respondent touched her. It also contributed to Delfino losing confidence in respondent's ability to teach at Collins. The degree of adversity to K.Z. was not severe, but Delfino's loss of confidence in respondent constitutes evidence of adverse impact sufficient to satisfy the *Morrison* standard. (*Lampedusa, supra*, 194 Cal.App.4th at p. 1463.)

(2) The proximity or remoteness in time of the conduct. Respondent committed the misconduct toward K.Z. in October 2019.

(3) The type of credential held or applied for by the person involved. Respondent holds a Clear Five-Year Single Subject Teaching Credential. He taught high school students, an age group that is still impressionable with respect to understanding appropriate norms of interaction authority figures.

(4) The extenuating or aggravating circumstances surrounding the conduct. The Commission has promulgated non-exhaustive lists of mitigating and aggravating factors. (Cal. Code Regs., tit. 5, § 80300, subds. (b)) Respondent's lack of prior discipline is an extenuating circumstance, and his positive employment evaluations and reputation as a well-regarded teacher before the incident are also extenuating circumstances. The nature of the conduct – touching the skin of a high school student's upper thigh – is an aggravating circumstance.

(5) The praiseworthiness or blameworthiness of the motives resulting in the conduct. Respondent was pointing out a dress code violation to K.Z., which was

a valid purpose, but he did so in an improper manner. There was nothing praiseworthy about touching K.Z.'s thigh, which negates his original motive for the interaction.

(6) The likelihood of the recurrence of the questioned conduct.

Recurrence of the questioned conduct seems unlikely, given the impact it had on respondent. He lost his job with Collins and is facing disciplinary charges by the Commission due to the conduct, which are strong disincentives for recurrence.

(7) The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. Respondent did not raise this issue, and disciplinary action will not inflict an adverse impact or chilling effect upon the constitutional rights of respondent or other teachers.

(8) The publicity or notoriety given to the conduct. K.Z. told a fellow student about the incident, and Ortega, Lee, and Delfino learned of it. A social media post in July 2020 also referred to respondent as a "weirdo."

9. The majority of the above-described factors support complainant's position that respondent's misconduct demonstrates an unfitness to teach. Therefore, the Commission may take disciplinary action against respondent's credential for unprofessional conduct.

10. On the other, the evidence presented is insufficient to prove respondent acted immorally or with moral turpitude. Specifically, the evidence does not prove to a high probability that respondent touched K.Z. with a sexual motivation or for some other immoral purpose. Respondent denies he did, and the details of the physical contact do not prove otherwise by clear and convincing evidence. The touch was brief and concerned a dress code violation, and it is unclear if respondent also had some

other motivation for it. Complainant also did not present sufficient evidence to prove any of the charges with respect to any other students. K.Z. was the only student who testified, and the evidence about how respondent behaved toward other students is insufficient to prove those charges.

DISCIPLINARY ACTION

11. The Commission may privately admonish, publicly reprove, revoke, or suspend a teaching credential for unprofessional conduct. (Ed. Code, § 44421.) While cause exists to impose discipline, imposing a suspension or revoking respondent's teaching certificate is too harsh a sanction on this record. Complainant only proved an isolated incident of unprofessional conduct. Respondent has been an otherwise well-regarded teacher with no prior disciplinary history. The evidence presented is also insufficient to prove respondent acted immorally or with moral turpitude. In addition, the likelihood of recurrence of the misconduct is low.

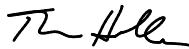
12. Considering the evidence, a public reproof is the most appropriate disciplinary action. A public reproof is "a public warning from the Commission that conduct is not appropriate for a credential holder or applicant. Following a public reproof, commission of the same or similar misconduct may result in more serious adverse action. It is issued only when adequate to appropriately protect the public, schoolchildren and the profession." (Cal. Code Regs., tit. 5, § 80300, subd. (p).)

13. A public reproof is proportional to the proven misconduct and adequate to protect the public. It warns respondent his conduct is not appropriate and that he risks more serious adverse action if it reoccurs. Unlike a private reproof, it also puts potential employers and the public on notice of the unprofessional conduct, which serves the public interest.

ORDER

Respondent Kevin Roberto Hernandez is publicly reprovved for unprofessional conduct.

DATE: 06/02/2023


Thomas Heller (Jun 2, 2023 11:39 PDT)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings