

**BEFORE A
COMMISSION ON PROFESSIONAL COMPETENCE
FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT
COUNTY OF SOLANO
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

JASON AGAN,

A Permanent Certificated Employee,

Respondent.

OAH No. 2019040423

DECISION

A Commission on Professional Competence (Commission) convened to hear this matter on July 22–26 and July 30–August 1, 2019, in Fairfield, California. Commission members are Nancy Vielhauer, Carmen Wright, and Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, who served as Chair.

Attorneys Matthew P. Juhl-Darlington and Nicole Phillips represented complainant Kris Corey, Superintendent, Fairfield-Suisun Unified School District.

Attorney Christopher O. Hammer represented respondent Jason Agan, who was present throughout the hearing.

The record closed and the matter was submitted for decision on August 1, 2019.

FACTUAL FINDINGS

Summary of the Case

1. The Fairfield-Suisun Unified School District (District) seeks to dismiss respondent Jason Agan from employment. Cause for dismissal is based on alleged immoral conduct (including but not limited to egregious misconduct); evident unfitness for service; and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or the governing board of the District.

2. Respondent is a mathematics and leadership teacher at Rodriguez High School. During the 2017-2018 and 2018-2019 school years, respondent engaged in conduct including: massaging and rubbing female students on the neck and shoulders during class; grabbing a student's hand and placing it on her leg to measure the length of her shorts; grabbing and removing a cell phone from the back pants pocket of a female student while she was sitting down; making a variety of comments about clothing worn by female students; making suggestive comments to students; and wearing a t-shirt to class that spelled out "pimp." Respondent's conduct made many students uncomfortable and had a negative effect on their educational environment. Multiple female students were emotionally distraught and described themselves as "victims." Respondent was warned by administrators, without changing his conduct.

3. The District's allegations against respondent were established by the consistent, credible, and persuasive testimony of multiple students, and the consistent and credible testimony of District administrators and staff. Respondent admitted some of the allegations, but denied others, or engaged in semantic arguments to explain or justify his own actions, suggesting a lack of candor. Respondent's explanations and

versions of events also changed over time, undermining his credibility. Overall, respondent's testimony evidenced an attempt to downplay and minimize his actions, and a failure to fully acknowledge his inappropriate behavior.

4. As set forth below, the conduct alleged and proven at hearing establishes cause for respondent's dismissal. The evidence presented at hearing was voluminous. The pertinent evidence is discussed below.

Background and Procedural History

5. Respondent is a permanent certificated employee of the District. He holds a single subject mathematics teaching credential. Respondent has been a mathematics teacher at Rodriguez High School for 17 years, since 2001, his entire teaching career.

6. Respondent received a bachelor's degree in mathematics in 2001 from California State University, Sacramento. He was hired by the District on an emergency credential, and received his teaching credential in 2004. Respondent later received a master's degree in curriculum and instruction from Chapman University.

7. Respondent's most recent performance evaluation, in December 2015, rated him as meeting or exceeding standards. He has not received any prior formal discipline or letters of warning or reprimand.

8. In the 2017-2018 school year, respondent taught two sections of Math 2-3 and one section of Advanced Placement (AP) Calculus. In the 2018-2019 school year, he taught one section of Math 2-3 and one section of AP Calculus. Math 2-3 is an accelerated class that condenses two years of math curriculum into one instructional

year; students in this class were typically sophomores. Students in AP Calculus were mostly juniors and seniors. Respondent was the only AP Calculus teacher at Rodriguez.

9. Respondent also was the leadership teacher and the student activities director at Rodriguez for the last seven years. He taught the leadership class during "zero period," starting at 7:00 a.m. Many students were in leadership for multiple years.

10. Respondent's classroom had rows of rectangular tables and chairs, with multiple students sitting at each table. The classroom adjoined the multipurpose room.

11. On October 5, 2018, respondent was placed on paid administrative leave, pending the District's investigation of allegations regarding his conduct.

12. At the December 6, 2018 meeting of the District's Board of Education, the Board approved a Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension. On December 27, 2018, respondent was served with the Statement of Charges and a notice of *Skelly* hearing. The *Skelly* hearing was conducted on January 8, 2019. The *Skelly* officer upheld the District's recommendation.

13. On April 23, 2019, Kris Corey, Superintendent of the District, served respondent with an Amended Statement of Charges and Recommendation for Dismissal and for Immediate Unpaid Suspension. Respondent timely requested a hearing, and this hearing before the Commission followed.

Applicable Statutes, Board Policies, and Regulations

14. Board Policy (B.P.) 4119.21, 4219.21, 4319.21, "Professional Standards," sets forth expectations for the District's employees.

The Governing Board expects district employees to maintain the highest ethical standards, behave professionally, follow district policies and regulations, abide by state and federal laws, and exercise good judgment when interacting with students and other members of the school community. Employees shall engage in conduct that enhances the integrity of the district, advances the goals of the district's educational programs, and contributes to a positive school climate.

The professional standards policy also enumerates various types of inappropriate conduct, including engaging in harassing or discriminatory behavior towards students.

15. Board Policy 5137, "Positive School Climate," provides that:

The Governing Board desires to enhance student learning by providing an orderly, caring, and nurturing educational and social environment in which all students can feel safe and take pride in their school and their achievements. The school environment should be characterized by positive interpersonal relationships among students and between students and staff.

The positive school climate policy also states that: "All staff are expected to serve as role models for students by demonstrating positive, professional appearance, attitudes, and respect toward each student and other staff members."

16. State law and the policy of the governing board of the District prohibit sexual harassment. (Ed. Code, §§ 200, 201, 212.5, 220; B.P. 5145.7.) The Education Code

defines sexual harassment as including “verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting,” where “[s]ubmission to the conduct is explicitly or implicitly made a term or condition of an individual’s . . . academic status, or progress,” or where the “conduct has the purpose or effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.” (Ed. Code, § 212.5.) The District’s governing board has adopted policies consistent with state law. It is the policy of the District to provide a safe school environment that is free from harassment and discrimination. (B.P. 5145.7.)

Administrative Regulation 5145.7 implements the Board Policy regarding sexual harassment, and defines prohibited sexual harassment of students in the same terms as Education Code section 212.5. The regulation also lists illustrative examples of conduct that is prohibited in the District and that may constitute sexual harassment, including: unwelcome leering, sexual flirtations, or propositions; unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments, or sexually degrading descriptions; graphic verbal comments about an individual’s body or overly personal conversation; sexual jokes; massaging, grabbing, fondling, stroking, or brushing the body; and touching an individual’s body or clothes in a sexual way.

17. District employees must complete an annual online training for mandated reporters, on topics such as child abuse, sex abuse, and sex trafficking. Respondent completed the mandated reporter training on September 4, 2018. District employees also must complete annual online training on sexual harassment prevention at the beginning of each school year. There is no evidence that respondent did not complete the required sexual harassment prevention training.

Respondent's Actions During 2017-2018 and 2018-2019 School Years

18. J.W.,¹ M.M., L.M., F.R., Z.A., R.R., J.S., F.R.'s father, Kara Kotarsky, Allison Klein, Gary Hiner, and Mike Minahen provided candid and credible testimony. There is no evidence that the student witnesses harbored underlying ill will toward respondent or had a motive that could be perceived to bias their statements or testimony.

2017-2018 SCHOOL YEAR

J.W.

19. In February 2018, J.W., a female sophomore in respondent's Math 2-3 class, complained to school administrators about respondent's behavior. J.W. was sitting down, taking a test, when respondent came up behind her and grabbed her cell phone out of her back pants pocket, without notice. She felt the phone sliding out of her back pocket, and did not know who had grabbed it or why. Respondent leaned over her, put the phone on the table, and said it looked like the phone was going to fall out of her pocket. J.W. described herself as feeling "shocked," "disgusted," and "powerless," noting that respondent could have walked to the front of the table to get her attention and told her to remove the phone herself.

(a) Respondent admitted at hearing that he grabbed the cell phone out of J.W.'s back pocket. He concedes this was invasive, and regrets he made her uncomfortable. He says his intent was to keep the phone from falling out of her pocket and breaking.

¹ The names of students are confidential to protect their privacy.

20. J.W. also told administrators about a comment that respondent made during class in late January or early February 2018, that boys should go to track meets "because there are a bunch of pretty girls running around in short shorts." J.W. felt very uncomfortable hearing this, especially because she was on the track team and was required to wear shorts as part of her uniform. Track conditioning had just started, and the comment made her think twice about putting on her uniform. J.W. observed that the comment provoked shocked looks and uneasy laughs from other students.

(a) Respondent denied at hearing that he made this specific comment, but admitted telling students that he used to run track as a student and he liked participating in a co-educational sport and socializing with girls. He says J.W. must have misunderstood or misinterpreted his remarks.

21. Lastly, J.W. told administrators about respondent massaging girls' shoulders in class. Respondent did this to J.W., either grabbing one of her shoulders from the side and massaging it, or grabbing both of her shoulders from behind. She felt very uncomfortable and powerless when it happened, but felt she could not speak up and say no, because respondent was in charge of the class and her grades. J.W. also observed respondent massaging other girls' shoulders, and saw that they tensed up or made a face. She felt uncomfortable seeing this, and felt bad for those girls.

22. J.W. spoke with assistant principal Gary Hiner in February 2018, and submitted a written statement. J.W. and her mother requested that she remain anonymous, due to concern about potential negative repercussions from respondent or other students. Because J.W. declined to provide names of other student witnesses, Hiner did not interview other students at that time.

23. Hiner spoke with respondent after receiving J.W.'s complaint. Because J.W. had requested anonymity, Hiner kept the conversation general. He did, however, tell respondent that students were uncomfortable with his touching them in class. Respondent said his classroom was very crowded, and he was touching students on the shoulders to move them forward in their chairs when he moved between tables. Hiner told respondent to "be careful" when touching students.

F.R.

24. F.R. was a female sophomore in respondent's Math 2-3 class. She saw respondent massage or rub the shoulders of female students in class during the 2017-2018 school year, which made her uncomfortable to watch.

25. In late January or early February 2018, respondent made a comment to F.R. about her t-shirt, which read "I'm just here for the savasana." (Savasana is a yoga pose in which the practitioner lies down on her back.) As F.R. was leaving class with other students, respondent nodded to her shirt and made a comment suggesting that F.R. should be lying down.² After F.R. said "what?" in confusion, respondent repeated the comment to which F.R. said "no," frowned, and walked away. F.R. acknowledged that her t-shirt was meant to be satirical, but she was taken aback by respondent's comment—it felt to her like an abuse of authority for a teacher to suggest she lie down. As she put it, "I think he was joking but don't think it was an OK joke to make."

² F.R. said that respondent said "lie down" to her. Respondent said he phrased it as a question, "how come you never laid down?" or "why aren't you lying down?" The difference between these phrasings is immaterial—even if respondent framed it as a question, the comment suggests that F.R. should be lying down on her back.

26. F.R. told her parents about the incident, and her father contacted assistant principal Allison Klein by email in late February, saying that he did not want to overreact, but he felt that respondent's comment to his daughter was inappropriate.

27. Klein met with F.R., and subsequently asked respondent about the incident. Respondent provided his recollection of the conversation and the explanation that his comment was a joke. He thinks F.R. misinterpreted his remark.

28. On March 5, 2018, Klein sent an email to respondent, stating: "Please be cautious in the future of what you say to students, even in jest, as things can be taken out of context or make others feel uncomfortable. I never want you or any students to be in a situation that is uncomfortable or cause for concern."

29. On March 14, 2018, respondent wore a t-shirt to school on Pi Day (a day referencing the first three digits of pi, 3.14). The shirt was printed with the Greek letter for "pi" (π), followed by the letters "m" and "p," thus spelling out "pimp." F.R. and other students noticed the shirt and asked respondent if it spelled pimp, to which he said, "oh, I didn't think you guys would realize it." F.R. felt it was "kind of explicit" for a teacher to wear such a shirt to school, and that it was inappropriate for a teacher to make a joke about pimps or to insinuate that he had the qualities of a pimp. F.R.'s father emailed Klein to tell her about the "pimp" shirt, which he found inappropriate for a public school teacher to wear to class.

(a) Respondent admitted at hearing that he wore the "pimp" shirt, but says it was not intended to refer to actual pimping or prostitution. He was intending it as a silly play on words, and wore the shirt "to make math cool." It did not cross his mind that wearing the shirt to school was inappropriate. Respondent recognizes that the

literal meaning of the shirt's text is offensive, and has come to realize that it could be misunderstood.

30. Klein was concerned by another issue having arisen with respondent's behavior in such a short period of time, and she agreed that the "pimp" shirt was not appropriate for respondent to wear to school. Klein asked respondent about the shirt he wore on Pi Day, and he sent her a picture of the image on the shirt.

31. On March 22, 2018, Klein sent an email to respondent, and copied the school principal, Clarence Isadore. Klein's email to respondent stated:

Thank you for sharing with me what was printed on the shirt for Pi Day. We previously had a conversation regarding a comment you made to a student telling her to lie down.

You stated you were joking because of the yoga term on her shirt. This is another concern that has been brought to admin attention regarding student safety in your care. In my opinion this shirt is not appropriate for an educational professional to wear during work hours or around students.

We want to always ensure we promote student safety and well-being, and make sure we are messaging clearly to students what is acceptable behavior, rather than modeling or advertising inappropriate or unsafe behaviors.

I caution you against making further inappropriate jokes to students because I know you want all students to feel comfortable in your class, and I do not want anything you

do to be misconstrued or perceived as damaging or inappropriate interactions with students.

The classroom and school setting in my opinion are not [the] appropriate time/place for sharing chairs with students,³ physically touching students, inappropriate innuendo, or jokes in poor taste.

I share this email out of concern for student safety, and concern for you as a professional and wanting to ensure you are taking precautions to ensure student comfort and safety in your class. I am happy to meet with you to discuss further if you'd like.

Respondent did not follow up with Klein to discuss her email message.

32. The Amended Statement of Charges alleged that respondent wore a t-shirt to school in April 2018 that depicted a cartoon character smoking marijuana. This allegation was not established by the evidence at hearing. The t-shirt worn by respondent showed Mickey Mouse wearing swim trunks, sneakers, and sunglasses, and making "peace" signs with his fingers, while standing in front of green palm trees.

2018-2019 SCHOOL YEAR

33. Despite being cautioned by administrators about touching students, respondent continued to do so during the 2018-2019 school year. Respondent

³ No evidence was introduced at hearing regarding sharing chairs with students.

massaged or rubbed the shoulders of multiple female students⁴ in class in Fall 2018, including L.M. (a sophomore in Math 2-3) and J.W. (a junior in AP Calculus that year). Respondent's continued touching of students came to light after R.R., a female sophomore in respondent's Math 2-3 class, made a report to school administrators that respondent had massaged her neck.

R.R.

34. On October 1, 2018, respondent came up behind R.R. in class, put a hand on her neck underneath her long hair, and massaged her neck. R.R. was caught by surprise, felt uncomfortable and violated, and did not know what to do. At hearing, she described her reaction by saying "I was frozen."

(a) Respondent denied at hearing that he put his hand on R.R.'s neck under her hair and massaging her neck, which he concedes would be inappropriate. He did say, however, that "it's possible" that he put his hand on the base of R.R.'s neck where it meets the shoulder and gave it a couple of squeezes or shakes "like I do."

35. After this event, R.R. spoke to other students, including those in leadership, to see whether it was an isolated incident or had also happened to others. She heard that respondent put his arms around girls in leadership class or massaged them. A friend told R.R. she should go talk to her school counselor.

⁴ There was some evidence that respondent also occasionally touched and rubbed the shoulders of male students, but most witnesses only observed this happening with female students, and felt respondent focused his attention on girls.

36. On October 3, 2018, R.R. spoke to school counselor Kara Kotarsky, told her about respondent massaging her neck, and asked to transfer out of respondent's class. R.R. seemed uncomfortable and scared by what had happened. Kotarsky did not think R.R. was overreacting. Kotarsky had R.R. write a statement and reported the incident to Hiner. That same day, Hiner called R.R. into the front office. R.R. happened to see respondent in the office area while she waited to speak with Hiner. R.R. had already gone to respondent's class that day, but felt so uncomfortable that she told Hiner she was thinking of skipping the class in the future. Hiner found that this indicated a serious concern, because it was unusual for a high-performing student such as R.R. to tell an assistant principal she planned to skip class.

37. On October 4, 2018, R.R. attended class, but respondent noticed that the computerized attendance sheet listed R.R. as having dropped the class. Later in the class period, respondent pulled R.R. aside and asked her why she was transferring out of class. R.R. felt caught off guard and intimidated by respondent making this inquiry, and was scared. She told respondent that she was switching classes because she was struggling to keep up in his class; she did not want to tell him that the real reason was due to the touching. R.R. thought respondent must know she had complained about him, since she had seen respondent in the front office when she was there the day before, waiting to speak to Hiner.

(a) Respondent admitted at hearing that he had pulled R.R. aside to ask why she was transferring out of his class, but denied that it was a "confrontation," which he interprets as involving aggression. He did not see R.R. when they were both in the front office the day before.

38. Toward the end of the day on October 5, 2018, the school psychologist called Hiner to her office, because R.R. was having a panic attack. When Hiner arrived,

R.R. was visibly upset, had been crying, and was having a hard time breathing. Hiner talked with R.R. after she had calmed down. R.R. had heard students talking, with students' opinions split as to whether one should come forward with concerns about respondent. R.R. thought that the students knew she was the one who had complained about respondent.

Other Students

39. In addition to massaging or rubbing students' shoulders, respondent had an overall tendency to touch students in class and encroach on their personal space.

(a) J.S. demonstrated how respondent would get uncomfortably close to students when looking at their work or answering questions, which she found to be "invasive." Respondent stood close behind the student's chair, grasped the student's left shoulder with his left hand, leaned over the table, and put his right hand on the table next to the student. Respondent admitted at hearing that he touched and leaned over students in this manner.

Respondent also once put his hand on J.S.'s head, which she described by saying that "he grasped my head firmly." This made her uncomfortable, as she does not like it when anyone touches her head or her hair.

(b) F.R. had experienced similar behavior in respondent's class the previous year. Respondent would get uncomfortably close with a hand on her shoulder to look at her paper, so that she could feel the warmth of his body. In her words, "if you moved an elbow you'd bump him."

(c) L.M. was stretching in class one day, with her arms behind her. After she commented, "I can't feel a stretch," respondent came up behind L.M., and grabbed and pulled on her arms. This made L.M. feel uncomfortable and unsafe.

40. Respondent grabbed the hand or wrist of M.M., moved her hand to the side of her leg, and extended her fingers to conduct a "fingertip length test" on a day when she was wearing shorts. (The District's dress code provides that students' shorts or skirts should be at least fingertip length.) This happened in front of other students, and it made M.M. and other students who witnessed it feel uncomfortable.

(a) At hearing, respondent did not specifically remember grabbing M.M.'s hand to conduct a fingertip-length test of her shorts, but he had no reason to believe she was not telling the truth about it, and said "I'm sure I've done it before."

41. The Amended Statement of Charges also alleged that respondent "swiped" his hand up the leg of one or more female students while conducting a fingertip length test. This allegation was not established by the evidence at hearing.

42. Respondent made comments to female students about their clothing that made them feel uncomfortable.

(a) On the first day of school, respondent's class was returning to their room after getting books, and respondent called out to L.M. from behind, calling her "short shorts" and making the comment that "those shorts are kind of short." Respondent did not formally "dress code" L.M. or send her to the office to obtain different clothing.

(i) Respondent admitted at hearing that he pointed at L.M. and said "hey, short shorts" to indicate that her shorts were too short, but denied calling her "short shorts" as a nickname.

(b) M.P. wore a tank top to school one day, which was partially visible under a large jacket. Respondent asked her, "What are you going to do when it gets hot?" She responded that she would fluff her jacket so air could circulate. M.P. was made uncomfortable by respondent's comment about her tank top, and was subsequently very cognizant of what she wore to his class. J.W. similarly reported that she paid close attention to what she wore to respondent's class, to avoid being "on his radar."

IMPACT ON STUDENTS

43. Most of the student witnesses who testified did so with manifest emotion as they recounted the effect of respondent's conduct on their school environment.

44. J.W. did not feel safe in respondent's AP Calculus class in Fall 2018. Respondent again massaged J.W.'s shoulders (Factual Finding 33), as he had the year before in Math 2-3 (Factual Finding 21). J.W. felt even more trapped and powerless when respondent touched her during the AP Calculus class than she had felt the year before, because she had complained to school administrators but respondent was continuing the same conduct. J.W. tried to sit with a group of friends, or sit with a bookshelf behind her, or sit in the back corners of the room so that respondent could not walk up behind her. She tried to stay quiet and not talk in class, having noticed that respondent more frequently massaged the girls he talked to. She felt miserable in respondent's class, but remained in it because respondent was the only AP Calculus teacher at Rodriguez.

45. F.R. was not comfortable with respondent as a teacher after the incidents she experienced in Spring 2018 (Factual Findings 24-25 & 29), and his class was stressful because she felt "on guard" and "on edge." She received an "A" in Math 2-3 class as a sophomore, and the next advanced math class ordinarily taken in sequence

would be AP Calculus. Instead, F.R. chose to take Honors Pre-Calculus her junior year, not AP Calculus, because she did not want to take another class from respondent. It was a hard decision, because F.R. likes to take challenging classes and wants to get into a good college, but she made the choice for her emotional well-being.

Respondent is the gatekeeper who signs students' enrollment forms for advanced math classes. When F.R. brought him her Honors Pre-Calculus enrollment form, respondent expressed disappointment that she was not taking his calculus class, and called her "lazy," which made her feel sad and insulted. When asked if respondent could have been trying to motivate her by that remark, F.R. said, "I know he wanted me to take it [AP Calculus], but it's a lousy way to motivate, by putting someone down."

46. When respondent massaged L.M.'s shoulders (Factual Finding 33), she felt unsafe, shocked, and confused, and was not sure what to do. Seeing respondent do this to other girls also made her feel unsafe and worried for her friends, saying "That's a predator move, to touch without consent." L.M. wanted to participate in leadership for the 2019-2020 school year, but visiting respondent's former classroom at the end of the year in 2019 to get the sign-up form made her uncomfortable, "brought too much back," and discouraged her from participating in leadership because she did not want to be in that room. (After respondent was put on leave, the Math 2-3 class was moved to a different room, so L.M. had not returned to respondent's former classroom before.) L.M. attended counseling and saw a psychiatrist after her experiences in respondent's class, receiving medication for posttraumatic stress disorder, depression, and anxiety.

47. R.R. did not feel safe or comfortable in respondent's class, saying "the vibe was just off." R.R. sought to transfer out of respondent's class and experienced a panic attack after reporting respondent's conduct and then being asked about her

class transfer. (Factual Findings 34-38.) It still makes R.R. uncomfortable to think about respondent putting his hands on her neck in class.

48. Multiple students (J.W., L.M., F.R., J.S.) stated that they would not have felt comfortable going to see respondent for extra help with math outside of class, because they did not want to be alone with him, due to his touching of students. Similarly, multiple students (J.W., M.M., J.S.) said they tried not to speak up or ask questions in class, to avoid drawing respondent's attention.

49. Students who observed respondent massaging other students during class were negatively affected by these observations, even if they were not massaged themselves. For example, M.M. was not massaged by respondent, but she felt uncomfortable watching him massaging the shoulders of other girls and seeing that they would cringe when it happened. Similarly, Z.A., a male student, felt uncomfortable watching respondent massaging the shoulders of female students.

INVESTIGATION BY THE DISTRICT IN FALL 2018

50. After receiving R.R.'s statement on October 3, 2018, assistant principal Hiner began an investigation of respondent's conduct. He separately interviewed and obtained statements from two other students that were identified by R.R. Hiner spoke to principal Isadore on October 4, 2018. Subsequently, Kristen Witt, the Director of Secondary Education, and Dr. Robert Martinez, Assistant Superintendent of Human Resources, were contacted. Hiner continued to interview students and obtained additional written statements from them in October 2018.

51. On October 5, 2018, Dr. Martinez placed respondent on paid administrative leave pending the District's investigation, and advised him not to

discuss the matter with others. Dr. Martinez sent respondent a confirming letter on October 9, directing him not to visit any District campus while on leave.

52. On October 12, 2018, Mike Minahen, who was the District's Director of Human Resources, initiated an investigation into respondent's conduct, in consultation with Isadore, site administrators, and District counsel. Minahen conducted individual interviews with students, with their parents present. He also interviewed respondent, with counsel for respondent and the District present. Minahen met with the Board in closed session to approve moving forward, and worked with Dr. Martinez and the Superintendent to develop the Statement of Charges, which the Board approved in December 2018.

53. At his *Skelly* hearing in January 2019, respondent presented the *Skelly* officer with letters of support from students, parents, and colleagues. The *Skelly* officer upheld the District's recommendation and also noted that she found it inappropriate for respondent to have gathered the supporting letters while on leave. The Statement of Charges against respondent was subsequently amended to include references to the *Skelly* hearing, including the District's belief that respondent had not been truthful with District representatives during the investigation.

54. Hiner and Minahen both testified about the impact respondent's conduct had on them as school administrators.

Hiner felt upset for the girls he interviewed, because he wants to ensure students are safe and comfortable at school. Hiner believes respondent created a sexually charged environment in his classroom. He believes that a male teacher should know better than to put himself in a situation that may be perceived negatively by

students, and that even if the teacher's intent in touching female students is not sexual, it may be perceived as such by the students.

Hiner reported that as a male administrator, he is not comfortable making comments about female students' clothing, and if he observes a dress code violation by a female student, he asks a female teacher or staff member to talk to the student.

As Minahen conducted student interviews, the impact on students and their families became evident to him. Students did not feel safe in respondent's class. Many of them used the word "victim" to describe themselves or said they felt violated. Some students broke down crying in interviews, including those who were eyewitnesses and had not themselves been touched by respondent. Parents had noticed changes in girls not acting like themselves. Minahen's goal as an administrator is for students to thrive. He was very disheartened by what he found in his investigation, saying it "weighed heavy on me" that so many girls "felt squashed."

Minahen also noted how unusual it was for high school students to "break the code" and come forward to make a complaint about a teacher, especially a leadership teacher who has influence over student activities throughout the entire school.

Respondent's Additional Evidence

55. Respondent described himself as a good teacher, and he wants to continue to teach.

56. Respondent's classroom was very crowded, making it difficult at times to walk around the class while all the students were working at tables. He conceded at hearing that it was not necessary to touch students to walk through his classroom.

57. Respondent denies paying more attention to girls than boys, saying he goes to whoever is asking questions, and girls asked more questions. His advanced math classes were approximately 60 percent female and 40 percent male.

58. The Associated Student Body (ASB) officers ran the leadership class under respondent's direction. In discussing this dynamic, respondent described himself as "the man behind the curtain." Respondent denied favoring his leadership students. He admitted, however, to having a more bonded relationship with his leadership students, because he spent so much time with them over multiple years.

59. Respondent denies having "massaged" students' shoulders, but admits "rubbing" them. He distinguishes between "massage" and "rubbing," characterizing massage as a kneading motion, and rubbing as a circular patting motion. This is a distinction without a difference. When asked to explain how multiple students could have described his actions as massaging, including students to whom it had happened personally, respondent suggested that the students had misinterpreted what he called a few squeezes or shakes, saying "maybe it looked like massage to them."

60. Respondent's version of events has changed over time when asked to explain his touching of students. When Hiner spoke with him in Spring 2018, respondent said he was touching students on the shoulders to move them forward in their chairs when he moved around his crowded classroom. When respondent was interviewed by Minahen in October 2018, he said he occasionally put his hands on students' shoulders and gave them a couple of squeezes. By the time of the hearing, respondent admitted to rubbing students' shoulders in class, in addition to touching, squeezing, shaking, and patting them.

Respondent explained that he was trying to touch students in an encouraging and supportive manner, to convey that "you've got this" when working on math problems. Respondent denies any sexual motivation in touching students.

61. Respondent admits having a tendency to touch students in class, including putting his hands on students' shoulders while talking about math problems or seeing if anyone needed help. He concedes he may have gotten "too close for comfort" for some students, and that he invaded students' personal space, but noted that everyone was very close together in his classroom.

62. Respondent contends that he would have stopped putting his hands on students' shoulders if he had gotten a "clear warning" not to do so. He thought that Hiner telling him to "be careful" touching students meant that it was fine to continue doing what he was doing, as long as he was not "massaging" students. Respondent contends he did not know what Klein meant by her March 22, 2018 email, in which she cautions him and says "[t]he classroom and school setting in my opinion are not [the] appropriate time/place for . . . physically touching students," because Klein never talked with him about touching students. Respondent did not follow up with Klein. Respondent did go to a union-involved colleague, Richard Bryan, to discuss his concerns about interactions with Hiner and Klein in Spring 2018. On Bryan's advice, respondent went to principal Isadore, and said he did not feel comfortable with Klein being his assigned workplace evaluator. Respondent thought the matter was resolved.

63. Respondent admits making comments about female students' clothing, but only in the context of enforcing the dress code. He was told by administrators when he first began teaching in 2001 or 2002 that he should enforce the dress code, including by using the fingertip-length test.

64. Respondent explained at hearing that he did not intend to make students feel uncomfortable, and he regrets that some students did not feel safe in his class. He believes that because he was so comfortable with his leadership students, he got used to doing certain things with them, and his actions carried over to math students who were not as close to him and for whom his actions did not have the same effect.

65. As for comments he made to students, respondent's testimony has a theme, that multiple students misunderstood or misinterpreted his remarks. Overall, respondent's testimony evidenced an attempt to downplay and minimize his actions, and a failure to fully acknowledge and take responsibility for his behavior.

RESPONDENT'S WITNESSES AT HEARING

66. Four former students, three current or former teachers, and one current staff member testified on respondent's behalf. Respondent's witnesses were not aware of the details of the allegations against respondent, for the most part only being aware of a general allegation that respondent touched shoulders of one or two students.

67. O.F. is a former student who graduated in June 2019. She was in leadership class for four years, was an ASB officer her senior year, and was in respondent's AP Calculus class her junior year. O.F. described respondent as caring about his students, saying that he is almost like a second parent to her, and that she felt at home in his class. Respondent touched O.F.'s shoulders in conversation, with what she called a gentle squeeze, which she did not find uncomfortable. O.F. also saw respondent with his hands on other students' shoulders, which she did not think was inappropriate. Respondent enforced the dress code when O.F. wore a tank top, telling her to wear something over it; she did not think this was inappropriate. O.F. saw respondent wear the "pimp" shirt, which she thought was a joke.

68. K.H. is a former student who graduated in June 2019. She was in leadership class for three years, and was an ASB officer her senior year. K.H. was in respondent's math classes her freshman through junior years, and was his teaching assistant for AP Calculus her senior year. She described respondent as a good teacher who was an encouraging and supportive mentor, inspiring her love of math. Respondent put his hands on K.H.'s shoulders, squeezing or rubbing them, which did not make her uncomfortable. She did not see him massage other students' shoulders, but did see him put hands on students to move them out of the way as he passed. Respondent enforced the dress code when K.H. wore short shorts her freshman year, having her stand up with her fingertips at her sides; she then unrolled the cuffs on her shorts to make them longer. She did not think this was an inappropriate interaction.

69. C.B. is a former student who graduated in June 2018. She was in leadership class for three years. She was in respondent's AP Calculus class her senior year and was also his teaching assistant for Math 2-3 that year. She described respondent as a good teacher who cares about his students, a mentor, a friend, and her favorite teacher. She felt safe in his class. Respondent would put his hands on C.B.'s shoulders, and she did not think this was out of the ordinary or find it uncomfortable. She also saw respondent with his hands on other students' shoulders. When asked if she thought massaging or rubbing female students' shoulders in class was appropriate, she said it was not something that was really taken notice of in respondent's class. C.B. saw respondent wear the "pimp" shirt, and did not understand it at the time. She thinks the joke went over most students' heads.

70. A.M. is a former student who graduated in June 2019. She was in leadership class for four years, as was her older sister. A.M. was in respondent's AP Calculus class her junior year, and was his teaching assistant for Math 2-3 her senior

year. A.M. described respondent as a great math teacher and activities director who cared about his students, and she felt like his classroom was a second home to her. He is a family friend and was her favorite teacher. Respondent put his hands on A.M.'s shoulders and rubbed them, starting when she was a freshman in leadership. She found respondent to be acting in a supportive manner. They would often hug after conversations. A.M. does see how some female students could feel uncomfortable with respondent rubbing their shoulders.

71. Richard Bryan was a math teacher at Rodriguez for 18 years, beginning the same year as respondent. He retired in June 2019. Bryan occasionally went into respondent's classroom; he never observed respondent act inappropriately with students. Bryan describes respondent as being professional and of good character, and does not believe he would knowingly do anything to harm a student.

Bryan was an executive board member of the teacher's union during the last two years of his career. Respondent came to Bryan with concerns after assistant principals Hiner and Klein spoke with respondent and after Klein's March 22, 2018 cautioning email. In describing his conversation with Hiner about touching students' shoulders, respondent said Hiner had told him "don't do it again." Bryan advised respondent to talk with the principal and follow up with Bryan if he needed more help.

Bryan has enforced the dress code with students. For girls wearing short shorts or tank tops, he would tell them it was a violation and in some cases would send them to the office or tell them to put on a jacket. Many years ago, he conducted the fingertip-length test by asking girls to put their arms down at their sides, but at some point he stopped doing so.

72. Scott Miller has been a music teacher at Rodriguez since 2000. His classroom connects to the multipurpose room, as did respondent's, and Miller teaches jazz band during zero period when respondent was teaching leadership. The two teachers interacted frequently due to collaborations between the music and leadership programs. He has not observed respondent acting inappropriately with students. Miller has socialized with respondent outside school, and considers him a friend. Respondent has also tutored Miller's teenage daughter in math. Miller describes respondent as a positive and good person with a strong work ethic, and does not believe he would intentionally harm students.

Miller reported that the dress code was more heavily enforced when he first started teaching, and he has sent students to the office with referrals for violations.

Miller understands that teachers should be positive role models for students, saying "you're on stage all the time." He believes that it is common knowledge that sexual harassment is against the school rules, and that teachers "should know better" without having to be warned against sexual harassment violations.

73. Edward "Mike" Sagan teaches videogame design and video production, and has taught at Rodriguez for 17 years. His classroom and computer lab were adjacent to respondent's classroom. Sagan has socialized with respondent outside school and considers him a friend. He describes respondent as a good and trustworthy person who would not intentionally harm a student.

Sagan was told by administrators to conduct the fingertip-length test in the early 2000's, and enforced the dress code strictly "for a while."

Sagan does not believe he needs to be warned against sexually harassing students, saying "students are children" and "I know it's wrong."

74. Yvette Nanney has worked as a campus monitor at Rodriguez for 18 years. Her assigned spot to monitor in the mornings, starting at 7:00 a.m., is the cafeteria, and she often walked into respondent's classroom. She describes respondent as a great teacher and positive role model, who has a "goofy" character and connects well with students. She does not believe he would intentionally harm a student.

Nanney enforces the dress code with students by pulling them aside and saying their clothing is not appropriate for school, and sometimes sends them to the office.

75. All of respondent's witnesses answered questions on cross-examination about their reactions to hypothetical scenarios mirroring the allegations in this matter.

All eight witnesses would find it inappropriate for a teacher to massage or rub a student's neck underneath her hair. Sagan and Miller would find it inappropriate for a teacher to massage students in class, with Miller commenting, "you're there to teach." Both Bryan and Miller would feel upset if they heard that female students were afraid to raise their hands in class because they did not want to be touched by the teacher.

All four former students would find it unnecessary and inappropriate for a teacher to remove a cell phone from a female student's back pocket. Three former students (O.F., K.H., and A.M.) and Sagan would find it inappropriate for a teacher to grab a student's hand to conduct a fingertip-length test.

Bryan would find it inappropriate for a teacher to wear a shirt saying "pimp" to school, even as a joke. Miller thinks it might be inappropriate, but notes that the word "pimp" has an alternate connotation now, such that to "pimp something out" could mean to "bling it out."

LEGAL CONCLUSIONS

1. The District has the burden of proof in this matter, and the standard of proof in a teacher dismissal hearing is a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1039.)

Statutory Grounds for Dismissal

2. Education Code section 44932, subdivision (a), provides that a permanent employee shall not be dismissed except for one or more of the causes set forth in that subdivision. The causes alleged in this matter are: immoral conduct, including but not limited to egregious misconduct; evident unfitness for service; and persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district. (Ed. Code, § 44932, subd. (a)(1), (6) & (8).)

3. When a school board recommends dismissal for cause, a Commission on Professional Competence may only vote for or against the dismissal; the Commission may not dispose of a charge seeking dismissal by imposing probation or an alternative sanction. (Ed. Code, § 44944, subd. (d)(1) & (3).) The Commission's decision is deemed to be the final decision of the school district's governing board. (*Id.*, subd. (d)(4).) The Commission has broad discretion in determining what constitutes unfitness to teach, and whether dismissal is the appropriate sanction. (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 343-344; *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 220-222.)

IMMORAL CONDUCT

4. The District seeks to dismiss respondent for immoral conduct, including but not limited to, egregious misconduct, pursuant to Education Code section 44932, subdivision (a)(1).

5. Egregious misconduct is "defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 [sex offenses] or 44011 [controlled substance offenses] of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code [child abuse, neglect, endangerment]." (Ed. Code, § 44932, subd. (a)(1).) At hearing, the District clarified that its charge of "egregious misconduct" was based on Penal Code section 11165.3, which defines willful harming or endangering of a child as "a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered." The Commission does not find that respondent's conduct meets the statutory definition of egregious misconduct.

6. Immoral conduct has been defined to mean that which is hostile to the welfare of the general public and contrary to good morals. Immoral conduct is not confined to sexual matters. It includes conduct showing moral indifference to the opinions of respectable members of the community, and conduct showing 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.) The definition of immoral 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." (*San*

Diego Unified School Dist. v. Commission on Professional Competence (2011) 194 Cal.App.4th 1454, 1466 [quotation marks and citation omitted].)

7. Based upon the matters set forth in Factual Findings 19-21, 24-25, 29, 33-34, 39-40, 42, and 59-60, it was established that respondent committed acts constituting immoral conduct. Respondent repeatedly touched students during class (primarily girls), including massaging, rubbing, squeezing, shaking, and patting. He grabbed a student's hand and held it against her leg to demonstrate the length of her shorts. He invaded students' personal space. These repeated physical contacts took place in an atmosphere where respondent paid close attention and made comments about what female students were wearing, made suggestive comments to students, and himself wore a shirt reading "pimp." Respondent's overall course of conduct demonstrated a moral indifference to community opinion and inconsiderate attitude toward the public welfare, by showing an inability or unwillingness to recognize appropriate boundaries between teachers and students. Cause exists to dismiss respondent for immoral conduct under Education Code section 44932, subdivision (a)(1).

EVIDENT UNFITNESS FOR SERVICE

8. Section 44932, subdivision (a)(6), provides that the District may dismiss a permanent employee for evident unfitness for service. Evident unfitness for service means clearly not fit or suitable for teaching, ordinarily by reason of a temperamental defect or inadequacy. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444.) The term "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.*)

9. The evidence established that respondent is evidently unfit for service, based upon the matters set forth in Factual Findings 19-21, 23-25, 27-29, 30-31, 33-34, 39-40, 42, 59-62, 64-65, and 67-70. Respondent repeatedly engaged in inappropriate behavior with students, over the course of two school years. His own witnesses confirmed that he had been massaging or rubbing students in prior years.

Respondent has been very slow to recognize or acknowledge that any of his behaviors crossed the boundaries of appropriate conduct, has consistently tried to minimize or downplay his inappropriate behavior, and repeatedly has insisted that students must have misunderstood or misinterpreted him. Respondent persisted in his behaviors, even after he was warned by administrators about touching students, inappropriate innuendo, and jokes in poor taste. Even now, he contends that he was not adequately warned and had no idea his conduct was problematic. (However, even respondent's own teacher witnesses recognized his actions as inappropriate, as set forth in Factual Finding 75.) Respondent's inability or unwillingness to fully acknowledge his misconduct, and his resistance to counseling, demonstrate a temperamental defect or inadequacy that connotes a non-remediable fixed character trait. Cause exists to dismiss respondent for evident unfitness for service under Education Code section 44932, subdivision (a)(6).

PERSISTENT VIOLATION OF SCHOOL LAWS OR REGULATIONS

10. Section 44932, subdivision (a)(8), provides that the District may dismiss a permanent employee for persistent violation of or refusal to obey school laws or regulations. Dismissal under this subdivision requires that the violation be persistent, that is, continuing or constantly repeated. (*Governing Board of the Oakdale Union School Dist. v. Seaman* (1972) 28 Cal.App.3d 77, 82.) A single violation of a school board's rules is not itself cause for dismissal under this subdivision, which pertains to

unintentional as well as intentional transgressions; "it is the persistent disregard of school rules that the subdivision is designed to regulate." (*Id.* at 84 [citation omitted].)

11. The evidence established that respondent persistently violated school laws and regulations over the course of two school years. Respondent was aware of the District's policies and regulations, and had completed required training. Respondent repeatedly violated the professional standards policy by failing to exercise good judgment when interacting with students and behaving in a way that did not contribute to a positive school climate. Respondent repeatedly engaged in behaviors that undermined students' ability to learn in a safe, orderly, nurturing school environment, and thus violated the policy on positive school climate. Respondent repeatedly engaged in behaviors that constituted sexual harassment of female students, including unwanted touching and verbal comments, violating the state law and the board's policy and regulation against sexual harassment. Cause exists to dismiss respondent for persistent violation of school laws and regulations under Education Code section 44932, subdivision (a)(8), by reason of the matters set forth in Factual Findings 14-17, 19-21, 24-25, 29, 33-34, 39-40, 42-49, and 59 through 61.

Analysis of the *Morrison* Factors

12. The ultimate question is whether respondent is unfit to teach under the factors established by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229-230. The *Morrison* factors are: (1) the likelihood that the conduct in question may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the teacher; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the

recurrence of the questioned conduct; and (8) 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. Only the pertinent factors must be addressed.

(*West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1777.) The factors may be applied to all of the proven conduct in the aggregate. (*Woodland Joint Unified School Dist., supra*, 2 Cal.App.4th at pp. 1456-1457.)

13. In this case, application of the pertinent *Morrison* factors demonstrates that respondent is unfit to teach.

Respondent's conduct adversely affected students and administrators, in some cases quite seriously. Students were afraid to participate in class, and were distressed by being touched and by the prospect of being touched in the future. Students sought to transfer out of respondent's class, avoided taking his class in the future, and refrained from seeking any extra help from respondent outside class. Even students who were not themselves touched by respondent were uncomfortable witnessing it. One student had a panic attack and another sought psychological treatment after interactions with respondent. Administrators were upset by witnessing students' distress and the knowledge that multiple students were experiencing a negative school environment due to respondent's behavior.

Respondent's conduct was very recent.

Respondent has received training in sexual harassment prevention. This is an aggravating circumstance.

Respondent characterizes his motives as praiseworthy, especially in connection with his touching of students, but his testimony on this point is not persuasive. Respondent's behaviors appear to have been primarily out of self-interest and to lack

a credible educational purpose. In some of his verbal comments and wearing the "pimp" shirt, respondent may have been trying to be funny, but his jokes were offensive or inappropriate.

The likelihood of recurrence is high. Respondent continued to engage in a pattern of inappropriate behaviors despite being warned. He spent years developing habits and normalizing behaviors. He denied conduct that was credibly established by other witnesses, and consistently minimized his misconduct. Respondent has failed to fully accept responsibility. Over time he has shown that he cannot or will not exercise good judgment.

Disposition

14. Respondent is a veteran teacher who should understand the high societal expectations for public school teachers. Respondent engaged in a pattern of immoral conduct and acts constituting sexual harassment over an extended period of time. He failed to change his behavior despite warnings, and has failed to fully acknowledge his misconduct. He has repeatedly shown an inability or unwillingness to use good judgment in his interactions with students, or to understand appropriate boundaries.

Respondent does have positive qualities as an educator, as evidenced by a positive performance review, the testimony of former students, and a lack of prior discipline. These factors, however, do not mitigate the serious nature and extent of respondent's misconduct.

15. The Commission on Professional Competence concludes that cause exists to dismiss respondent based on immoral conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws or regulations. The Commission

reached this decision on a unanimous vote. Each ground for dismissal provides a separate and independent basis for respondent's dismissal.

ORDER

Respondent Jason Agan is hereby dismissed from his position as a permanent certificated employee of the Fairfield-Suisun Unified School District.

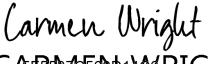
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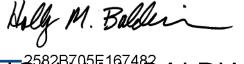
Commission Member

DATE: November 6, 2019

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Commission Member

DATE: October 28, 2019

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HOLLY M. BALDWIN
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Commission Chair

Administrative Law Judge

Office of Administrative Hearings