

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS AND A
COMMISSION ON PROFESSIONAL COMPETENCE FOR THE
VALLE LINDO SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Dismissal of:

DEREK LYNN,

A Permanent Certificated Employee,

Respondent.

OAH No. 2023010710

DECISION

This matter was heard by the Commission on Professional Competence, (Commission) in South El Monte from September 25 through 28, 2023, and by videoconference from October 4, 5, 6, and 18, 2023. The Commission consisted of Ken David, Lance Ebel, and Nana Chin, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, State of California.

Valle Lindo School District (District) was represented by Paul Z. McGlocklin, Esq. and Erica E. Noriega, Esq., Atkinson, Andelson, Loya, Ruud & Romo, Attorneys at Law.

Derek Lynn (Respondent) was represented by Tamra Smith, Esq., Equality Law.

Before presentation of evidence, the parties each brought several motions in limine. The ALJ considered and ruled on those motions in limine at the commencement of the hearing.

Testimony and documentary evidence were received. Respondent presented oral closing argument at completion of the evidence. The record was held open to permit the District to submit written closing argument. The District's closing argument was timely submitted. The matter was thereafter submitted for decision on October 20, 2013.

The Commission considered the matter in executive session. After due consideration of the entire record herein, the Commission makes the following factual findings, legal conclusions, and order.

PROTECTIVE ORDER

Before the hearing, Respondent moved for a protective order to protect the identity of one of the student witnesses. Complainant did not oppose the motion, the motion was granted, and the ALJ issued an order having the student witness be identified in all publicly available documents, including any future transcript, as "Student A." During the hearing, the ALJ ordered that all other student witnesses would be identified in any future transcript by their first name and the initial letter of their last name.

A confidential names list (CNL) has been created that identifies all the students by number for the Decision. Concurrent with this Decision, the ALJ has issued a Protective Order sealing the CNL. The CNL will remain sealed unless necessary for appropriate court review.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent was, at all times relevant herein, a permanent certificated employee of the District assigned to the Dean L. Shively Middle School (Shively).

2. On November 4, 2022, the District served Respondent with a Notice of Proposed Recommendation for Immediate Suspension Without Pay and Dismissal, and draft Statement of Charges.

3. On December 7, 2022, Dr. Elizabeth Evans, District Superintendent, filed a Statement of Charges against Respondent, charging him with immoral conduct (Education Code sections 44932, subdivision (a)(1) and 44939) and evident unfitness for service (Education Code sections 44932, subdivision (a)(6)).

4. The District's Board of Education (Board) adopted a resolution of its intention to dismiss Respondent from employment and directing Dr. Evans to serve Respondent with the Board Resolution, the Statement of Charges, a Request for Hearing Form, and applicable statutory and regulatory provisions. Respondent was served on December 8, 2022.

5. Respondent timely filed a Notice of Defense, and this hearing ensued.

Background

6. Respondent has been employed as a teacher at Shively since 2014. During his second year at Shively, Respondent began assisting another teacher, Ramona Shay, with the school's Division A (fifth through sixth grade) Science Olympiad team and the eight-grade robotics team. Together, Ms. Shay and Respondent, started

the school's Division B (seventh through eighth grade) team, which Respondent later became the head coach of. For his efforts, Respondent was awarded the Golden Apple Award in 2018.

7. In the 2019-2020 school year, Shively added a Science, Technology, Engineering, and Math (STEM) lab to its school curriculum. Respondent was instrumental in building the STEM program and became the STEM lab teacher. The classroom for STEM lab was arranged differently than that of a traditional classroom. Instead of student desks, the classroom had standing tables that were shared by multiple students and counter-height chairs.

8. The following year, classes at Shively were conducted remotely due to the COVID-19 pandemic (COIVID). Shively returned to in-school learning in the 2021-2022 school year, operating under strict COVID protocols, which included having teachers and students wear masks, using hand sanitizers, and using plastic barriers on the student desks.

9. Respondent also resumed his duties as the STEM lab teacher. During designated weekly periods, fourth through eighth grade students attended STEM lab for approximately one class period while their other teachers conducted student conferences or prepared their lesson plans. Though the barriers were removed as students started working on their projects, Respondent wore a KN94 mask that school year and made sure every student used hand sanitizer before entering class. After school, Respondent supervised STEM club with Ms. Shay.

Monday, January 31, 2022 Incident

10. On Monday, January 31, 2022, Student 1, a seventh-grade student in Respondent's STEM lab (7th grade STEM), fell, loudly moaning that she had hit her

head. Respondent, who felt Student 1 was “playacting” a bit said, “aww,” in a teasing manner, and either kissed his hand and touched Student 1’s forehead, or touched Student 1’s forehead while making a kissing noise.

11. Student 1 discussed the incident with her friends, Student 2 and Student 3. They decided Respondent was “weird” and that they were uncomfortable around him. Student 2 then tried to convince other classmates to report Respondent.

12. Student 2 later told Student 7, a 6th grade student in Respondent’s STEM lab (6th grade STEM), about the incident with Student 1. Student 7 subsequently told two of her classmates, Student 8 and Student 9, that Respondent kissed a student in November or December. While discussing Respondent’s behavior, they all stated they were uncomfortable around Respondent and discussed reporting him. They had never discussed being uncomfortable around Respondent before that date.

Wednesday, February 2, 2022

13. Emily Guerra is the District’s Dean of Students. Ms. Guerra began working with Respondent approximately four and a half years ago when she started working with the District. During the 2021-2022 school year, Ms. Guerra was the District social worker and would receive complaints from students about District staff and other students. Ms. Guerra had never received any complaints from students about Respondent before February 2022.

14. On February 2, 2022, Student 2 went to Ms. Guerra to report Respondent.

15. During the approximately 20-minute meeting, Student 2 told Ms. Guerra she was uncomfortable during STEM lab. Student 2 reported that Respondent “kept rubbing her forehead during STEM,” stood behind her while she worked, and leaned in

so close to her that she could feel his breath. (Exh. D.) Student 2 also told Ms. Guerra about the January 31, 2022, incident involving Student 1, stating Respondent kissed his hand and rubbed Student 1's forehead, reported seeing Respondent getting very close to Student 3, and "hover[ing] closely around" Student 4. (*Ibid.*) Student 2 made no allegations, at that time, that Respondent touched or rubbed her back.

16. Ms. Guerra told Student 2 she did the "right thing" by reporting but did not ask Student 2 any questions about the allegations because she "just wanted to take in her report." Ms. Guerra also asked Student 2 to keep the information confidential and allow the District to handle the matter.

17. Ms. Guerra then relayed Student 2's allegations to Shively's principal, Daniella Perez, who, in turn reported the allegations to Dr. Evans.

18. District administration decided to assign Venus Maureen Fields, an instructional aide who had, that school year, been acting as Shively's attendance clerk, to Respondent's STEM lab and to meet with him to discuss the allegations.

Thursday, February 3, 2022

19. On February 3, 2022, at 6:31 a.m., Principal Perez sent Ms. Fields an email, changing her schedule and assigning her to assist Respondent in STEM lab for the majority of the day. There were no visits by District administration to Respondent's classroom after Ms. Fields was assigned to Respondent's STEM lab.

20. At 7:21 a.m. on February 3, 2022, Principal Perez sent Respondent a text asking Respondent to meet with her and Dr. Evans at 8:00 a.m.

21. During the meeting, Principal Perez and Dr. Evans discussed Student 2's allegations with him. Respondent did not have union representation at the meeting.

Respondent denied Student 2's allegations. Respondent also explained the January 31, 2022, incident, stating he had touched Student 1's forehead and making a kissing sound in a playful manner. Respondent explained that he joked with students because that's how he builds friendships with his students. Respondent apologized for the incident and stated there would be no similar incidents.

22. At hearing, Principal Perez expressed she found Respondent's response to be concerning "because as a teacher and as an educator" there are certain boundaries, and she did not believe Respondent had been "conducting himself in a professional manner."

23. The same day, Student 3 met with Ms. Guerra. (Ms. Guerra testified that Student 3 had asked to speak to Ms. Guerra on February 2, 2022, but Ms. Guerra was not able to speak with Student 3 that day.) During a meeting that also lasted approximately 20 minutes, Student 3 reported that Respondent "had been acting strange." (Exh. D.) She stated Respondent awards more PBIS points to girls, giving the boys five PBIS points and the girls 25-30 PBIS points, would "hovers around the girls," and had, on one occasion, stared at her. (*Ibid.*) (PBIS points, or "Positive Behavior Interventions and Supports" points, are given to students when they exhibit positive behaviors, which could then be used by students at the student store to purchase things. Students can see if they received PBIS points by checking a website.) Student 3 also told Ms. Guerra about the January 31, 2022 incident, stating Respondent had kissed his hand and rubbed Student 1's forehead. Ms. Guerra "affirmed" Student 3, by telling her she did the right thing by reporting and asked her to keep the information confidential but did not ask Student 3 any follow-up or clarifying questions.

24. Principal Perez sent Respondent another text that afternoon asking him to meet with her to sign a memo of the meeting. The memo does not make any

mention Respondent was offered the opportunity to request union representation. The directive in the memo states, "You are directed to refrain from making any physical contact with students at any time for any reason. You are expected to maintain appropriate physical distance at all times. It is imperative you refrain from touching students in any manner." (Exh. A.)

Friday, February 4, 2022

25. On February 4, 2022, Ms. Fields did not come to school. Respondent was instructed to substitute teach the seventh-grade physical education class (PE) and STEM lab was cancelled.

26. Student 2, Student 1 and Student 3 approached Ms. Guerra together and asked that they be excused from PE and be permitted work in the Student Services Center because they were uncomfortable with Respondent teaching them PE.

Wednesday, February 9, 2022

27. On February 9, 2022, Student 9, accompanied by Student 8, went to meet with Ms. Guerra to report her concerns about Respondent's behavior. According to Ms. Guerra, the meeting lasted approximately 40 minutes. During the meeting, Student 9 reported she was nervous about attending STEM and had been uncomfortable with Respondent from the beginning of the school year. Student 9 stated Respondent would get uncomfortably close to her, touch her hand, and stare at her. In order to minimize her contact with Respondent, she stated she would ask a third classmate to ask questions for her.

28. Ms. Guerra again “affirmed” Student 9 by thanking her for reporting, asked Student 9 and Student 8 to keep their conversation confidential, and assured them the District would handle the matter.

Friday, February 11, 2022

29. On Friday, February 11, 2022, Student 7 approached Ms. Fields with another student, Student 11, during the lunch period. Student 7 told her it was the first time she had felt safe in Respondent’s class all year. Ms. Fields asked Student 7 what she meant, and Student 7 stated Respondent would invade her personal space by getting “really, really close to her.” Once Ms. Fields understood where the conversation was going, she had Student 11 leave so she could listen to Student 7 without interruption.

30. Student 7 told her there had been an incident when Respondent had placed his hand on her back. Student 7 also reported that Respondent had acted similarly towards Student 8 and had kissed Student 1 on the forehead. Student 7 stated that Respondent did not act that way when Ms. Fields was in the class.

31. Though Ms. Fields acknowledged Respondent was a little “odd,” she tried to stay neutral during the conversation. Ms. Fields listened to Student 7’s concerns and asked Student 7 questions so that Student 7 felt comfortable in fully expressing her concerns. At hearing, Ms. Fields emphatically denied ever telling Student 7 she saw Respondent touching the female students in class or that she felt uncomfortable around Respondent.

32. When the lunch period was over, Ms. Fields waited for lunch to finish and then went to Principal Perez to share what Student 7 had told her.

33. Later that evening, Student 7 reported to her mother that she had been uncomfortable in the STEM class for the past week. Student 7 stated that Respondent had been standing too close to her, would stare at her, massage her shoulder and touch her middle back. She also told her mother that there had been an incident in crochet club where Respondent stared at her for an extended period of time, asking if she needed additional help when she did not. Student 7 also told her that Student 2 had told Student 7 that Respondent kissed a student on her forehead. Student 7 shared that she spoke to Ms. Fields about her concerns that afternoon.

34. Student 7's mother called Student 7's father later that evening to discuss what Student 7 had told her. Afterwards, Student 7's mother, who recently began cohabitating with Student 2's father, spoke to Student 2 and Student 2's father about Respondent. During the conversation, Student 2 told her she had also had similar experiences to Student 7's and she had seen Respondent kiss a student on the forehead. Student 2 told Student 7 that she had "mentioned" her concerns to her own mother and it was being addressed by the school.

Saturday, February 12, 2022

35. On February 12, 2022, Student 7's parents submitted a formal complaint of sexual harassment to the District.

36. Dr. Evans responded on either Sunday or Monday informing them that Respondent would not be returning to Shively and another staff member would take over the class.

Tuesday, February 15, 2022

37. On February 15, 2022, the District placed Respondent on administrative leave.

38. Later that day, Student 8, accompanied by Student 9, went to report her concerns about Respondent to Ms. Guerra. Student 8 reported Respondent, in class, would place his hands on her waist to move her and that she was not comfortable with his behavior. Ms. Guerra again affirmed Student 8 by telling her she did the right thing by reporting, stated she would be sharing the information with administration but asked that they keep the information confidential.

Title IX Investigation

39. Title IX is a federal civil rights law that ensures that male and female students and employees in educational settings are treated equally and fairly. Title IX investigations are conducted when there has been an allegation or complaint of gender-based harm including sexual harassment. The investigations must be conducted by a neutral and objective investigator who oversees the investigation. After the investigator gathers the evidence, parties are given an opportunity to review and respond to all the evidence directly related to the allegations. The investigator will consider the parties' written response to the evidence and complete the investigative report. The investigator's findings are then submitted to the Title IX decision-maker who issues a written determination regarding responsibility. (34 C.F.R. § 106.45.)

40. The District retained attorney, Alexandra (Alex) Worthy, to conduct a Title IX investigation.

41. Investigator Worthy is a Senior Legal Services Attorney for the California School Board Association (CSBA). Before working for CSBA, she was in private practice, representing school districts and community colleges. According to Investigator Worthy, she has attended approximately nine trainings on conducting investigations, read the Association of Title IX Administrators (ATIXA) handbook, provided approximately 10 trainings on conducting investigations, and took part in creating a Title IX handbook for community colleges.

42. Some of the trainings that Investigator Worthy attended provided information related to conducting investigatory interviews of minors. The information was largely related to ensuring the comfort of child witnesses during an interview. Investigator Worthy did not receive any training on any protocols geared toward eliciting credible statements from child witnesses. Investigator Worthy estimates she has conducted approximately four dozen investigations as an attorney, 40 percent of those investigations involved interviewing minors.

43. After reviewing the complaint and the District's documents, Investigator Worthy interviewed Student 7, Student 2, Student 3e, Student 8, Student 9 (collectively, Student Complainants) and Student 10. Investigator Worthy also identified two other students who she felt would have information relevant to the investigation, Student 1 and Student 4, but their parents refused to provide her with consent to interview them. All the students she interviewed had at least one parent or legal guardian present during their interviews.

44. Investigator Worthy's investigation began with an interview of Student 7 and her parents at the District office on March 28, 2022. During the interview, Student 7 made several disclosures. According to Student 7, Respondent "was really nice" when she first met him in the fall but he started doing little things that made her feel

uncomfortable. (Exh. Z, p. B465.) Student 7 claimed Respondent would sit in front of her every single day in crochet club and stare at her and her friends. He also made unsolicited offers to help her, touched her and massaged her, and hovered over her. Student 7 stated Respondent was assigned to STEM club after school and so she did not know why he visited crochet club. Student 7 further stated he exhibited similar behavior towards other students in crochet club. Student 7 also stated her stepsister, Student 2, told her that, when she asked Respondent for help, he came over and "hovered over her." (Exh. Z, p. B466.) Student 7 stated she didn't remember when it started but estimated that it was "[p]robably a week of him doing that then that Friday before February 12 [she] told her parents." (Exh. Z, p. B465.) Student 7 also claimed that before that week, she noticed Respondent would "hover" over Student 9 and Student 7 described some of the things she had been told by Student 8 and Student 2. According to Student 7, Respondent treated the female students in class differently than the male students, giving the example of Respondent's use of hand sanitizer, stating he would squirt it into "the man's hands" but would "touch the girl's hands and put sanitizer into the girl's hands." (Exh. Z, B467.)

45. Investigator Worthy interviewed Student 2 by Zoom on April 6, 2022. During her interview, Student 2 claimed that Respondent "started getting behind her in a weird way when she was sitting down," rubbed her shoulders for about 30 seconds at a time during class, and stared at her. (Exh. Z, p. B485.) Investigator Worthy then prompted Student 2 to tell her more about "the time that [Respondent] leaned in close to [her] and [she] could feel his breath on [her] back?" (*Ibid.*) Student 2 stated that that was behavior that had started more recently. She was sitting down and he was hovering with her with his hands on her shoulders. Student 2 claimed she would see Respondent "hover" over Student 4 and get close to her. (Exh. Z, p. B486.) Student

2 also reported Respondent would treat the girls differently than the boys, paying more attention to the girls and giving them more PBIS points.

46. Investigator Worthy interviewed Student 8 by FaceTime on April 7, 2022. During her interview, Student 8 claimed that, starting around September, Respondent would put his arm around her shoulders and place his hand on top of her hand for a minute at a time. She also claimed that Respondent was generally more touchy with female students and never “hovered” over the male students. (Exh. Z, p. B489.) Student 8 claimed that when he wanted female students to get out of the way, Respondent would grab their waists and move them aside and that he had done that to her about three to four times. Student 8 reported that she heard from Student 7 that Respondent had kissed a student. Since January or February, Student 8 tried to stay away from Respondent as much as possible.

47. Investigator Worthy interviewed Student 10 by Zoom on April 11, 2022. During Student 10’s interview, she denied ever feeling uncomfortable in Respondent’s class. She stated Respondent had never touched her shoulders, back or hand and she had never seen him touch other students. Student 10 denied Respondent treated girls differently from the boys or that she had ever been asked by other girls to ask Respondent questions so they wouldn’t have to talk to him.

48. Investigator Worthy interviewed Student 3 by phone on April 18, 2022. When asked what made Student 3 uncomfortable in Respondent’s class, Student 3 stated Respondent would just stare at her, both inside and outside of class. She claimed it started happening in the second class and that he would stare at all the girls, and only the girls in the classroom. Student 3 denied Respondent had ever massaged her shoulders or back and stated he “[j]ust tapped [the students on the shoulder] to get your attention.” (Exh. Z, p. B491.) When asked if she felt Respondent

had hovered over her while she was sitting at her desk, she stated he “hovered over you. Never touched while hovering.” (Exh. Z, p, B492.) Student 3 also stated Respondent would favor the female students in class giving them 25 points when he would give the boys 10 points.

49. Investigator Worthy interviewed Student 9 by Zoom on April 19, 2022. During the interview, Student 9 acknowledged feeling uncomfortable in Respondent’s class. When asked if Respondent had ever touched her shoulders or back in class, she stated that “he did once. Somewhere in the middle. Placed his hand.” (Exh. Z, p. B493.) She also stated that he had touched her hand when she needed help by placing his hand on top of hers while tracing something. She estimated that this occurred about three times. When asked if she ever felt Respondent “has hovered over [her] while [she] was sitting at [her] desk,” Student 9 responded, “Kind of, yeah.” (Exh. Z, p. B494.) When asked if she had ever asked other students to ask questions for her so she doesn’t have to interact with Respondent, Student 9 stated she asks Student 10 to ask for her.

50. In addition to the students, Investigator Worthy interviewed Ms. Fields on April 6, 2022. (The notes of Investigator Worthy’s interviews do not appear to be consistent with the summary of the interview contained in the evidence report and investigative report. Therefore, only the portions that were consistent are summarized.) During the interview, Ms. Fields stated that Student 7 had walked up to her with another student on either February 10 or 11, and reported that “this is the first time she felt safe.” (Exh. Z, p. B497.) Student 7 stated that she was always uncomfortable because Respondent was always touching her, rubbing her back. Student 7 also reported that Respondent also did the same thing to Student 8 and that, on a different occasion, Respondent kissed Student 1 on the forehead. (*Ibid.*) Ms. Fields reported the

complaint to Principal Perez "right after." (*Ibid.*) Ms. Fields told Investigator Worthy she was "blindsided" by Student 7's report. She had never noticed any improper behavior between Respondent and the students. Ms. Fields did note, however, that Respondent has a tendency to stand too close and she stated she believed it was because he does not have "spacial [*sic*] awareness." (*Ibid.*)

51. At hearing, Ms. Fields stated she shared with Investigator Worthy that Respondent had "the same personality" as a lot of "musicians, engineers" she grew up with in that Respondent simply did not have the same concept of personal space and did not believe Respondent intended his behavior to be "intrusive." Ms. Fields stressed that she did not believe when he was standing close to others, Respondent was motivated by any improper motive; instead, she believed he simply lacked a sense of personal space.

52. Investigator Worthy prepared an evidence report, consisting of the documents she obtained and summaries of her interviews, but made no findings. Consistent with the regulations governing Title IX investigations, the evidence report was forwarded to Student 7's parents and Respondent. (At the time of the evidence packet was prepared, Investigator Worthy had not interviewed Ms. Shay because she was on leave.)

53. Student 7's parents sent back their response to the report on April 27, 2022. In their response, Student 7's parents asked Investigator Worthy to ask Respondent some additional questions and thanked her "again for advocating for our daughter, we truly appreciate all your attentiveness to this issue and want to thank you from the bottom of our hearts for all your efforts to support us during this time." (Exh. 1, p. A92.)

54. Respondent, through his counsel, also submitted a response. In addition to noting the discrepancies in Student 7's statements, Respondent also pointed out that all the witnesses Investigator Worthy interviewed were friends who were connected either through Student 2 or Student 7. Respondent asserted that these relationships would explain the similarity in their allegations and requested Investigator Worthy interview "as many students as possible who were in the same classes as the accusers" and obtain and review District documents which would show Student 7's allegations could not be true. (Exh. F, p. B64.)

55. Investigator Worthy sent the questions posed by Student 7's parents to Respondent, obtained additional District documents, and interviewed Ms. Shay by phone on April 28, 2022, but did not interview any other students.

56. During the April 28, 2022 phone interview, Ms. Shay stated she has worked with Respondent for over 10 years. She has coached with him and together they have an after-school program. Ms. Shay stated she had never seen Respondent act inappropriately and the students look up to him. Ms. Shay expressed she is "protective" of the students and if she had seen anything, she would have reported it. Ms. Shay also stated that STEM lab is so busy, there would be no time to stare at students.

57. On May 2, 2022, Investigator Worthy issued the investigative report. Investigator Worthy framed the issues she investigated as follows: (1) "[Respondent] touched female students in his classes;" (2) "[Respondent] massaged and/or rubbed the shoulders and backs of female students;" (3) "[Respondent] kissed female students;" (4) "[Respondent] violated the personal space of female students;" and (5) "[Respondent] stared at female students." Investigator Worthy concluded the

allegations that Respondent kissed female students and stared at female students were not substantiated. She found the remaining three issues were substantiated.

58. On May 12, 2022, Respondent, through counsel, sent a detailed response to the investigative report to Dr. Evans, the District's Title IX decision maker. In addition to providing a detailed table regarding the evidence that contradicted many of Student 7's allegations, Respondent asserted "[t]he only students Investigator [Worthy] interviewed . . . were a small clique of interrelated individuals handpicked by [either Student 7 or Student 2] which resulted in skewed and biased information." (Exh. G, p. B66.)

59. Following receipt of Respondent's letter, Dr. Evans directed Investigator Worthy to conduct interviews of Principal Perez and Dina Bartling.

60. Investigator Worthy interviewed Dina Bartling by phone on May 25, 2022. During Ms. Bartling's interview, Ms. Bartling stated she has known Respondent since he started at Shively and has observed him interacting with and supervising students during lunch breaks, recess and on the patio. Ms. Bartling had never seen Respondent engage in any concerning conduct with students on those occasions. She also denied ever seeing Respondent touch students, kiss students, or stare at students. Ms. Bartling did acknowledge Respondent does stand too close to her when talking but stated she would step backward or remind him to maintain social distancing. Ms. Bartling expressed that she believed his conduct was exacerbated during the pandemic. Ms. Bartling noted Respondent did this to everyone and stated she believed it was a product of Respondent being unaware of acceptable social distance standards during face-to-face conversations.

61. Investigator Worthy interviewed Principal Perez on May 26, 2022. During Principal Perez's interview, Principal Perez expressed that she had never seen Respondent act inappropriately with students. She had seen Respondent shake students' hands but had been the way Shively teachers greeted their students when they arrived at their classrooms before COVID. Principal Perez also stated she had not seen Respondent stand too close to students but felt Respondent sometimes stood too close to her and heard from other staff members they had similar experiences. Principal Perez explained that Respondent's proximity made her feel uncomfortable, and that she found it "creepy" but noted Respondent had never touched her during these interactions. (Exh. Z, p. B500.) Principal Perez stated she believes "Respondent simply does not have awareness of acceptance of social distancing." (*Ibid.*)

62. During the interview, Investigator Worthy also asked if the student witnesses were friends. Principal Perez noted that even though Student 7 and Student 2 are "stepsisters" they did not interact with each other on campus. (Exh. Z, p. B488.) Principal Perez denied Student 7 or Student 10 were close with Student 9 and that Student 2, Student 1 and Student 3 were all still friends.

63. On August 3, 2022, Dr. Evans issued a Title IX Final Written Determination and Decision Regarding Responsibility (Title IX Report). Though Dr. Evans acknowledged some issues related to the allegations by the Student Complainants, Dr. Evans found none of the issues to be material and issued findings consistent with Investigator Worthy's findings in her Investigative Report.

Student Testimony

STUDENTS IN 6TH GRADE STEM

64. Three students from Student 7, Student 8 and Student 9's 6th Grade STEM testified at hearing:

Student 12 recalled everyone wore a mask during STEM lab. According to Student 12, she sat at the same table with Student 8, Student 9 and Student 10. Of the group, Student 8 was the one who usually asked Respondent questions. Student 10 did not ask questions. Student 12 described one incident when Respondent touched the hands of one of the students to help them with one of the projects but did not appear to consider that to be unusual. She also noticed that, in class, Respondent would talk to the boys more because they participated more.

Student 10's testimony was extremely confused. She had difficulty answering simple questions and often had to be prompted to answer by her grandmother who was present during her testimony. Student 10 recalled sitting with Student 8 and Student 9, who she stated were her friends, in 6th Grade STEM. Student 10 described Respondent as standing extremely close to her when he spoke and stated he "only talks to girls and not boys." When asked about Respondent's behavior, Student 10 stated Respondent would act "weird" by "talking strange" to her. When asked what Respondent said that was strange, Student 10 stated Respondent would ask her how her day was. Student 10 also had a difficult time separating what she personally saw from what she heard about. For example, she stated she saw Respondent "touch one girl, that's it" but then later clarified she only heard about Respondent touching a girl on the shoulder. Student 10 initially denied asking questions in Respondent's class on behalf of other student but then stated she asked a

question for Student 8 “just one time” for reasons that were unknown to her. Student 10 did not initially recall having a Zoom meeting with Investigator Worthy. When asked if she recalled having a meeting with “someone” who asked her questions about Respondent, she stated she “thought so” and claimed no one had been with her in the meeting. When asked if her grandmother had been present, she appeared not to understand the question and only answered after she was prompted to say yes.

Student 13 was also in Respondent’s 6th Grade STEM but did not sit with Student 7 or any of the other Student Complainants. Student 13 did not see Respondent touching anyone shoulders, rubbing students backs or putting hand his hand on top of another student’s hand. Student 13 did not receive PBIS points from Respondent and did not know if any of her classmates received PBIS points from Respondent. Students who received PBIS points could check their points through a website. Student 13 was also a member of crochet club. Student 13 occasionally saw Student 7 at crochet club but did not recall ever seeing Respondent there, noting that would be unlikely as he coached STEM club during the same period.

STUDENTS IN 7TH GRADE STEM

65. Student 5 and Student 6, two students from Student 1, Student 2 and Student 3’s 7th Grade STEM testified. Both students described Respondent as being “really nice.” They did not see Respondent treat the boys differently than the girls or act in an inappropriate manner by massaging a student’s shoulders. They both indicated Respondent wore a mask in 7th Grade STEM during the 2021-2022 school year.

STUDENT COMPLAINANTS

Student 7

66. Student 7 was in Respondent's 6th Grade STEM in the 2021-2022 school year. At hearing, Student 7 testified she sat at a table with two other students, whose names she did not remember. During STEM, Student 8, Student 9 and Student 10 sat together. She did not remember where Student 12 sat during STEM.

67. According to Student 7, the class was "at first okay" but after Christmas, she started seeing things she didn't like. Respondent would go behind her seat, was very close all the time, asking her if she needed help, touched her shoulders, moved her to see her work, and was always hovering. Student 7 testified Respondent would stand close with most of the students. Respondent rarely gave PBIS points in his class.

68. According to Student 7, after December, she would go to crochet club and she would see Respondent talking to the crochet teacher, Ms. Bartling, a couple of times during the week.

69. Student 7 spoke with Student 8 who also stated Respondent would touch her back. Student 7 first reported her concerns about Respondent's behavior to Ms. Fields. "Probably two days after," she testified she talked to Ms. Guerra.

Student 2

70. Student 2 was in Respondent's 7th Grade STEM in the 2021-2022 school year. At hearing, Student 2 testified she, Student 1, Student 3 spoke about what had happened after the January 31, 2022 incident. Student 2 later told Student 7 about the incident. She denies ever telling Student 7 that Respondent has kissed Student 1 and does not consider what Respondent did that day to be kissing.

71. Student 2 asserted she had talked to Ms. Guerra about Respondent on at least two occasions. She reported to her that she was uncomfortable in his class, that Respondent would put his hands on her shoulders and massage them. Student 2 also testified Respondent would also come up behind her, and lean forward, putting his hand or hands on her shoulders. She also stated she knew he was close because she could feel him breathing close to her face. Student 2 denied ever speaking about Respondent with Student 4 and stated she “never” told Ms. Guerra Student 4 was uncomfortable with Respondent.

Student 9

72. Student 9 was in Respondent’s 6th Grade STEM in the 2021-2022 school year. Student 9 testified that in 6th Grade STEM she sat at a table with Student 8, Student 12 and Student 10. Student 7 sat at a different table behind her. According to Student 9, she spoke to Ms. Guerra on two occasions. During the first meeting, she told Ms. Guerra about how Respondent would stand by the tables and how he would make her feel uncomfortable by the way he would talk to her and help her draw things.

73. According to Student 9, there was one occasion when Respondent complimented her freckles, nails and braids. Student 9 “didn’t think too much about it” but after talking about it with Student 8, it made her uncomfortable. Student 9 told Ms. Guerra about the compliment during her second meeting.

74. Student 9 also stated on one occasion, she was walking to use the glue gun, Respondent grabbed her shoulders and moved her aside. According to Student 9, Ms. Fields had been in the classroom at the time that incident occurred, but no one had seen it happen and she never told anyone about it.

75. Student 9 claimed that Respondent would always be near their table, touching it, and not paying attention to the boys who would be running around. Student 9 explained that she decided to report Respondent after Student 8 stated she was going to Ms. Guerra to report him and recommended Student 9 also report him.

Student 8

76. At hearing, Student 8 testified that in 6th Grade STEM, she sat at a table with Student 12, Student 9 and Student 10. Student 7 sat at a different table behind her. According to Student 8, Respondent would be either moving around in class, checking on students' progress or standing in the back of the class near the doors. When he came to their table, she, Student 10 or Student 9 would ask him questions. According to Student 8, Respondent would get "really close and touchy," putting his arm around her shoulder, her mid-back and lower back, and sometimes put his hand on top of hers.

77. There was also an occasion when Respondent grabbed her waist. According to Student 8, she did not mention it during the deposition because it only happened on one occasion and she thought it might have been an accident.

78. After Student 7 told Student 9 and Student 8 about how Respondent kissed a student, Student 9 and Student 8 started talking about how uncomfortable Respondent made them. Student 8 decided to report Respondent after Student 7 and Student 9 encouraged her to report it. According to Student 8, she ultimately had three meetings with Ms. Guerra.

Student 3

79. Student 3 was in 7th Grade lab with Student 1 and Student 2. According to Student 3, Respondent would either be sitting at his desk or walking to see if anyone needed help while the students were working on windmills or robots.

80. According to Student 3, the reason she felt uncomfortable was because Respondent was always looking at the girls and never at the boys. During the hearing, Student 3, for the first time, alleged Respondent would always be looking at the girl's restroom. Student 3 did not notice Respondent engaging in any other inappropriate behavior until after the January 31, 2022 incident.

81. On the day of the January 31, 2022 incident, Student 1 had been picking up something and hit her forehead on a table. Student 3, who had been in class that day, "only saw a glimpse of it" but saw Respondent had kissed his hand and put it on her forehead, which Student 3 thought was weird. Student 3 originally testified she did not remember asking Student 1 about it but then later testified she talked about how "it was weird." Student 2 recommend she report it to Ms. Guerra.

82. After the incident, Student 3 noticed how Respondent would "hover" and believes she reported that to Ms. Guerra. She did not tell Investigator Worthy Respondent touched her, and does not remember telling Investigator Worthy Respondent had touched anyone else.

Testimony Investigator Worthy

83. At hearing, Investigator Worthy testified that when she conducts an interview, she prepares a series of questions before the interview. During the interview,

she would make notes of responses under the questions from which she creates a summary.

84. During the Shively Investigation, Investigator Worthy did not recall how she worded her questions when she interviewed the students but acknowledged she may have simply asked the questions as she wrote them.

Respondent's Testimony

85. When students returned to in person learning in the 2021-2022 school year, Shively was operating under COVID protocols. Respondents and students all wore face masks during class and Respondent would spray hand sanitizer into the student's hands as they entered his classroom. On a few occasions, students would move their hands to avoid the sanitizer. He would then hold their hand still to spray the sanitizer. Respondent soon changed the system and assigned the job to another student.

86. Respondent explained that there was not a lot of lecturing in STEM lab. Their first project involved building with cardboard. Students in the 6th Grade STEM built cardboard cars and the 7th Grade STEM built cardboard windmills. Respondent acknowledged that he would occasionally touch the hands of students when he assisted them in using glue guns or to help students use a compass to draw circles. According to Respondent, he initially directed students to use the glue guns independently but after several students were sent to the office with blisters, Principal Perez instructed him to maintain control of the glue guns.

87. Because of the nature of the class, Respondent would be walking around to the student tables 75 percent of the time. When students had questions, Respondent would typically go to their desks. Respondent acknowledged that the

masks would sometimes make it difficult for him to hear what the students were saying, and he would lean in toward them to try to hear them. Respondent admitted he would touch the student tables or put his hand on the back of the chairs but denied ever placing two hands on the chair, pointing out that the chairs and tables in his classroom were higher than the regular student desks and chairs doing so would have been extremely awkward. Respondent denied ever touching or massaging students on their shoulders and backs or grabbing them. Respondent did recall one occasion when the class was about to leave the room, the students were getting rambunctious, and he was having difficulty getting through, he did move a student to the side using both his hands. He did not know who the student was but believes, based on Student 8's hearing testimony, it may have been her.

88. Respondent denied he treated the female students in his classroom differently than the male students. Respondent denied he gave more PBIS points to female students than male students, noting that he rarely used PBIS points in STEM lab.

89. The concept of Capturing Kids Hearts is a teaching model Shively follows. Under that approach, the focus is on building positive relationships with students before introducing any academics. Respondent maintained he tried to implement that approach in his teaching. Respondent would try to engage with the students and compliment them. Student 1 was a student with an outgoing personality. He would often joke with her and he felt he had a good rapport with her.

90. Respondent described the January 31, 2022, incident. At the end of class that day, students were gathering their things to leave when he heard Student 1 bemoaning the fact she had hit her head. To Respondent, her behavior was "over the top" and she seemed to Respondent to be play-acting, so he touched her forehead

with his three fingers and made a kissing sound. He was wearing a mask and did not kiss his hand. It was obvious it made her uncomfortable and he regretted his actions immediately. Looking back, he should have just sent Student 1 to the office to get checked.

91. Respondent did not report the incident to District administration, thinking it would "blow over." However, a few days later, he was called in for a conference that with Principal Perez and Dr. Evans. According to Respondent, he did not request union representation because Dr. Evans assured him, he would not need it. During the conference, he was told something to the effect of, don't touch students in the future and he was given the conference memo later that day.

92. After the conference, Respondent became very careful around students, keeping his hands in his pockets. As he described it, Respondent became "very paranoid" about getting close to girls especially.

93. He had never previously been spoken to about standing too close to others. When he found out that there were staff members who felt that way, Respondent was shocked. Respondent maintained that, if this issue had been brought to his attention beforehand, he would have made sure he did not stand too close to his colleagues or students.

Character Witnesses

94. At hearing, several character witnesses testified on Respondent's behalf including current and former Shively staff.

Kim Tran has been a math teacher for seventh and eighth grade students at Shively for the past 26 years. She has worked with Respondent since he started

there. Ms. Tran's experience of Respondent is that he is a knowledgeable, helpful and dedicated teacher. Ms. Tran's son was a member of Shively's Science Olympiad team. Her son found his experience on the team to be a "highlight." None of Ms. Tran's students have ever expressed to her that they did not like Respondent's STEM lab and she has never observed Respondent being inappropriate.

Ms. Shay has been a fifth-grade teacher for the District for 17 years, is a Science Olympiad coach, and is active in Shively's after school clubs including STEM Club. Ms. Shay supervises STEM club with Respondent. As Respondent has the keys to the classroom, Respondent needs to open the classroom for STEM club. She has never had to go to crochet club to get Respondent to begin STEM lab. Despite their association, Ms. Shay maintained she would not have hesitated to report it if she became aware Respondent touched a student in an inappropriate manner. In her experience, her students were generally happy to go to STEM lab. Based on her experience with Respondent, she trusts him and has never seen him treat a child inappropriately. Ms. Shay expressed concern that she would face retaliation from District administration for testifying on Respondent's behalf.

Mary Lou Rivas Fimbras is a former fifth grade teacher and worked for the District for approximately 40 years, until she retired in 2022. When she was working as a teacher, Ms. Fimbras shared some students with Respondent. Ms. Fimbras would teach students Language Arts in the morning and would send the students to Respondent to teach Math and Science in the afternoon. Respondent would, at the same time, send his morning students to Ms. Fimbras for Language Arts. As a colleague, Ms. Fimbras thought Respondent was professional. When Respondent became the STEM lab teacher, Ms. Fimbras would take her students to STEM lab. Her students always seemed excited and happy about going to Respondent's STEM lab.

Based on her observations, Respondent spoke to children in a kind way and never exhibited any behaviors that concerned her.

Lance Wilder is a long-time friend, who wrote a Declaration for Respondent and testified at hearing. Mr. Wilder believes Respondent is a kind, honest, honorable, and caring person who finds joy in being a teacher. Mr. Wilder has never seen or heard Respondent speak or act in an unkind manner towards anyone.

95. In addition, Respondent also submitted eight Declarations from friends and family who supported Respondent, talked of his caring nature, and trusted him with their children.

Expert Testimony

96. Respondent's expert, Bradley McAuliff, Ph.D., appeared by video conference. Professor McAuliff is a professor of psychology at California State University, Northridge, and has done extensive research and training in the area of child suggestibility and forensic interviewing. (Exh. P.) Professor McAuliff has testified in over 140 matters, each time on behalf of an accused party.

97. In advance of his testimony at hearing, Professor McAuliff reviewed Investigator Worthy's notes and final report, Superintendent Evans' Title IX determination and email forwarded by Superintendent Evans regarding children's initial disclosures to Ms. Guerra, and Student 6's declaration.

98. Professor McAuliff identified how "suggestibility," "cross-contamination," "stereotype induction" and "confirmation bias" may have played a part in the complaints against Respondent and the District's subsequent investigation.

99. Stereotype induction occurs when an idea is introduced about an individual. The resulting stereotype influences the perceptions of how the individual interprets both retrospective and prospective events. For example, once an idea is introduced that a teacher is “creepy,” that colors a student witness’s perceptions of both past events as well as the student’s subsequent interactions with the teacher. Specifically, past innocuous events are filtered through a negative stereotype and places the student on alert as to the future incidents.

100. Professor McAuliff suggested that this may have occurred after the January 31, 2022 incident involving Student 1. Suddenly, interactions with Respondent were being filtered through a suspicious light. After the incident, students spoke with each other about it, resulting in cross-contamination with students adopting reported experiences of others as their own. This tendency is particularly prevalent in middle school. Peer groups are especially important to adolescent females. This can have a dramatic effect of both a child’s openness to another person’s interpretation of events and willingness to misrepresent the truth.

101. According to Dr. McAuliff, though spontaneous child disclosures are the most reliable, they are rare. Dr. McAuliff noted the fact that the disclosures are not spontaneous, however, does not mean that the complaints were untrue. It simply is more imperative that the investigation that the allegations are properly verified. In this matter, students went forward with reporting Respondent to District administrators and their parents after they discussed Respondent with each other. These reports were, therefore, not spontaneous.

102. Professor McAuliff identified a few issues related to the interview process. First, there was only one investigator conducting all the interviews. If an investigator gets the sense something happened from first interview, there is a tendency for the

investigator's focus to become increasingly narrower, leading to questions that become more leading as the interviews progress. The information then is coming from the investigator rather than the children. Dr. McAuliff opined that this is what appeared to be taking place during Investigator Worthy's interviews. Investigator Worthy began her interviews by identifying Respondent and his behavior as a person of interest by directly asking students about Respondent and their perceptions about him instead of asking more open-ended questions. With each subsequent interview, Investigator Worthy's questions became increasingly more focused and more leading. Leading questions are questions that suggest the answer in the question. Children are more open to suggestion and will, when asked a leading question, have a tendency to agree to the suggested answer.

103. Another other issue Dr. McAuliff identified was that the students were being interviewed in the presence of their parents. According to Dr. McAuliff, this becomes a problem because their presence makes it difficult for a child to change their story or recant altogether either because they do not want to get in trouble with the parent or to get the parent who vouched for them in trouble.

104. Finally, an investigation can be influenced by confirmation bias. Individuals tend to seek information that supports their pre-existing beliefs and ignore information that might contradict or counter their beliefs. In terms of interviewer bias, this is reflected in the narrowing of the focus of questions based on what was heard by other witnesses and disregarding information that does not confirm their beliefs, such as by failing to probe inconsistencies.

105. According to Professor McAuliff, though Investigator Worthy appears to be well intentioned, she does not appear to understand how, by asking questions in the way she has, she may be distorting the truth.

Analysis

CREDIBILITY OF STUDENT COMPLAINANTS

106. The Commission considered the factors under Evidence Code section 780 in assessing the credibility of witness testimony. Those factors are: (a) the witness's demeanor while testifying and the manner in which the witness testifies; (b) the character of the witness's testimony; (c) the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which the witness testifies; (d) the extent of the witness's opportunity to perceive any matter about which the witness testifies; (e) the witness's character for honesty or veracity or their opposites; (f) the existence or nonexistence of a bias, interest, or other motive; (g) a statement previously made by the witness that is consistent with the witness's testimony at the hearing; (h) a statement made by the witness that is inconsistent with any part of the witness's testimony at the hearing; (i) the existence or nonexistence of any fact testified to by the witness; (j) the witness's attitude toward the action in which the witness testifies or toward the giving of testimony; and (k) the witness's admission of untruthfulness. (Evid. Code, §780, subds. (a)-(k).)

107. Video depositions of each of the students took place before the hearing. Student 2 was deposed on April 26, 2023; Student 3, Student 9, and Student 8 were deposed on April 28, 2023; and Student 7 was deposed on May 4, 2023. The Student Complainants also testified at the hearing. There were several conflicts between the witnesses about what they said, what they were told, and when and if these conversations occurred. For example, Student 2 testified that she saw Respondent rub Student 1's forehead after she fell which is what she told Student 7. Student 7, however, testified that Student 2 told her that Respondent had kissed Student 1's forehead. Student 9 and Student 8 testified that they had been together when Student

7 had told them Student 2 had told her Respondent had kissed a student. Student 7, however, testified that both Student 9 and Student 8 had been aware of the incident involving Student 1, she did not tell them what Student 2 had told her, and that she had spoken with them separately. When asked about the inconsistencies, the Student Complainants were unable to provide any credible explanation for the inconsistencies.

108. The testimony of the students at hearing often conflicted with either their deposition testimony or the prior statements they made as summarized by Ms. Guerra and Investigator Worthy. There were conflicts regarding what troubling behavior Respondent exhibited to each of the students, when Respondent exhibited these behaviors, what was said during their discussions with each other regarding Respondent's behaviors, and where they sat in Respondent's STEM lab. For example, during 6th Grade STEM, Student 7 testified during her deposition that she sat at a table with Student 12 and another student but at the hearing, Student 7 testified she did not know where Student 12 sat. Student 3 testified at the deposition that she did not think Respondent did anything regarding the PBIS points that she did not think he should be doing. At the hearing, however, Student 3 claimed Respondent awarded more PBIS points to female students than to male students.

109. The testimony of students was not corroborated by any other witness or documents. For example, during her deposition, Student 7 stated Student 13 witnessed and commented on the fact Respondent insisted on helping her after Student 7 told him she did not need help. Student 13, who testified at hearing, however, stated Respondent was "nice." Student 13 testified Student 7 was behind her in class and she could not see what Student 7 was doing and did not remember ever seeing Student 7 with Respondent during after-school break. In addition, is unclear how Student 13 could have seen the behavior as Student 7 sat behind her in class.

Student 9 and Student 8 testified that Student 7 had told them that Ms. Fields told her that she had seen Respondent touching girls. At the hearing, Ms. Fields denied making any such statements. Student 9 told Investigator Worthy that she and Student 8 would ask Student 10 to ask Respondent questions for them. Student 12, however, one of the students that sat at their table, testified that Student 8 was the one who would ask most of the questions and that Student 10 did not ask Respondent any questions.

110. Finally, the testimony of the students was, at times, not probable. For example, Student 7 testified that Respondent stared at her in crochet class. The testimony from other students and staff clearly establish that Respondent did not go to crochet club and that he had his own after-school activity, STEM club, which he and Ms. Shay oversaw when crotchets club was taking place. Student 2's assertion that she could feel Respondent's breath is also not found credible. All the students who testified at the hearing stated Respondent always wore a mask during STEM lab. Under these circumstances, it is improbable that Student 2 could have "felt his breath" through Respondent's mask.

111. Applying the factors in Evidence Code section 780, the Commission found the student complainants were not credible.

INVESTIGATION INTO ALLEGATIONS

112. There were multiple failures by District administration and the Title IX investigator in investigating the student complaints against Respondent.

113. Ms. Guerra was the first District staff member to receive any complaints about Respondent. Ms. Guerra told each student they had done the right thing for reporting Respondent and recorded their statements. According to Ms. Guerra, she spent approximately 20 minutes with Student 2 and then Student 3 after receiving

their complaints and 40 minutes with Student 9 and Student 8. This is an insufficient amount of time to address complaints of this nature.

114. Without gathering any additional information, it is unclear that the behaviors the students were complaining of were a cause for genuine concern, an overreaction to innocuous behavior, or false reports. For example, some of the behaviors Student 2 reported were genuinely confusing. Student 2 told Ms. Guerra Respondent “rubbed her forehead” during STEM lab and she did not know why. Not only is this behavior highly unusual but it is also behavior that would likely have been noticed by others and verified. Student 2 also reported Respondent was so close she could feel his breath. As the school was operating under COVID protocols in the 2021-2022 school years, it is unclear how Student 2 could have felt Respondent’s breath if he was wearing a mask. If Respondent routinely taught class without a mask, this is information that could have been asked of the students and verified.

115. The Title IX investigation was clearly flawed. Investigator Worthy testified that she was aware of the issues related to “confirmation bias.” That is, children, in stressful situations such as being interviewed will simply confirm what the interviewer says. Investigator Worthy also acknowledged that to minimize confirmation bias, interviewers do not use leading questions. The evidence established, however, almost all Investigator Worthy’s questions were leading.

116. The notes of the student responses established that Investigator Worthy would routinely use the questions she wrote in her notes. Investigator Worthy’s notes reveal that she would often just repeat information she heard from others and ask students to tell her about that. For example, the questions she asked students included “Did you see [Respondent] get close to Student 4 L and rub her shoulders/back?” “Did you see [Respondent] get close to Student 3 C and invade her personal space?” “Have

you ever felt uncomfortable in [Respondent's] class?" "Has [Respondent ever touched your shoulders or back in class?" In other words, Investigator Worthy would consistently ask the student witnesses "leading questions." This process undermines the validity and accuracy of Investigator Worthy's findings.

117. The cursory nature of Investigator Worthy's investigation is illustrated, in part, by assumptions made regarding Ms. Shay's statement to support her finding Respondent massaged/or rubbed the shoulders and backs of female students. Investigator Worthy notes "Ms. Shay indicted that she is very busy in the STEM class assisting students in what she called 'controlled chaos'." (Exh. 1, A19.) She was a fifth-grade teacher and was not present in Respondent's STEM lab. Review of Ms. Shay's statement indicates she never stated to Investigator Worthy she was a STEM lab teacher. Ms. Shay supervised the afterschool STEM club with Respondent.

118. The District appears to have made little to no effort to test the veracity of the complaints. Specifically, Student 7 claimed Respondent "stared at her during crochet club. No effort appears to have been made to confirm this information until Respondent, through counsel, pointed out that this could not have happened because Respondent had never been in crochet club as he had another after school club he supervised with another teacher when the crochet club was taking place. Other allegations made by Student Complainants could have easily been verified by other evidence. Several of the Student Complainants claimed Respondent gave the female students in class more PBIS points than the male students. For students to use PBIS points at the student store, there must have been a system in place to track the points. According to at one student, PBIS points were tracked via a website. There is no evidence there was any effort made to obtain information about which students, if any, were given PBIS points from Respondent and no male students were ever contacted to

confirm that information. Student 7 also made allegations regarding Respondent's use of hand sanitizer, claiming Respondent would grab the hands of female students but just squirt the sanitizer on the hands of the male students. Though this type of information could have easily been confirmed by asking students in 6th Grade STEM what Respondent's COVID protocols were and how he implemented the protocols, that was not done.

119. Dr. Evans was not a credible witness. When questioned, she was often evasive, claiming either not to understand simple questions or providing nonresponsive answers, argumentative, and, on at least one occasion, untruthful. It was also clear from Dr. Evans' testimony at hearing that she was determined to sustain the allegations against Respondent and recommend his dismissal regardless of any evidence she received.

120. Dr. Evans finally acknowledged that the dates and times Student 7 alleged incidents to have occurred were "not correct" and that some of her allegations were demonstrably untrue but she insisted the allegations satisfied the "preponderance of the evidence" standard. According to Dr. Evans, the only evidence that could have potentially changed her mind would have been statements from other students who stated Student 7 had been lying or students who stated that they were watching Student 7 and did not see Respondent acting inappropriately towards her. When it was pointed out there were students who had sat at Student 7's table and could potentially provide that information, Dr. Evans claimed she did not direct Investigator Worthy's investigation.

121. The evidence, however, did establish Dr. Evans had directed the investigation when she specifically requested Investigator Worthy to interview Principal Perez and Ms. Bartling after she received the Investigative Report. Further,

when making the Final Determination as the District's Title IX Decision Maker, Dr. Evans explicitly determined "that interviewing additional staff and students would not yield a more accurate picture of [Respondent's] conduct because such other students and staff were not present for or witness (*sic*) the alleged encounters, and could not, therefore speak to whether [Respondent] engaged in the conduct alleged." (Exh. 2, p. 106-107.) In addition, even if she did not have the authority to have additional students interviewed as part of the Title IX investigation, Dr. Evans could have requested additional interviews of students be undertaken as part of the disciplinary process.

122. The Commission did not rely on Professor McAuliff's testimony to come to a determination regarding the credibility of the Student Complainants and the validity of the Title IX investigation. Professor McAuliff's testimony regarding suggestibility and cross-contamination provided potential explanations for why the students' initial reports regarding Respondent's conduct differed from their testimony during their depositions and at hearing and for why Student Complainants used similar language to describe Respondent's conduct. Professor McAuliff's testimony on confirmation bias, however, provided a potential explanation for why there was no logical follow-up to any of the inconsistencies in the statements of the students and why exculpatory statements were not considered.

LEGAL CONCLUSIONS

Jurisdiction

1. The Commission has jurisdiction to proceed in this matter under Education Code section 44944.

Burden and Standard of Proof

2. In this case, the District has the burden of proving the allegations set out in the Statement of Charges by a preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040.) Preponderance of the evidence means that "the evidence on [the District's] side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

Statutory Grounds for Dismissal

3. The grounds for the dismissal of a teacher in this state are enumerated in Education Code section 44932. In this case, the District relies on the grounds set forth Education Code section 44932, subdivision (a)(1) (immoral conduct), and Education Code section 44932 (a)(5) (evident unfitness for service).

4. "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 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. [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 (*Weiland*).) For instance, a teacher's falsification of attendance records to add names of three students to secure continued employment was deemed immoral and dishonest conduct based on this definition. (*Weiland*, *supra*, 179 Cal.App.2d at p. 812.)

5. Evident unfitness for service is established by conduct demonstrating that the teacher is "clearly not fit, not adapted or suitable 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 (*Woodland*)). "'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." (*Id.*)

6. As set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, a teacher's conduct cannot be abstractly characterized as "immoral," or "unprofessional," thus warranting discipline, "unless that conduct indicates that [respondent] is unfit to teach." (*Id.* at p. 229.) *Morrison, supra*, enumerated criteria for the trier of fact to analyze in determining whether a teacher is unfit to teach.

Disposition

7. It is the unanimous conclusion of the Commission that Respondent has not engaged in immoral conduct, within the meaning of Education Code section 44932, subdivision (a)(1).

8. It is the unanimous conclusion of the Commission that Respondent is not evidently unfit for service as a teacher, within the meaning of Education Code section 44932(a)(6).

9. Because the District did not establish that Respondent committed any of the alleged improper acts, consideration of the *Morrison* factors are not applicable here.

ORDER

The Accusation against Respondent Derek Lynn is hereby dismissed.
Respondent Derek shall not be dismissed from employment with the Valle Lindo School District.

IT IS SO ORDERED.

DATE: 01/24/2024


Ken Davis (Jan 24, 2024 16:03 PST)

KEN DAVIS

Commission Member

DATE: 01/25/2024


Lance Ebel (Jan 25, 2024 16:26 PST)

LANCE EBEL

Commission Member

DATE: 01/25/2024


Nana Chin (Jan 25, 2024 16:26 PST)

NANA CHIN

Administrative Law Judge

Office of Administrative Hearings