BEFORE THE FAIR DISMISSAL APPEALS BOARD OF THE STATE OF OREGON

In The Matter of the Appeal of BENJAMEN WICHSER, Appellant, v. BEAVERTON SCHOOL DISTRICT 48J, Respondent.	**Case No.:** FDA-19-02 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

INTRODUCTION

In 2019, Benjamen Wichser ("Appellant"), a well-regarded high school math teacher, was dismissed by the Beaverton School District ("the District") after he accidentally projected a highly inappropriate, sexually explicit picture from his personal cell phone to a classroom of students. The District had permitted teachers to use personal devices in the classroom yet had not provided training on wireless networking processes (hereafter described as "Wi-Fi" or "syncing"). Prior to his termination, Appellant had been using his personal Apple iPad Pro in the classroom to demonstrate math problems, using the school's wi-fi connection and his personal Apple ID, when his devices synced and, to his horror, the picture appeared on a large screen projected to the class. The picture had been taken a day earlier and been intended for his adult romantic partner in a consensual erotic exchange.

The District relied on three statutory grounds for dismissal under Oregon's Fair Dismissal Law: "neglect of duty;" "inadequate performance;" and "immorality." Appellant appealed his dismissal to the Fair Dismissal Appeals Board ("FDAB") and a hearing took place in July 2020. Appellant was represented by Margaret Olney of Bennett, Harman, Morris and Kaplan, LLP, and the District was represented by Michael Porter and Erin Burris of Miller, Nash, Graham and Dunn LLP. The hearing was conducted before a panel appointed from the FDAB, consisting of

Ronald Gallinat, Duane Johnson, and Robert Sconce, with Yael Livny of the Oregon Department of Justice acting as legal counsel to the panel.

As explained in more detail below, this panel finds the District has not proven sufficient facts to sustain the dismissal decision. First, even though the incident was highly inappropriate and likely damaging to several students, there is no evidence that Appellant acted intentionally to harm anyone, and the District did not establish the degree of fault or intentionality necessary to justify dismissal for "neglect of duty." Further, the District did not present facts to support a finding of "inadequate performance," which requires repeat behavior and an opportunity to correct. The problematic event in this case did not relate to Appellant's teaching performance. Finally, the panel concludes the District did not present sufficient evidence to support a finding of "immorality" under the current FDAB definition and interpretation of that standard, as Appellant was not shown to have acted excessively selfishly or with harmful intent.

In light of the lack of facts to support one or more of the cited statutory grounds for dismissal, the panel must grant this appeal and reverse the District's dismissal decision.

FINDINGS OF FACT

1. Appellant started teaching math at BHS in 1996 and taught a variety of math courses until his dismissal in April 10, 2019. Tr. 282:5-11, 282:16-283:10 (Appellant testimony). In the 2018-2019 school year, Appellant taught a lower-level math course primarily for freshman and sophomore students, namely Algebra, Geometry, and Statistics, during fifth period. Tr. 285:6-16 (Appellant testimony).

2. In his twenty-two years as a teacher, Appellant has taught all levels of high school math, and received excellent evaluations and no discipline. Tr. 282 (Appellant testimony). Appellant was known for being able to effectively teach AP students as well as struggling math students. He was also known for his professionalism, passion and commitment to teaching and the craft of teaching, his commitment to equity, and for being an outspoken advocate for students. Tr. 28, 318 (Appellant testimony); Tr. 364 (Heaton testimony); Ex. A-102 (containing strong and detailed letters of support from colleagues).

3. In April of 2019, Appellant was in an intimate relationship with another adult. Tr. 341:13-16 (Appellant testimony). Students were aware that Appellant was dating this individual. Tr. 129:23-130:11 (S.M. testimony); Tr. 204:23-205:7 (L.V. testimony).

4. On April 9, 2019, Appellant took a close-up photo of his erect penis using his personal cell phone, an iPhone, to send to his romantic partner, with that individual's consent, from within his text messaging application ("app"). Tr. 298:6-23 (Appellant testimony); *see also* Exs. D-13, D-14.

5. At some point earlier in time, Appellant had manually set his iPhone to sync his camera roll to his other Apple devices, including his personal iPad, meaning that photos taken on the iPhone would automatically sync to the iPad and be available on its camera roll. However, he did not think pictures taken from within his text messaging app were automatically on any camera roll. Tr. 325:10-326:3 (Appellant testimony); Tr. 45:6-10 (Furman testimony).

6. Appellant also used two District-issued iPads and one District-issued laptop to use for teaching, along with other District-provided technology in the classroom – including a projection system, speakers, and an Apple TV that could be used to project images over District Wi-Fi. Tr. 287:2-18, 289:4-291:10 (Appellant testimony).

7. However, Appellant had started using his personal iPad for school use, to enable him to work from home and to use at school during instruction. Tr. 291:11-21 (Appellant testimony). Appellant opted to use his personal iPad during class instruction instead of a District device because his personal iPad was more agile and fluid for "changing between documents, certainly for taking photos to be put up on the screen, which was [his] primary use." Tr. 292:15-292:21 (Appellant testimony). His personal iPad was an iPad Pro (with a keyboard), which permitted him to take a photo of a student's work and project it on a whiteboard for the student to explain their thinking. Tr. 288, 292; SM Test., Tr. 111 (Appellant testimony). At the time, he determined he could not do this easily with a laptop or District iPad or did not want to risk having to reimburse the District for equipment if something happened to it when he took it home. (*Id.*) Tr. 292.

8. Appellant also used his personal Apple ID to log onto multiple devices, which was "necessary to be able to have documents move fluidly between the devices. That is the whole point of having an Apple ID [–] that it allows photos to sync and it allows files to

sync in the most seamless way possible" – meaning, pictures across all devices would sync to any device Appellant had logged into with his Apple ID. Tr. 187:5-9 (Langford testimony); Tr. 294:9-17 (Appellant testimony).

9. Appellant also logged into his District iPad with his Apple ID, meaning that his personal photos would sync easily over Wi-Fi, although teachers do not need to enter a personal Apple ID for District devices to function for instructional purposes. Tr. 186:21-187:9, 190:18-21 (Langford testimony); *and see* Ex. D-13 at 2. However, most educators use their personal Apple ID to link with the Apple TV and to otherwise sync among devices. Tr. 1873 (Langford testimony); Tr. 294 (Appellant testimony). This is because the District did not provide staff with a work Apple iCloud account, nor did it require staff to establish a separate work-only account. Tr. 294 (Appellant testimony).

10. The District permits staff to use their own devices. Tr. 184 (Langford testimony). The District does not require any training or instruction specific to Apple IDs, Apple iCloud processes, or syncing / Wi-Fi processes including awareness of potential unintentional syncing. The District's Code of Professional Conduct for technology simply defines "unacceptable use" for technology as follows: "[u]nacceptable behavior or uses include, but are not limited to, those that are illegal, have no reasonable basis for improving the teaching or learning of the district curriculum or completion of District business, are offensive, harassing, or potentially harmful to others." Ex. D-20.

11. On April 10, one day after Appellant took the image of his penis to send to his romantic partner, Appellant took out his personal iPad during a math class to take pictures of students' work and project images from his camera roll onto a large whiteboard for students to view together. Tr. 111:21-112:1 (S.M. testimony); Tr. 299:20-300:8 (Appellant testimony).

12. Appellant began projecting the images of students' math work. At one point, when Appellant deleted the image of a student's math problem projected onto the whiteboard, the most recent photo on his camera roll popped up—which happened to be the image of his erect penis. The image was projected onto the whiteboard in front of the class. Tr. 112:2-18 (S.M. testimony); Tr. 300:8-11 (Appellant testimony).

13. Appellant initially did not recognize the photo. He was then shocked when he realized what it depicted. He quickly took the photo down, saying something like "that shouldn't be there" and then continued with class. Tr. 299-301 (Appellant testimony).

14. Students' memories vary as to how long the image was on the screen: anywhere from five seconds to two or three minutes. Tr. 112:8-9 (S.M. testimony); *and see* Ex. D-11.

15. It is undisputed that Appellant was horrified when he realized what was happening. It is undisputed he had zero intention of projecting this private image to anyone but his romantic partner – and certainly zero intention to project it to a class of high school students. Tr. 300:12-23 (Appellant testimony).

16. The mood in the room changed in an instant. Tr. 113:5-10 (S.M. testimony); Tr. 300:24-301:6 (Appellant testimony). The class fell silent. Tr. 300:24-301:6 (Appellant testimony). "[N]o one really said anything, just the entire atmosphere of the classroom changed from happy and doing homework to quiet and very uncomfortable." Tr. 113:5-10 (S.M. testimony). The feeling in the room was "really awkward and tense." Tr. 206:2-4 (L.V. testimony). Appellant "knew it was a significant event." Tr. 306:9-307:5 (Appellant testimony).

17. Senior student S.M. was "shocked and very uncomfortable" and "very upset" after seeing the image. Tr. 112:24-113:4 (S.M. testimony). She testified, "I couldn't keep my head up. I was looking down at my paper the rest of the time in the classroom." Tr. 112:24-113:4 (S.M. testimony). S.M. asked her classmates sitting nearby whether they had seen the image, too, and they had. Tr. 113:11-19 (S.M. testimony). "[W]e all asked each other what happened, why was that up there, what was it, why was it up there?" Tr. 113:11-16 (S.M. testimony). S.M. "sat for a few minutes trying to collect some sort of thoughts" and then "kind of just up and left," leaving her belongings behind. Tr. 113:20-114:1 (S.M. testimony). S.M. called her parents and also saw her counselor. Tr. 114:9-14 (S.M. testimony); Tr. 364:18-22 (Heaton testimony).

18. Appellant taught his next 7th period class without incident. Appellant planned on talking with the school administration about the incident at the end of the day. Tr. 304 (Appellant testimony).

19. Meanwhile, at least two other students reported the incident to a counselor. From class, junior N.H. text messaged Jodi Monroy, a BHS "graduation mentor" – staff who provides counseling and mentoring to students to improve the graduation rate – that Appellant had projected a picture of his penis to the class and she needed to leave class immediately. Tr. 138:7-14, 17-25 (Haywood testimony). Monroy was not on campus that day, so Monroy text messaged another counselor, David Haywood, saying, "Are you free right now? [N.H.] needs help … Apparently [Appellant] showed a dick pic and she's all kinds of awkward now." Tr. 139:6-17 (Haywood testimony), Ex. D-2.

20. Haywood went to Appellant's classroom and asked Appellant if he could take N.H. out of class. Tr. 141:5-8 (Haywood testimony). N.H. appeared "shut down" and "her body language was grave" when Haywood arrived. Tr. 141:9-22 (Haywood testimony). Once they were outside in the hallway, N.H. told Haywood what had happened. Tr. 141:23-142:3 (Haywood testimony).

21. Appellant noticed at least one student, S.M., had left and had not returned. Tr. 302:14-17 (Appellant testimony). Appellant strongly suspected the reason the student had left. Tr. 301:18-19 (Appellant testimony). Appellant understood she might be feeling "isolated" or "awkward." Tr. 301:24-302:1 (Appellant testimony). Appellant sent L.V. and another student who were friends with S.M. out of the class to make sure that S.M. was doing okay. Tr. 301:21-24 (Appellant testimony).

22. Appellant understood that something serious had occurred, but he carried on with class and did not address displaying the photo to the students, because in that moment, he did not think he could do so without "adding to the trauma." Tr. 302:10-303:17, 337:21-338:22 (Appellant testimony).

23. In the meantime, Assistant Principal Dave Furman was informed of the incident, met with a couple of the affected students, and reported the incident to BHS's principal, Anne Erwin. Tr. 40:11-16 (Furman testimony). Erwin immediately sought guidance from the District's Human Resources Department ("HR"). Tr. 213:8-16 (Erwin testimony). Furman and Heaton also transferred S.M. to a new math teacher. Tr. 42:7-11 (Furman testimony).

24. S.M. requested an immediate transfer out of Appellant's class. She was extremely stressed by the image she had seen. She felt Appellant "was more than just a teacher."

Tr. 117:6-15 (S.M. testimony). S.M. believed he was a mentor to her and other students, "[s]o when that happened it really traumatized me… so I just couldn't even go back into the classroom." Tr. 117:6-15 (S.M. testimony). S.M. had "really liked [Appellant]" before the incident. Tr. 366:10-15 (Heaton testimony).

25. After meeting with students and counselors, Furman stopped by Appellant's classroom to check in and offer Appellant an opportunity to set up a meeting with union representation. Tr. 42:15-43:9 (Furman testimony). Appellant agreed to meet the following morning. Tr. 43:10-44:12 (Furman testimony). Although Furman had initially suspected a prank by a student and was "still hopeful a […] kid had done this … [t]hat it wasn't a teacher error," Appellant informed Furman, "[w]hatever [students] said…it's probably true." Tr. 44:5-6 (Furman testimony).

26. On April 11, 2019, administrators Erwin and Furman met with Appellant and his representative, Karen Lally. Tr. 45:6-10 (Furman testimony). Furman conducted the interview and Erwin took notes. In that meeting, Appellant:

a. confirmed a photo of his erect penis was briefly displayed in the classroom for maybe five to ten seconds;
b. explained the photo was an image he had taken the night before within his text message application on his personal iPhone, for his romantic partner;
c. explained he was shocked and surprised the photo was on his iCloud camera roll at all. He had taken the image from within his messaging app and believed it resided exclusively in the text message string unless separately saved – similar to any image sent to him; and
d. acknowledged displaying the image in class was inappropriate and it could have an impact on students.

27. Appellant was emotional and fearful during the interview. He had never been in trouble before, and he understood displaying the image was inappropriate and it could have an impact on students. Tr. 45 (Furman testimony);, Tr. 307 (Wichser testimony).

28. Appellant requested time off work, and Erwin had already arranged for a substitute teacher. Tr. 217:7-12 (Erwin testimony), Tr. 307:6-16 (Appellant testimony). Appellant was placed on administrative leave pending the outcome of the investigation into the incident in his classroom. Tr. 217:21-218:12 (Erwin testimony); Tr. 307:17-25 (Appellant testimony).

29. News spread to other students and to parents about the incident. Tr. 142:4-17 (Haywood testimony). Tr. 116:12-20 (S.M. testimony). Tr. 116:25-117:5 (S.M. testimony). Tr. 400:8-18 (V.V. testimony). Tr. 304:14-305:10 (Appellant testimony); Tr. 219:6-220:6 (Erwin testimony); *see also* Ex. D-3 at 4.

30. Erwin ordered an investigation into the matter. As part of the investigation, the District's Chief Information Officer Steven Langford examine Appellant's District iPad and laptop to evaluate the content and settings, to see if the image had been downloaded on them or if there were any other inappropriate images found. Nothing was found. Langford issued a report on April 22, 2019 (Ex. D-13), finding:

a. the District iPad was set to automatically upload and share library of photos;
b. The District iPad had not been turned on or synced for 50 days;
c. Photos were not visible until connected to network; all photos were personal or work-related;
d. The image of Appellant's penis was date stamped April 9, 2019 at 9:37 p.m. – consistent with Appellant's explanation – and only found in the "recently deleted" photos folder.

31. Langford concluded once the District device accessed a Wi-Fi network, it had automatically synced the images from Appellant's personal Apple ID account and loaded the photo of Appellant's penis onto the recently deleted photos library. Tr. 181:13-183:11 (Langford testimony); Exs. D-13, D-14.

32. While the investigation was taking place, some parents reached out to the school with varying levels of distress, including one grandparent who asked to move her student from Appellant's class. This was a student who was not even in the math class when Appellant displayed the image. Tr. 59:17-60:9 (Furman testimony), Ex. D-9.

33. As part of the investigation, the school's assistant principals (Furman and Melissa Baran) interviewed students about the incident. Tr. 52:19-53:7 (Furman testimony). Baran and Furman interviewed all the students who were present that day. Tr. 53:1-53:7 (Furman testimony). Overall, every single student in that class expressed at minimum "discomfort" from seeing the photo, and a few, including S.M. and L.V., expressed feeling traumatized; however, Furman testified there were "nuances to each student's version" of what happened. Tr. 56:22-57:1 (Furman testimony); *and see* Ex. D-16.

34. The District also spoke with Appellant's romantic partner, who confirmed that the text / intended image was welcome. Ex. D-15.

35. The District did not engage in any investigation about whether Appellant could be effective if returned to the classroom. Neither Furman nor Erwin conferred with counselors or explored with Appellant how he would address questions relating to the incident. Tr. 77, 96 (Furman testimony); *see also* Tr. 265-266 (Erwin testimony).

36. During the hearing in this case, Tom Breyer, a professional in the field of sexual trauma, testified for the District that when a person in a trusted relationship with someone, such as a teacher, is subjected to a sexual image, it can be particularly upsetting because it can trigger the student to re-experience a traumatic event and those children can "really struggle with having faith in their safety around adults." Tr. 157:17-24 (Breyer testimony).

37. According to Breyer, a teacher displaying a sexual image in the classroom could cause particular harm for those who have experienced childhood sexual abuse by causing them to "relive that experience and essentially replace and go through all the adjustment disabilities from the initial trauma" such as "emotional numbing, denial, [and] difficulties with sleep." Tr. 156:1-16 (Breyer testimony). At least one of Appellant's students did have a history of sexual abuse as disclosed to counselor Haywood. Tr. 145:17-25 (Haywood testimony). According to Breyer, statistically, there might have been about four or five other students in Appellant's class who had experienced some type of sexual abuse, given that about 25.3 percent of females and 7.9 percent of males have been exposed to child sexual abuse. Tr. 155:21-156:8 (Breyer testimony). He acknowledged, however, that there are many possible triggers for a child, such as someone looking like their perpetrator. He also testified that merely hearing about the image would not necessarily re-traumatize people who weren't present. *Id.*

38. Regarding the potential consequences of such an event, Breyer indicated that the wrongdoer's intent is important. He also made clear that feeling awkward is not the same as being "traumatized" and that adolescents are concerned with the "here and now." Tr. 162-164 (Breyer testimony).

39. At the time of the incident, the District did not treat this it as one requiring the District "trauma" team (known as the "flight team") to come to the school. Tr. 478 (Rodriguez testimony).

40. During his testimony, Breyer did not elaborate as to the potential impact or importance of certain circumstances surrounding a potentially traumatic or triggering experience – for instance, the affected student being informed the image was not shared intentionally, and/or was intended for a sexual encounter between consenting adults in a romantic relationship. Breyer also did not elaborate how this experience might compare to other unwanted sexual experiences in high school or in life generally, and/or the frequency of such, including overhearing sexual conversations or witnessing sexual images on television or the Internet.

41. During the Appellant's case, the school's head counselor Heaton testified that in order for Appellant to return to the classroom, "first of all, it would be on my department to be sure that the kids who had him in that class did not have him as a teacher again. Whether they felt any trauma around it or not, I think it would be best to keep those students out." Tr. 373:23-374:3 (Heaton testimony). Heaton believed it would be best because "there could be some [students] who would feel uncomfortable so why put [Appellant] or the student through that." Tr. 384:18-385:5 (Heaton testimony).

42. Heaton, whose job entails paying attention to student chatter and school climate, testified there was remarkably little talk about the incident among students and few complaints from parents to the counseling department. Tr. 369 (Heaton testimony). To the contrary, within a few weeks, students began asking when Appellant would be back. Tr. 369, 375 (Heaton testimony).

43. Heaton acknowledged that even though some students – particularly those who had seen the image – would understandably be uncomfortable in his classroom, the counseling department could easily schedule around that. Tr. 366-367 (Heaton testimony). She

also explained why she believed it may not have been as big a deal to students as she feared. She concluded students are currently exposed to so much it would not be as shocking as it would have been fifty years ago. Tr. 370 (Heaton testimony).

44. Finally, Heaton testified about why she believed Appellant could weather the challenges of returning to the classroom. She explained it would be a life lesson – people make mistakes and can recover. She also noted Appellant is an excellent teacher who she expects is skilled to handle questions about the event, and, if not, has strong collaborative relationships with the counseling department to seek additional support. Tr. 374 (Heaton testimony).

45. However, at the time, Furman and Erwin believed "students and parents" were talking about the incident, in school and on social media, and concluded Appellant needed to be fired. Tr. 231-232; 266 (Erwin testimony); Tr. 64 (Furman testimony). Other than the week immediately following the event and two emails (Ex. A-104), the District provided no specific evidence of these conversations, social media postings, or complaints. Appellant testified that, as a teacher and parent of teens, he is relatively knowledgeable about current social media. Students use Instagram, Snap Chat and Tic Toc, which do not typically allow easy access to old postings. He was unable to retrieve any images or posting regarding the incident when he searched. Tr. 315-317 (Wichser testimony).

46. Erwin acknowledged that the general questions or chatter she heard from students did not mean students did not want to be in Appellant's classroom or they thought he should be fired. Even Erwin acknowledged that many students asked when Appellant would be back. Tr. 267 (Erwin testimony).

47. During the process of reviewing the facts and deliberating on an outcome, HR had not found comparable conduct to Appellant's. Tr. 470:13-14 (Rodriguez testimony). The Association agreed Appellant's conduct was unique. Tr. 444:9-16 (Lally testimony). Ultimately, the two key factors considered by decisionmakers were the "intensity of the impact on students and the fact that […] there was policy that was broken." Tr. 474:8-14 (Rodriguez testimony). The nature of the picture was also "very significant" to HR because students were in a classroom which is "a place of trust where students have their eyes trained on a screen because they're looking at math problems and then to have a very large image of a penis, that's shocking and it

would be shocking if it was just generic, but it's their teacher and they knew it and they knew it was their teacher that that came from." Tr. 477:22-478:4 (Rodriguez testimony).

48. Following the District's investigation and other process, during which there was little to no dispute on the key facts, the District ultimately decided to recommend the termination of Appellant. Tr. 440:5-13 (Lally testimony). The administrators arrived at a consensus, although they did not arrive at a consensus quickly, but rather it involved a "robust back and forth" until the administrators involved "came to [the conclusion] on their own after we really debated and look at the evidence." Tr. 470:3-12 (Rodriguez testimony). Although the District found that the display of the image was unintentional, Erwin recommended termination because of the "lasting impact on students, staff and families" and because of knowledge through social media. Ex. D-18; Tr. 64 (Furman testimony); Tr. 229 (Erwin testimony).

49. Erwin ultimately recommended dismissal by letter on June 14, 2019. Tr. 503:21-504:1 (Erwin testimony); *and see* Ex. D-18.

50. According to Erwin, she considered several factors, including the nature of the incident, the impact on students, the continuing awareness of the incident on students and the community, Appellant's reputation, how the photo had been displayed, and that students knew it was Appellant's penis. Tr. 229:1-11, 230:1-4, 231:10-25, 232:12-23 (Erwin testimony). Although Erwin believed that Appellant had been a good teacher, "what had happened had a tremendous impact on students." Tr. 230:1-4 (Erwin testimony). Erwin believed "trust between a teacher and the student is central" to the important work of educating children. Tr. 229:19-25 (Erwin testimony). The fact that students knew the image was of Appellant and it was not a "random picture" of a stranger, but rather someone the students "knew, trusted, had a relationship with as their teacher" meant that Appellant could not return to the school, according to Erwin. Tr. 232:17-233:9 (Erwin testimony).

51. Erwin also considered the possibility of recommending transferring Appellant to another school, but she decided that the widespread knowledge of the incident through discussion and social media and the schools within the District were interconnected and it would be too challenging for colleagues at other schools. Tr. 93:15-24 (Furman testimony); Tr. 230:9-20 (Erwin testimony).

52. On July 16, 2019, the school board approved Appellant's termination. *See* Ex. D-19.

53. There is no evidence the District has terminated an employee for a single unintentional violation of policy. Tr. 482 (Rodriguez testimony); *see also,* Ex. A-121, pp. 1-4; 6-12.

54. There is no evidence the District has terminated employees for violation of the District's technology policies (often combined with other policy violations). The record included the following examples of progressive discipline:

a. Letter of Reprimand for teacher who intentionally circumvented District security to make himself an "administrator" in order to improve effectiveness for instruction. Reprimand noted employee "did not intend to do any harm by his actions," although it viewed his "lack of ethical judgment as very serious." Ex. A-107;
b. Memorandum of Concern for teacher who used his official position to sign up for use of District facilities to benefit a private coaching business. Ex. A-112.
c. Memorandum of Concern for teacher who sent email and video using District technology, which included the statement, "that rape scene is so brutal (probably the best part though)." Students did not view video. Ex. A-113.
d. Two Letters of Reprimand for educator for inappropriate emails and other conduct with fellow staff, as well as emails about students that were perceived as negative. Ex. A-108; A-110.
e. No discipline for teacher who had "boudoir" pictures stored on her District technology, due to syncing over the cloud. Association representative asked to notify teacher to be careful. Students did not view pictures. Tr. 436 (Lally testimony); Tr. 475 (Rodriguez testimony).

55. There is no evidence the District has terminated teachers for even repeated violations of policies relating to physical and verbal conduct with students and/or 'boundary' violations. The record included the following examples of progressive discipline:

a. Five-day Suspension without Pay for educator (with previous letter of reprimand) found to have used "forceful physical conduct" with kindergarten students and raised voice. Ex. A-109.
b. Letter of Reprimand for educator who physically disciplined a student, whom educator heard swearing, by putting hand on neck and then on shoulders with comment, "you better not say that again." Ex. A-115.
c. Two Letters of Reprimand for educator who (1) commented on female student's appearance and touched students' hair in a way that made them feel uncomfortable; and (2) told stories about guns at school during a schoolwide lockdown drill, causing students to be fearful. Ex. A-116 and A-118.
d. Two-day Suspension without Pay for educator who sent four non-academic texts to a student without correctly identifying himself; otherwise crossed boundaries that made students feel uncomfortable, failed to follow prior directive contained in Letter of Reprimand. Ex. A-117.
e. Letter of Reprimand for repeated use of profanity while teaching. Ex. A-121, p. 13-16.

CONCLUSIONS OF LAW

1. The District is a "fair dismissal district" under the Accountability for Schools for the 21st Century Law. Appellant is a "contract teacher" entitled to a hearing before this panel.

2. The factual allegation that Appellant had a personal device (cell phone) in the classroom, which contained a picture of his erect penis in a text messaging app intended for a romantic partner in a consensual exchange, is true and substantiated.

3. The fact that Appellant used his personal iPad Pro as a teaching tool, as well as his personal Apple ID and used the school's Wi-Fi connection, and was permitted to do so by the District without training regarding Wi-Fi and syncing processes, is true and substantiated.

4. The factual allegation that Appellant, when he used his personal Apple ID over the school Wi-Fi, on one occasion inadvertently and unintentionally caused a picture of his erect penis to project briefly onto a whiteboard in front of a classroom due to devices syncing, is true and substantiated.

5. The true and substantiated facts are not adequate to support the charge of neglect of duty as a ground for dismissal.

6. The true and substantiated facts are not adequate to support the charge of inadequate performance as a ground for dismissal.

7. The true and substantiated facts are not adequate to support the charge of immorality as a ground for dismissal.

8. Because this panel concludes that the true and substantiated facts are not adequate to support the grounds for dismissal relied upon by the District, it is unnecessary for this panel to consider whether the dismissal of Appellant was arbitrary, unreasonable or clearly an excessive remedy within the meaning of ORS 342.905(6).

9.

DISCUSSION

I. Applicable Legal Standard.

In Oregon, the permissible grounds for terminating a contract teacher are as follows:

> (a) Inefficiency;
> (b) Immorality;
> (c) Insubordination;
> (d) Neglect of duty, including duties specified by written rule;
> (e) Physical or mental incapacity;
> (f) Conviction of a felony or of a crime according to the provisions of ORS 342.143;
> (g) Inadequate performance;
> (h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or

> (i) Any cause which constitutes grounds for the revocation of such contract teacher's teaching license.

ORS 342.865. At the conclusion of a hearing appealing a District's dismissal decision, the panel reviews the evidence pursuant to the legal standard set forth in ORS 342.905(6), which provides:

> The Fair Dismissal Appeals Board panel shall determine whether the facts relied upon to support the statutory grounds cited for dismissal or nonextension are true and substantiated. If the panel finds these facts true and substantiated, it shall then consider whether such facts, in light of all the circumstances and additional facts developed at the hearing that are relevant to the statutory standards in ORS 342.865(1), are adequate to justify the statutory grounds cited. In making such determination, the panel shall consider all reasonable written rules, policies and standards of performance adopted by the school district board unless it finds that such rules, policies and standards have been so inconsistently applied as to amount to arbitrariness. The panel shall not reverse the dismissal or nonextension if it finds the facts relied upon are true and substantiated unless it determines, in light of all the evidence and for reasons stated with specificity in its findings and order, that the dismissal or nonextension was unreasonable, arbitrary or clearly an excessive remedy.

ORS 342.905(6) (emphases added). The "degree of proof of all factual determinations by the panel shall be based on the preponderance of the evidence standard." OAR 586-030-0055(5). At the hearing, evidence of "a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" is admissible. OAR 586-030-0055(1). Thus, ORS 342.905(6) creates a three-step review process this panel must follow:

> First, the [FDAB] panel determines whether the facts upon which the school board relied are true and substantiated. Second, the panel determines whether the facts found to be true and substantiated constitute a statutory basis for dismissal. Third, even if the facts constitute a statutory basis for dismissal, the panel may reverse the school board's dismissal decision if the decision nonetheless was 'unreasonable, arbitrary[,] or clearly an excessive remedy.'

Bergerson v. Salem-Keizer School District, 341 Or 401, 412 (2006) (footnote omitted). If the panel determines "the facts are not true and substantiated, or even if true and substantiated, are not relevant or adequate to justify the statutory grounds cited by the district, the appellant shall be reinstated with any back pay that is awarded in the order." OAR 586-030-0070(3).

In this case, the panel reviewed the evidence and determined what facts relied upon by the District in its dismissal decision are true and substantiated. The panel then considered

whether the true and substantiated facts constitute or are adequate to support the grounds for dismissal, based on those cited by the District at the time of termination. Here, the District terminated Appellant pursuant to three grounds: ORS 342.856(1)(d) – neglect of duty; ORS 342.865(g) – inadequate performance; and ORS 342.865(b) – immorality.

II. The True and Substantiated Facts are Not Adequate to Justify the Statutory Grounds Cited by the District.

A. The charged facts are not adequate to justify dismissal for neglect of duty.

The panel concludes the District has not established facts adequate to support Appellant's dismissal for "neglect of duty." The panel has defined neglect of duty to mean a teacher's failure to engage in conduct designed to bring about a performance of his or her responsibilities, either by engaging in "repeated failures to perform duties of relatively minor importance" or "a single instance of failure to perform a critical duty." *Meier v. Salem-Keizer School District*, FDA-13-01, p. 30 (2013), *aff'd,* 284 Or App 497, 508-509 (2017), *rev. den*, 362 Or 175 (2017). Since the conduct at issue here does not involve repeated conduct, the panel examines whether Appellant has engaged in a "single instance of failure to perform a critical duty" as that concept has been understood and applied in prior panel decisions. Here, given an absence of facts demonstrating intentionality or malice, or even recklessness, the panel concludes there is not enough proof to justify dismissal for neglect of duty.

Here, it is undisputed a serious, highly concerning event took place, which likely violated school policies related to showing or possessing offensive material at school, especially using school technology. However, this panel is not statutorily empowered to review or impose discipline of a teacher, even a teacher whose conduct or omission obviously requires correction or even severe sanction to avoid similar occurrences or violations of policy. Rather, the panel's task is to determine whether the District proved facts adequate to justify dismissal on a limited set of grounds identified by statute and developed through prior case law. Here, in keeping with previous FDAB cases involving neglect of duty, the panel examines the degree of intentionality or "fault" on the part of the teacher engaged in problematic conduct. *See Wilson v. Grants Pass School District,* FDA 04-07 (2008), p. 10; citing *Enfield v. Salem-Keizer School District*, FDA 91-1 (1992), *aff'd w/o opinion*, 118 Or App 162 (1993), *rev den.* 316 Or 142 (1993)). The panel

concludes the District did not offer persuasive evidence relating to Appellant's "fault" – such as whether he acted negligently, recklessly, purposefully, or simply reasonably but unluckily. The panel is therefore left to assume his fault lies in the fact he lacked the technical savvy to prevent his devices from syncing, at that moment, in a way that ultimately projected a private, highly inappropriate (but legally and consensually used) image, to an unintended audience. *See* TR 84 (Furman testimony) (explaining the concrete duty Appellant violated was "not understanding and not taking enough care about how his phone synced with his iPad[;] he had a duty to be more careful about that.") Thus, Appellant made a mistake – a serious blunder, with extreme consequences; but the degree of care he should have exercised, or to what extent he acted in a blameworthy manner, according to the District, is unknown. The panel concludes his conduct did not contain any hint of malice. Further, the District did not develop proof showing Appellant's conduct, at the time, was reckless, or even negligent, and the panel is left guessing as to the District's position on Appellant's blameworthiness.[1]

Thus, this case is different from most neglect of duty cases where the underlying act involves some type of intentionality or wrongdoing, designed to injure or harm someone else. *See, e.g*. *Kristen Kibbee v. Bethel School District*, FDA 13-09 (2013) (dismissal of administrator for neglect of duty upheld where administrator with prior history of discipline, grabbed a student's forearm in frustration and then initially lied to her supervisor about the incident); *Thomas v. Cascade Union High School No. 5*, FDA 84-7 (1987) (dismissal of teacher for neglect of duty upheld , where the teacher reacted to a student who had thrown a ball at her by intentionally kicking the student in anger); *Thyfault v. Pendleton School District*, FDA 90-4 (1992) (dismissal of teacher for neglect of duty upheld, where teacher forcefully spanked, grabbed and pulled student in anger); *Webster v. Columbia Education School District,* FDA 96-1 (1998) (neglect of duty upheld for teacher who purchased narcotic drugs on campus and then

[1] The panel acknowledges this kind of error could take on a more reckless (*i.e.*, intentional) character as Wi-Fi/syncing technology and cloud computing becomes more commonplace, and greater technical savvy can become presumed or expected. Here, the District did not offer evidence Appellant knew or should have known which steps to take to avoid the mistake. At the time, the District allowed teachers to use personal devices but did not, to the panel's knowledge, mandate or even offer training on Wi-Fi or syncing issues for teachers who brought personal devices into class. Asking the panel to read blameworthiness or recklessness into Appellant's conduct, in light of the District's own decision to allow teachers to use personal devices and sign-in information, without training, is too far of a step.

lied); *Bergerson v. Salem-Keizer School Distr*., 194 Or App 301, 324 (2004) (neglect of duty found where educator intentionally drove her van into estranged husband's truck). Here, the panel does not see similarity between Appellant's conduct and the conduct in prior neglect of duty cases that involved explicitly reckless, impulsive, or intentional behavior risking harm to someone else (*e.g.*, spanking, lying, destructive behavior).

In addition to intentionality, in neglect of duty cases, this panel also examines how the employer has handled corrective action in other cases. The conduct will unlikely rise to the level of neglect of duty to warrant termination if the employer "has not previously considered the conduct at issue as grounds for immediate termination." *Meier v. Salem Keizer Sch. Dist.,* FDA 13-10, p. 31. Here, there was evidence of other District staff inadvertently showing personal images in school presentations and settings and even storing inappropriate images on a *District*-owned laptop, without disciplinary consequences. TR 91 (Furman Testimony), TR 436 (Lally Testimony), TR 475 (Rodriguez Testimony). District administrators further acknowledged that the only reason that Appellant's conduct is grounds for termination in this case is because of the "impact on students." TR 85-86 (Furman Testimony); TR 229-230 (Erwin Testimony); TR 468 (Rodriguez Testimony). However, impact on students is not a recognized determinative factor in neglect of duty cases; instead, as discussed above, the panel has historically focused on the blameworthiness of the teacher. The panel also cannot square the evidence of the District's history of other personnel actions with the termination decision in Appellant's case, when it considers evidence the District has only coached or disciplined teachers who behaved intentionally in front of student by, *e.g.*, 'joking' about rape as a positive thing, physically putting hands on a child and threatening them, commenting on a female student's appearance and touching students' hair in a creepy way, or repeatedly using profanity in the classroom. By contrast, Appellant made a mistake; he did not engage in clear wrongdoing. Given the absence of sufficient facts or caselaw to even support a finding of reckless behavior that Appellant should have knows would result in harm, the panel is missing a necessary element to find neglect of duty.

For the reasons above, the panel finds the neglect of duty grounds for dismissal is not based on true and substantiated facts.

B. The charged facts are not adequate to justify dismissal based on inadequate performance.

The panel concludes the true and substantiated facts are not adequate to support dismissal for "inadequate performance." Briefly, inadequate performance requires proof that: (1) the educator had clear notice of the job duties and performance expectations; (2) notice of the deficiencies; (3) an opportunity to correct those deficiencies; and (4) the educator had repeatedly or substantially failed to meet those standards, to the substantial detriment of the District. *Elaine Ferguson v. Dayton School District*, FDA 04-06 (2004) (citing *Packard v. Corvallis School District No. 509J*, FDA 97-4 (1998)). The case at issue does not involve a history of performance issues or prior similar conduct, but a one-time occurrence unrelated to the quality of his work as a math teacher. Since the alleged facts do not satisfy the definition of inadequate performance, on its face, the panel concludes the standard is not met.

C. The charged facts are not adequate to justify dismissal for immorality.

This panel concludes the true and substantiated facts are inadequate to support dismissal for "immorality." The FDAB has defined immorality as conduct that is selfish or malicious and shows a disregard for the rights or sensitivities of other persons. *Crouch v. Springfield Public Schools*, FDA-17-02 (2018) (internal citations omitted). Moreover, the educator's selfishness must be "excessive" to meet the standard of immorality, which is not the case here.

Here, the District did not establish selfishness, let alone malice, on the part of Appellant, as discussed above with regard to neglect of duty. Certainly, Appellant acted unwisely when he carried a device into class that contained inappropriate images, without the technological know-how to avoid the accidental projection of an extremely private file. However, even if Appellant's failure might seem negligent or lazy – and, therefore, somewhat selfish – this panel has held that the selfishness must be "excessive" or "significant" to meet the standard of immorality, usually found where the teacher acted extremely recklessly, or with actual intent to inflict harm on others, such as acts that can cause injury or damage, or deciding to interfere with an investigation. *See Crouch v. Springfield Pub. Sch.* (teacher's off-duty cocaine use, for which she sought treatment, was not "excessively" selfish); *see Kari v. Jefferson* (teacher who knowingly

permitted her husband to illegally grow and sell marijuana from her house was not immoral) (emphasis added); *Thyfault v. Pendleton* (teacher who intentionally spanked a student and then urged a co-worker to lie for her was immoral); *Webster v. Columbia* (teacher who bought morphine on school grounds was immoral: her purchase was a repeated event, "rather than an isolated and inadvertent providing of a temporary medicinal relief on one occasion," and, she lied to investigators about how she had purchased drugs); *Bergeson v. Salem* (teacher who consumed drugs off-duty but then purposefully drove her car into her husband's truck, which then crashed and damaged his girlfriend's garage, was immoral).

The District has not proven Appellant acted excessively selfish, or with intent to harm anyone. Had the District proven Appellant knew or should have known of the risk of projecting the image by using his device in the classroom, or had the image itself revealed he was engaged in sending explicit images to a non-consenting party – in other words, if there were facts showing Appellant had engaged in some type of purposeful, destructive behavior toward another person – the panel's analysis might be different. *See Crouch* (citing *Bergeson v. Salem-Keizer Sch. Dist.*, FDA 02-2 (reasoning the underlying conduct must be "other directed" or harmful to community standards to meet the FDAB's definition of immoral)). As noted in *Crouch*, school districts are known to have permitted teachers convicted of driving under the influence of drugs or alcohol to keep their jobs; certainly, a person whose legal, consensual erotic act is accidentally revealed is not acting more selfishly than a drunk driver getting behind the wheel.

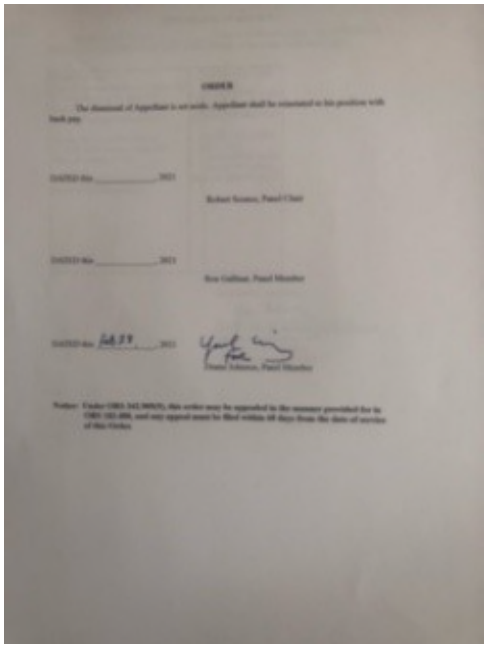
Finally, the panel briefly addresses the District's evidence of harm – namely, that several students experienced trauma due to viewing the image. As this panel explained in *Crouch*, community opinion of – and, by extension, individual responses to – a teacher's conduct cannot be a deciding factor in determining whether conduct was immoral. *See Crouch; Ross*, 300 Or 507, 515-516 (1986) ("[F]DAB is responsible for deciding on the criteria that make conduct immoral without looking for community opinion on immorality.") The question of actual harm to students then and now is especially nebulous here, since the teenagers exposed to the image will presumably have already graduated, will soon graduate, or can (and several did) request a transfer to another math class if learning under Appellant is too triggering or traumatic.

For the above reasons, the panel concludes the District has not offered sufficient evidence to conclude Appellant's conduct was excessively selfish or malicious or intentionally harmful,

and therefore did not prove the dismissal basis of immorality.

CONCLUSION

For all the reasons discussed above, this panel does not believe that Appellant engaged in neglect of duty, inadequate performance, or immorality. Even if his actions (or inactions) relating to technology involved poor judgment and caused unacceptable consequences, this panel cannot conclude that his termination was warranted under the grounds asserted by the District.



ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position with back pay.

DATED this _____ day of _____, 2021.

Robert Sconce, Panel Chair

DATED this _____ day of _____, 2021.

Ron Gallman, Panel Member

DATED this 5th day of Feb, 2021.

Frank Johnson, Panel Member

Notice: Under ORS 342.905(5), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position with back pay.

DATED this _____, 2021

_____

Robert Sconce, Panel Chair

DATED this 2/23, 2021

_____

Ron Gallinat, Panel Member

DATED this _____, 2021

_____

Duane Johnson, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position with back pay.

DATED this 2/23, 2021

Robert Sconce, Panel Chair

DATED this _____, 2021

Ron Gallinat, Panel Member

DATED this _____, 2021

Duane Johnson, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to his position with back pay.

DATED this _____, 2021 _____

Robert Sconce, Panel Chair

DATED this _____, 2021 _____

Ron Gallinat, Panel Member

DATED this _____, 2021 _____

Duane Johnson, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on _____, I served a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

Margaret Olney Bennett Hartman Morris & Kaplan LLP 210 SW Morrison St. Suite 500 Portland, OR 97204 margaret@bennetthartman.com	[ ] [ ] [ ] [ ] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Michael Porter and Erin Burris 111 S.W. Fifth Avenue, Suite 3400 Portland, Oregon 97204 mike.porter@millernash.com erin.burris@millernash.com	[ ] [ ] [ ] [ ] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

_____

Yael A. Livny, Sr. Assistant Attorney General

Labor & Employment

General Counsel Division

Oregon Department of Justice

Yael.a.livny@doj.state.or.us

CERTIFICATE OF SERVICE

I hereby certify that on _____, I served a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

Margaret Olney Bennett Hartman Morris & Kaplan LLP 210 SW Morrison St. Suite 500 Portland, OR 97204 [redacted]	[ ] HAND DELIVERY [ ] U.S. MAIL [ ] OVERNIGHT MAIL [ ] TELECOPY (FAX) [X] ELECTRONICALLY
Michael Porter and Erin Harris 333 S.W. Fifth Avenue, Suite 3400 Portland, Oregon 97204 [redacted]	[ ] HAND DELIVERY [ ] U.S. MAIL [ ] OVERNIGHT MAIL [ ] TELECOPY (FAX) [X] ELECTRONICALLY

Respectfully submitted,

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