BEFORE THE FAIR DISMISSAL APPEALS BOARD

OF THE

STATE OF OREGON

In The Matter of the Appeal of DEBI MEIER, Appellant, v. SALEM-KEIZER SCHOOL DISTRICT, District.	**Case No.:** FDA-13-01 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

INTRODUCTION

Appellant, a school counselor, was dismissed from her employment with Salem-Keizer School District (the "District") on January 22, 2013. She timely appealed to the Fair Dismissal Appeals Board ("FDAB") on January 30, 2013. A hearing on the merits was conducted in Salem, Oregon on May 7 and 8, 2013. Appellant was represented by John S. Bishop, Attorney at Law, and the District was represented by Rebekah R. Jacobson, Attorney at Law. The hearing was conducted before a panel appointed from the FDAB, consisting of David Krumbein, Dennis Ross, and Carolyn Ramey. The panel, having considered the evidence and the arguments of counsel, makes the following rulings, findings, conclusions and order.

PANEL RULINGS AND OTHER MATTERS

The Appellant objected to the admission of Exhibits D-8, D-9, and D-20 on the basis of relevance. The panel overruled that objection and admitted those exhibits. The District objected to the admission of Exhibits A-12, A-13, and A-14 on the grounds of relevance. The panel overruled that objection and admitted those exhibits. These rulings and all other rulings were reviewed and determined to be correct.

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After the hearing, the Appellant filed a motion to supplement the record to admit Exhibit A-18. Exhibit A-18 is a copy of a print-out obtained on June 21, 2013 from the Oregon Judicial Department's online information system, the "Oregon Judicial Information Network" or "OJIN." The print-out shows the status on June 21, 2013 of *State v. Debi Meier*, Marion County Circuit Court Case No. 13C40782, the case in which Appellant was charged with the offense of failing to report child abuse. The print-out shows that a 66-minute trial occurred before the court on June 21, 2013. The court found Appellant not guilty of the offense. In support of her argument that Exhibit A-18 should be admitted, Appellant argued that the OJIN print-out should be admitted because the panel admitted Exhibit D-9, which is an OJIN print-out showing the status of *State v. Debi Meier*, Marion County Circuit Court Case No. 13C40782, as of April 23, 2013. Appellant also argued that Lt. Lance Inman testified about Exhibit D-9 during the hearing before the panel; therefore, this panel should admit Exhibit A-18 to ensure that the record regarding *State v. Debi Meier*, Marion County Circuit Court Case No. 13C40782, is complete.

The District opposed Appellant's motion to supplement the record on the basis that (a) the record in this case was closed on May 8, 2013, (b) the District has no opportunity to respond to Exhibit A-18 if it is admitted, and (c) exhibits not distributed before the hearing should be excluded pursuant to OAR 586-030-0050.

This panel agrees with Appellant that the admission of Exhibit A-18 is appropriate in light of the admission at hearing of Exhibit D-9. Both exhibits show the status of *State v. Debi Meier*, Marion County Circuit Court Case No. 13C40782, at particular points in time. Having admitted Exhibit D-9, in fairness and to accurately reflect the status of the *State v. Debi Meier* case at two points in time before the issuance of this order, this panel grants Appellant's motion to supplement the record. This panel expressly notes, however, that it did not consider Exhibit D-9, Lt. Lance Inman's testimony about Exhibit D-9, or Exhibit A-18 in reaching its findings and conclusions and in issuing this order. The panel concluded that the record in this case,

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without consideration of Exhibit D-9, testimony about Exhibit D-9, or Exhibit A-18, is sufficient to support the panel's findings of fact, conclusions of law, and order in this case.

FINDINGS OF FACT

Background

1. The District hired Appellant on August 9, 2005, as a counselor at McNary High School. By the 2012-13 school year, Appellant was a "contract teacher" with the District within the meaning of ORS 342.815(3).[1]

2. Appellant has worked as an educator, either as a teacher or a counselor, since 1986. She obtained her master's degree in counseling in 2001.[2]

3. Appellant had not received any discipline or counseling performance before she was dismissed by the District. At the end of the 2008-09 school year, Appellant's supervisor, who had worked with her for four years, described Appellant to be "an excellent counselor and a professional educator that really cares about kids."[3]

4. Like every District employee, Appellant had a duty arising under ORS 419B.010 and District policy to report to the Oregon Department of Human Services (DHS) or law enforcement when she had reasonable cause to believe a child with whom she had come in contact had suffered abuse within the meaning of ORS 419B.005(1)(a).[4]

5. During her employment with the District, Appellant regularly filed formal reports of suspected abuse with no criticism about her reasons or method for doing so.[5]

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[1] Stip. ¶ 1. The panel uses the following citation methods in this order. The District exhibits and Appellant exhibits are referred to as D-# and A-#, respectively, with the relevant page number following when appropriate. The parties' Stipulated Facts are cited as "Stip.," with the relevant paragraph number following (*e.g.* Stip. ¶#). The hearing transcript is referred to by citation to the volume number, *e.g.*, either "TR1" (for May 7, 2013) or "TR2" (for May 8, 2013) and then the relevant page number(s) (*e.g.* "TR1 25").

[2] A-3; A-4.

[3] A-5

[4] Stip. ¶2; ORS 419B.005(4)(c); D-15 at 1.

[5] *See, e.g.*, A-6; TR2, 25 (testimony of Assistant Principal Sue Smith: "Debi had always followed protocol and talked to our SRO or called DHS whenever there was a suspected abuse. Forms were filled out and filed").

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6. The District requires all employees who have mandatory reporting obligations under ORS 419B.010 to attend annual trainings on their responsibilities. Appellant attended all such trainings during her employment. [6] District policy states that "All district employees and students are mandatory reporters of sexual conduct and child abuse" and that "All district employees and students" are subject to the District's policy on the subject.[7] District training materials on the policy inform employees that failure to report suspected abuse is a violation of the policy "possibly resulting in disciplinary action." [8] The District also maintains a Sexual Incident Response Committee protocol, which requires District employees to initiate certain steps in the protocol upon hearing of a "sexual incident."[9]

7. During the 2011-12 school year, AV was a student at McNary High School.[10] She was in the 11th grade.[11] She was approximately 17 years old.[12] Appellant was assigned to be AV's guidance counselor.[13]

8. AV had been in special education classes in school since she was in the second grade.[14] She was initially diagnosed with autism and it is believed she may have a form of Asperger's syndrome.[15] AV has a relatively low I.Q., approximately 78 in mathematics and 80's for reading.[16]

9. AV was assigned to work as an aide in the high school counseling office during the 2011-12 academic year. Her responsibilities included running "call slips" to students in their

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[6] Stip. ¶15.

[7] D-15 at 1.

[8] D-10 at 5; D-11 at 7.

[9] D-17; D-18.

[10] The student discussed in this order is referred to as AV, a pseudonym.

[11] Stip. ¶3.

[12] TR1 31.

[13] TR2 61.

[14] TR1 32.

[15] *Id.*

[16] TR1 32-33.

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classrooms and answering the phone and taking messages. Appellant encountered AV periodically in her role as a student aide and she conversed with her. AV was not shy toward Appellant. She was always smiling and bubbly.[17]

10. Appellant did not know during the 2011-2012 school year that AV was autistic; Appellant learned AV's diagnosis the next school year, in October 2012.[18]

Events in May 2012

11. In May 2012, AV was enrolled in a class called Social Understanding, taught by Teresia Adams-Sinclair, a teacher in the high school's Learning Resource Center (LRC).[19] The class was offered during the first period of the day.[20]

12. AV arrived at class one day at the very beginning of the period and was upset and crying. She said she and her mother had a fight.[21] She would not go into the classroom. Adams-Sinclair asked Instructional Assistant Debra Johnson to escort AV to the counselors' office. Adams-Sinclair did not know anything about what had caused the fight between AV and her mother. She knew only that she could not address AV's issues and simultaneously manage a class full of students.[22]

13. Johnson walked AV to the counselors' office. The counselors' office was approximately three minutes away from Adams-Sinclair's classroom. There is no evidence AV told Johnson why she was upset.[23]

14. When Johnson and AV arrived at the counselors' office, the counselors' secretary notified Appellant and Appellant came out to greet AV. She took AV into her office. No one

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[17] TR2 65-66.

[18] TR2 94-95.

[19] TR2 41.

[20] *Id.*

[21] TR2 43-44.

[22] TR2 45.

[23] TR2 45-46.

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told Appellant why AV had been brought to the office.[24] AV showed no signs of being upset by this point; she seemed "fine, mood-wise."[25] Although she was not "smiley and bubbly," she smiled when she saw Appellant.

15. Appellant asked AV what she needed to talk about. AV stated abruptly: "A little more than a year ago my brother molested me."[26] Appellant replied: "Well, tell me what that means to you. When you say that, what does that mean?"[27] Appellant asked this question to clarify what "molest" meant to AV. By being around AV as a student aide, Appellant had become aware AV had relatively low cognitive abilities and wanted to be sure what she meant by "molest" when she used the word.[28] She also observed AV "seemed like she always did" and "didn't seem upset or anything."[29]

16. AV said her brother had touched her. Appellant asked where. AV gestured by waving her hand in a circular motion in front of her upper torso area, making a large circle in the air from approximately her neck down to her stomach area.[30] AV did not use words to describe her brother touching any part of her body.[31] Appellant probed with more questions to find out if there had been any sexual contact.[32] AV seemed "very comfortable telling [Appellant] everything."[33] AV did not report anything to Appellant to lead her to think any sexual contact had occurred.[34]

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[24] TR2 67.

[25] *Id.*

[26] TR2 67-68.

[27] *Id.*

[28] TR2 95.

[29] TR2 68.

[30] TR2 68.

[31] TR2 68-69.

[32] *Id.* at 69.

[33] *Id.*

[34] *Id.*

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17. AV confirmed to Appellant she had been able to get her brother to stop the behavior she did not like.[35] Appellant concluded the interaction was a matter of a little brother being "a little pill" or "kind of a jerk."[36]

18. Approximately one year earlier, in May 2011 when the physical contact described by AV allegedly occurred, AV's younger brother would have been in junior high school.[37]

19. AV did not say anything to Appellant about what she wanted Appellant to do.[38] Appellant told AV she intended to contact AV's mother.[39] AV seemed to accept this idea, did not object, and did not show any outward signs of being opposed to it.[40]

20. Appellant sent AV back to class. AV appeared "fine" to Appellant when she left Appellant's office and seemed satisfied with how the meeting had gone.[41] Adams-Sinclair saw AV later in the day and asked her if she was feeling better. AV said she was feeling better.[42]

21. Appellant called her immediate supervisor, Assistant Principal Sue Smith, at the end of the day to tell her about her conversation with AV.[43] Appellant explained it was her plan to contact AV's mother to talk to her about AV's concerns with her brother.[44] There was no evidence that Assistant Principal Smith instructed Appellant not to contact AV's mother.

22. Appellant called AV's mother and left a voice mail message for her.[45] AV's mother and father are divorced. AV was living full-time with her mother and regularly visiting

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[35] *Id.*

[36] *Id.*

[37] TR1 202 (Nove) (brother was approximately 11 or 12 years old at the time of the conduct described by AV).

[38] TR2 70.

[39] *Id.*

[40] *Id.*

[41] TR2 70-71.

[42] TR2 46-47.

[43] TR2 24.

[44] TR2 26.

[45] Stip. ¶3; D-23.

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her father.[46] As the custodial parent, AV's mother's name came up first in Appellant's computer system displaying parent contact information.[47]

23. AV's mother returned Appellant's call and they discussed Appellant's meeting with AV.[48] Appellant explained AV had used the word "molest" when referring to her brother's actions but said that it sounded to Appellant like the brother had been trying to grab, wrestle or horseplay with AV and was trying to touch her.[49] She explained AV said it happened more than a year ago and that AV was able to get her brother to stop.[50] AV's mother responded saying she did not believe it had happened and that she needed to talk with AV. Appellant encouraged the mother to talk also with the younger brother. She also recommended the mother talk to their father.[51] AV's mother said she and the father did not communicate well but she would talk to him.[52] She also told Appellant she would follow up with her the following week.[53]

24. AV's mother came with AV to Appellant's office on Monday morning of the following week.[54] She told Appellant "we talked about it and the issue has been resolved, and we've got a plan."[55] She did not discuss any details of "the plan" with Appellant.[56] The meeting lasted about ten minutes. Appellant concluded the issue had been resolved. AV nodded during the meeting, but did not talk much. To Appellant she seemed like she was satisfied with the discussion. AV said nothing to object.[57]

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[46] Stip. ¶5.

[47] TR2 73.

[48] D-23.

[49] TR2 74.

[50] *Id.*

[51] TR2 75.

[52] *Id.*

[53] *See, e.g.*, D-23.

[54] Stip. ¶3; TR2 76.

[55] TR2 76.

[56] TR2 76-77.

[57] TR2 78.

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25. AV continued to work as an aide in the counseling office for the remainder of the 2011-12 school year.[58] Appellant continued to interact with her in that setting. AV did not act any differently toward Appellant.[59]

26. Appellant did not report her May 2012 conversation with AV to DHS or law enforcement.[60] Appellant did not report it because she did not hear that that any sexual contact had occurred between AV and her brother. Appellant concluded that AV was reporting an incident of "a younger brother harassing an older sister."[61] Appellant also did not initiate the District's Sexual Incident Response Committee's ("SIRC") process. Appellant did not initiate the SIRC process because she concluded AV was not reporting a "sexual" incident to her.[62]

Events in Fall 2012

27. On October 19, 2012, AV told her father and her step-mother that her younger brother had sexually abused her.[63] During that conversation, AV claimed she told Appellant about the abuse.[64] Her father testified AV never did say when AV said she made this report to Appellant.[65]

28. On October 22, 2012, AV's father contacted Appellant and asked to meet with her to discuss AV. Appellant agreed to meet on October 26. AV's father later asked that Appellant have a District administrator attend the meeting as well. Appellant arranged for Assistant Principal Adam Watkins to attend.[66]

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[58] TR2 78.

[59] *Id.*

[60] Stip. ¶4.

[61] TR2 72.

[62] *Id.*

[63] TR1 34.

[64] *Id.*

[65] TR1 34-35.

[66] Stip. ¶6.

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29. When Appellant met with AV's father, AV's step mother, and Assistant Principal Watkins on October 26, the father told of his conversation with AV the previous weekend. He said AV told him she "had been molested, sexually abused, by her brother at her mother's house."[67] He said AV "had mentioned it to the school."[68] In response, Appellant described her recollection of the conversation she had with AV and her mother in May 2012. Appellant disputed that AV said she had been sexually assaulted or sexually abused.[69] AV's father and AV's step mother accused Appellant of failing to fulfill her statutory obligation to report suspected sexual abuse.[70]

30. On October 29, 2012, AV's father filed a formal written complaint against Appellant with the District.[71] AV's father wrote that his complaint concerned "discrimination" because Appellant did not contact him when his daughter reported she had been sexually abused at her mother's house.[72] He complained he had been "excluded from this communication simply because I am a male noncustodial parent."[73] The father alleged AV had reported being "molested multiple times by her minor brother in her mother's home to * * * Appellant * * * in the Spring of 2012."[74] He said he did not know the exact date of the report. He said Appellant confirmed during the meeting in her office that AV told Appellant "sometime in the spring of 2012 that she had been molested by her minor brother while at her mother's home."[75] AV's father reported to the District he would "file a formal complaint [against Appellant] with the licensing body that oversees the counseling licensure of Debi Meier." He also said, "I am going

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[67] TR1 36.

[68] *Id.*

[69] TR2 82-87.

[70] Stip. ¶7.

[71] Stip. ¶8; D-2.

[72] D-2 at 1.

[73] *Id.*; AV's father reiterated his complaint of discrimination at the end of the form by writing, "I was discriminated against as the non-custodial male parent in this case." D-2 at 3.

[74] D-2 at 1.

[75] D-2 at 2.

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to seek legal representation and take legal action against * * * Appellant, McNary High School and Salem-Keizer 24J to make sure this gross violation of counseling ethics does not occur again."[76]

31. At the time of the hearing before the FDAB panel, AV's father had not filed any complaint against Appellant with the licensing body that oversees her counseling licensure and he had not sought any legal representation to take legal action against Appellant, the high school or the District.[77] He was not sure he still intended to do any of those things.[78]

32. On October 29, 2012, McNary High School Principal John Honey delivered a notice to Appellant notifying her of an investigative meeting on October 31, 2012. Honey's notice advised Appellant that the meeting was in regard to a report of "sexual assault" Appellant had received in May 2012.[79]

33. Appellant and her Oregon Education Association representative Eric Schutz met with Principal John Honey and Assistant Principal Adam Watkins on October 31, 2012. They discussed the conversation Appellant had with AV in May 2012 and Appellant's response to that conversation. [80]

34. Appellant fully acknowledged to Honey and Watkins she had a conversation with AV in or around early May 2012. She also acknowledged she had subsequent conversations with AV's mother by phone and in person, thereafter. She confirmed she heard AV say she had been "molested" by her younger brother. Appellant said AV's responses to the questions she asked afterwards to clarify what AV meant did not lead Appellant to believe there had been any sexual contact between AV and her brother.[81]

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[76] D-2 at 2.

[77] TR1 43-44.

[78] *Id.*

[79] Stip. ¶9; A-17.

[80] Stip. ¶10.

[81] *See, e.g.*, TR2 9-16 (Schutz); D-22; D-5; D-7.

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35. The District placed Appellant on paid administrative leave beginning on November 1, 2012.[82] The District put Appellant on paid leave in order to investigate Appellant's alleged failure to report suspected child abuse.[83]

36. No District administrator ever interviewed AV to determine what she recalled saying or not saying to Appellant in May 2012 about the abuse she suffered from her younger brother.[84] No District administrator interviewed AV's father or stepmother after they accused Appellant of having received a report of abuse from AV during the October 26 meeting with Assistant Principal Watkins.[85] Police reports containing information about AV's interviews with law enforcement officials were unavailable to District officials from the date Appellant was placed on administrative leave and up to the hearing on this appeal.[86]

37. District administrators also never attempted to learn what AV may have reported to Appellant by speaking to the Instructional Assistant who brought AV to Appellant's office, to the teacher who sent AV with the Instructional Assistant, or to Appellant's immediate supervisor, Assistant Principal Sue Smith.[87]

38. No direct or hearsay evidence was presented at the hearing on this appeal to show specifically what AV recalled telling Appellant during the May 2012 conversation about AV's younger brother.

39. By letter dated November 20, 2012, District Superintendent Sandra Husk notified Appellant she would recommend to the District Board that Appellant be dismissed from District employment. Superintendent Husk said her recommendation would be based on the following statutory grounds: neglect of duty; insubordination; inefficiency; inadequate performance; and

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[82] Stip. ¶11.

[83] TR1 198.

[84] TR1 75-76 (Watkins); TR1 118 (Honey); TR1 184 (Joa); TR1 234 (Nove).

[85] TR1 116-17 (Honey); TR1 237 (Nove).

[86] TR1 137-38.

[87] TR1 92-93 (Honey); TR2 48 (Adams-Sinclair); TR2 28-29 (Smith).

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"any cause which constitutes grounds for the revocation of such contract teacher's teaching license."[88]

40. On January 22, 2013, the District Board conducted a hearing on Superintendent Husk's recommendation to dismiss Appellant. Following the hearing, the Board voted to uphold the superintendent's dismissal recommendation on the grounds of: neglect of duty; insubordination; and any cause which constitutes grounds for the revocation of such contract counselor's teaching license. The District Board did not vote to uphold the dismissal recommendation on the grounds of inefficiency or inadequate performance.[89]

41. The District's 20-day dismissal notice contained the following factual allegations:

> Despite this extensive training, Ms. Meier admits that she failed to report suspected child abuse in the spring of 2012, when a student, AV, reported sexual abuse to her.
>
> AV was escorted to Ms. Meier's office by an instructional assistant who reportedly said to Ms. Meier, "[AV] wants to talk with you." The instructional assistant then left them alone in Ms. Meier's private office. At that point AV disclosed to Ms. Meier that her younger brother, age 12, had touched her breast and upper torso area. Ms. Meier reports that AV said she had been "molested" and then indicated that she had been touched on her breasts and upper torso. Ms. Meier determined that AV in her opinion could not understand the meaning of the word "molested", because AV is a special education student. Ms. Meier also decided AV's brother was just "being a pill" and that the report sounded more like a middle schooler fooling around and not molestation. Ms. Meier determined she would not report the matter to anyone except the Mother (JV) of both AV and the perpetrator.
>
> Ms. Meier reported that she told the mother of both students and the mother promised she would get counseling for the student and make a plan to avoid a repeat of the behavior. Ms. Meier was unable to recall what the plan was and did not follow up with the mother beyond a phone call the following week. The mother of AV disputes Ms. Meier's account of their conversation.[90]

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[88] Stip. ¶12.

[89] Stip. ¶13.

[90] D-1, pp. 4-5.

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42. By letter dated January 30, 2013, Appellant appealed to the Oregon Fair Dismissal Appeals Board from the District's decision to dismiss her from employment. [91]

CONCLUSIONS OF LAW

1. 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 admitted she did not report AV's disclosure to her in May 2012 to law enforcement or to the Oregon Department of Human Services is true and substantiated. The factual allegation that Appellant admitted she did not report *sexual abuse* to law enforcement or to the Oregon Department of Human Services is *not* true or substantiated.

3. The factual allegation that student AV described sexual abuse to Appellant when AV visited Appellant in her office in May 2012 is not true or substantiated.

4. The factual allegation that Appellant had reasonable cause to believe that AV reported sexual abuse to Appellant in May 2012, such that Appellant had a duty under law or District policy to report sexual abuse, is not true or substantiated.

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

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

7. The true and substantiated facts are not adequate to support the charge of any cause which constitutes a ground for the revocation of such contract teacher's teaching license 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).

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[91] Stip. ¶14.

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Discussion

I. Applicable Legal Standard.

The applicable legal standard that guides this panel's analysis is 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).

ORS 342.905(b) 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, 144 P3d 918 (2006) (footnote omitted). If the panel "finds 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,

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the appellant shall be reinstated with any back pay that is awarded in the order." OAR 586-030-0070(3).

II. The Facts Relied Upon by the District are not True and Substantiated.

This panel concludes that the critical facts relied upon by the District to support Appellant's dismissal are not true and substantiated. For the reasons explained below, the panel concludes that Appellant did not admit that she failed to report sexual abuse. The panel also concludes that Appellant did not, as the District alleged, fail "to report suspected child abuse in the spring of 2012, when a student, AV, reported sexual abuse to her."[92] The panel concludes that these two facts—(1) the alleged admission by Appellant, and (2) the alleged disclosure by AV that she experienced sexual abuse—are not true and substantiated. Appellant acknowledges that she did not report AV's disclosure to either law enforcement or to the Department of Human Services. Appellant asserts, however, that AV did *not* report conduct to her that would constitute sexual abuse. Appellant also asserts that she did not report abuse to law enforcement or DHS because Appellant *reasonably* concluded that AV disclosed only that her younger brother was "being a pill" to his older sister. This panel agrees Appellant reasonably concluded as she did, for the reasons explained below.

First, the panel concludes that it is not true and substantiated that Appellant *admitted* that AV disclosed *sexual abuse* to her. The only evidence for this assertion was Assistant Principal Adam Watkins' testimony and his notes of the October 26, 2012 meeting with Appellant, AV's father, and AV's step mother.[93] Assistant Principal Watkins testified that Appellant said that AV said she had been "sexual assaulted."[94] Appellant disputed saying this and the allegation was implicitly contradicted by the testimony of AV's father and the testimony of Lt. Lance Inman. AV's father met with Appellant on October 26, 2012. Lt. Lance Inman interviewed Appellant on October 29, 2012. Both AV's father and Lt. Lance Inman testified at the hearing, and neither

[92] D-1 at 4.

[93] TR1 68-69; D-3.

[94] TR1 68-69.

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testified that Appellant admitted that AV said she had been "sexually assaulted." Additionally, Principal John Honey testified at the hearing that he never heard Appellant say at the October 31, 2012 meeting that AV disclosed that she had been sexually assaulted or sexually molested.[95] Assistant Principal Watkins corroborated that during the October 31, 2012 meeting Appellant did not say that AV disclosed that she had been sexually assaulted.[96] For these reasons, this panel concludes that it is not true and substantiated that Appellant *admitted* that AV described sexual abuse to Appellant.

It is true and substantiated that an instructional assistant walked AV to Appellant's office in May 2012. Teresia Adams-Sinclair identified this instructional assistant as Debra Johnson. There is, however, no evidence in the record that Johnson told Appellant that AV "wants to talk with you," as the District alleged. The District did not present Johnson as a witness, nor did any District employee interview her during the investigation into Appellant's conduct. Johnson's alleged statement is, therefore, not substantiated.

Further, this panel concludes that it is not true and substantiated that AV described sexual abuse to Appellant. The preponderance of the evidence supports a finding that Appellant reasonably construed AV's comments to her in May 2012 as a description of AV's brother teasing AV, engaging in non-sexual horseplay, or attempting to touch AV's breasts in a non-sexual way. At the hearing, Appellant acknowledged that AV told her that AV's brother "molested" her. During their meeting, Appellant asked AV clarifying questions. Appellant noticed that AV did not seem upset and she smiled when she saw Appellant. AV did not describe any sexual touching by her brother. AV did not say that her brother had touched her breasts. Based on AV's answers and demeanor during their conversation, Appellant made a reasonable decision that AV was not describing sexual contact.

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[95] TR1 116 (on cross examination, Principal John Honey conceded that Appellant said that AV used only the word "molested," not "sexually molested").

[96] TR1 71-72.

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The panel concludes that Appellant reasonably construed AV's disclosure to her as a description of AV's brother just "being a pill," in Appellant's words. At the hearing, the District argued that AV's mere use of the word "molest" was sufficient to trigger Appellant's duty to report the conversation to law enforcement and DHS. This panel disagrees. The word "molest" has multiple meanings.[97] Although the word is frequently understood to refer to sexual conduct or, at least, conduct with sexual overtones, this panel concludes that in this specific case, AV's use of the word "molest" was not, standing alone, sufficient to trigger Appellant's child abuse reporting obligation. In this case, the specific word AV used was only one relevant fact among many Appellant considered.

Appellant made a judgment based on multiple factors in addition to AV's word choice. Appellant considered the fact that AV's demeanor during their conversation was not consistent with the gravity of a disclosure of sexual contact by her brother. Appellant also considered AV's answer to Appellant's question about where AV's brother had touched her. In response to the question, AV waved her hand in a circular motion in front of her upper torso and chest area. AV never said that her brother touched her breasts. Her hand gesture did not necessarily indicate sexual touching. AV did not say anything about sexual touching (unless, as the District alleges, using the word "molest" was sufficient on its own to describe sexual touching, which this panel does not conclude in the circumstances of this case). Appellant considered the fact that AV told Appellant she had been able to get her brother to stop behavior she did not like, and the fact that AV did not object to Appellant telling AV's mother about AV's disclosure. As Appellant credibly testified:

> Q: [By District's counsel]: Does a child need to say magic words to you or to anyone to report child abuse?
>
> A: [By Appellant]: I don't know what you mean by "magic words."

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[97] *See* The American Heritage College Dictionary, which provides two definitions: "to disturb, interfere with, or annoy," followed by "to subject to unwanted or improper sexual activity." *American Heritage College Dictionary* (3d ed. 2000).

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Q: Well, you had the discussion on direct about, did she say anything that led you to believe it was sexual abuse?

A: *No, she didn't say anything that led me to believe the touching was sexual in nature.*

Q: Okay. And so the word 'molest' to you doesn't connote that's sexual?

A: It's an ambiguous word. If she said 'sexually molest,' that might get me going in that direction. *And I gave her ample opportunity to tell me something that would be considered sexual, and that did not come up in that conversation.*[98]

In light of all the relevant facts—AV's behavior, demeanor, comments, the absence of a specific description of sexual contact, and AV's circular hand gesture—this panel concludes that Appellant did not have reasonable cause to believe AV was reporting that her younger brother had engaged in sexual contact with her. It follows that Appellant did not fail to report sexual abuse, because she had no reasonable cause to believe sexual abuse had occurred.

This panel also concludes that it is not true and substantiated, as the District alleged, that Appellant "determined that AV in her opinion could not understand the meaning of the word 'molested,' because AV is a special education student."[99] This panel concludes that it is not true and substantiated that Appellant concluded that AV "could not understand the meaning of the word 'molested'" *solely* because AV was a special education student. The District's charge implies that Appellant rushed to judgment and, in that rush, failed to fully consider the possible sexual connotations of the word "molest."[100] The District's charge also implies that Appellant exercised her judgment about whether she had a child abuse reporting obligation solely based on AV's word choice. This panel disagrees. As described above, this panel concludes that Appellant considered *multiple* factors, including AV's demeanor, gesture, other comments, and

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[98] TR2 110-11 (emphasis added).

[99] D-1 at 4.

[100] Principal John Honey articulated this concern in his testimony: "Debi made the comment that because of AV's cognitive abilities as related to autism, she wasn't even sure that she knew what molestation or abuse was. That raised a real red flag for me. I would hope that in that kind of a situation, we would err on the side of caution rather than sort of dismissing it as maybe a kid not really knowing what it meant." TR1 88.

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word choice, and reasonably concluded that AV was not disclosing sexual abuse. In reaching its decision, the panel took into account the substantiated fact that Appellant called her supervisor, Assistant Principal Sue Smith, the same day that AV visited her in order to share with her supervisor Appellant's plan to call AV's mother. This panel believes that Appellant's call was not consistent with a counselor rushing to judgment to attempt to avoid her abuse reporting obligations. Like Appellant, Assistant Principal Smith did not report AV's disclosure to law enforcement or DHS. There is no evidence that Assistant Principal Smith asked Appellant whether Appellant thought she needed to make such a report.[101]

The District also alleged that Appellant:

> [R]eported that she told the mother of both students and the mother promised she would get counseling for the student and make a plan to avoid a repeat of the behavior. Ms. Meier was unable to recall what the plan was and did not follow up with the mother beyond a phone call the following week. The mother of AV disputes Ms. Meier's account of their conversation.[102]

It is true and substantiated that Appellant called AV's mother and left a voicemail message for her after AV's visit to Appellant's office in May 2012. It is true and substantiated that AV's mother returned the phone call. This panel concludes that the District did not substantiate the allegation that AV's mother "promised she would get counseling" for AV's brother. AV's mother did not testify at the hearing. District Director of Employee Relations Kathryn Nove testified that she talked to AV's mother. Nove's notes, however, state, "No counseling (did not provide to kids). Did not tell Debi about counseling."[103] There is no other evidence on which this panel could rely to conclude that AV's mother promised Appellant she would get counseling for AV.

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[101] The District's position implies that Appellant minimized AV's report when Appellant called Vice Principal Smith at the end of the day. The panel does not accept that implication as true. Vice Principal Smith testified that Appellant "always followed protocol and talked to our SRO or DHS whenever there was suspected abuse." TR2 25. The panel heard no testimony to support a finding that Appellant was covering up or avoiding her duty to report child abuse. There was no evidence to support a conclusion that Appellant had any such motive.

[102] D-1 at 4.

[103] D-19 at 2.

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The panel concludes that the alleged fact that AV's mother "disputes Ms. Meier's account of their conversation" in May 2012 is not substantiated. AV's mother did not testify at the hearing. District Director of Employee Relations Nove testified about what AV's mother told Nove about what AV's mother allegedly said to Appellant. Nove, however, had not talked to Appellant, and this panel concludes that it cannot rely solely on Nove's hearsay account of AV's mother's alleged comments to find that AV's mother contradicts Appellant's account of their conversation. As between Nove's testimony about AV's mother's statements [104] and Appellant's account of her conversations with AV's mother, this panel weighed Appellant's account more heavily than Nove's testimony.

In addition to the reasons for its conclusions described above, this panel notes that the District did not present witnesses at hearing for some of the relevant facts at issue. Most significantly, the District did not present AV as a witness, although she was at least 18 at the time of the hearing. The District also did not present AV's mother as a witness. The District also did not present Instructional Assistant Debra Johnson, who walked AV from Teresia Adams-Sinclair's classroom to Appellant's office for the meeting at which AV disclosed to Appellant that her younger brother "molested" her. Appellant's testimony about what AV told her, and what Appellant and AV's mother discussed on the telephone and in person about AV's disclosure, was the only non-hearsay testimony in the record about Appellant's conversations with AV and her mother. This panel relied heavily on that fact in reaching its conclusions.

The panel further notes that, in reaching its conclusions, it considered Appellant's credibility and found her to be a credible witness. The panel concluded that Appellant's testimony was specific, detailed and internally consistent. In reaching its conclusion that Appellant's testimony was credible, the panel also noted the fact that the District did not present as witnesses the individuals whose statements the District relied upon to argue that Appellant inaccurately described her meeting with AV and her discussions with AV's mother. Instead of

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[104] *See, e.g.*, TR1 202-203.

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presenting AV as a witness, the District presented testimony from Officer David Zavala of the Keizer Police Department. Officer Zavala repeated statements AV made to him when he interviewed AV, although he acknowledged he did not ask AV questions specifically about what AV told Appellant in May 2012.[105] The District did not present AV's mother as a witness at the hearing. Instead, the District presented testimony from District Director of Employee Relations Kathryn Nove, who repeated statements AV's mother made to her when she met with AV's mother. Although the panel members considered the hearsay statements by AV and by AV's mother, the panel members weighted Appellant's testimony more heavily because Appellant testified credibly at the hearing and was subject to cross examination.

III. 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 Insubordination.

The panel concludes that the true and substantiated facts are not adequate to support dismissal on the basis of insubordination. Insubordination within the meaning of ORS 342.865(1)(c) means "disobedience of a direct order or unwillingness to submit to authority," and must be accompanied by a defiant intent or attitude on the part of the teacher. *Bellairs v. Beaverton Sch. District,* 206 Or App 186, 199, 136 P3d 93 (2006). In this case, there is no basis for this panel to conclude that the true and substantiated facts support a conclusion that Appellant, with a defiant intent, disobeyed the law or policy or was unwilling to submit to authority in the four ways the District contends. The District contends:

> First, [Appellant] did not report the suspected abuse to DHS or law enforcement. Second, she informed the parent of the victim who was also the mother of the perpetrator of the reported abuse. Third, she did not make a report to any administrator or the SIRC team. Fourth, she did not follow SIRC protocols. Ms. Meier also failed to inform the non-custodial parent of the reported abuse, further

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[105] In response to Appellant's counsel's question about whether AV mentioned anything about her spring 2012 meeting with a school counselor, Officer Zavala testified, "Not that I recall without having to really look over this. No, not that I have any recollection of. I guess for the record, I didn't ask those questions because that's not what I was looking into. I was looking into the criminal aspect of this." TR1 137.

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endangering the student when AV and her brother visited her father and step-mother.[106]

The true and substantiated facts are not adequate to support these alleged instances of insubordination. We discuss each specific ground in turn, below.

1. Insubordination: Failure or Refusal to Report Sexual Abuse.

The panel concludes that Appellant did not defiantly refuse to report abuse to law enforcement or to the Department of Human Services, as required by ORS 419B.010, and as claimed by the District. Appellant's duty to report child abuse is imposed by ORS 419B.010, which requires any "public or private official having *reasonable cause to believe* that any child with whom the official comes in contact has suffered abuse ... shall immediately report or cause a report to be made in the manner required in ORS 419B.015." ORS 419B.010(1) (emphasis added). School employees are public or private officials. ORS 419B.005(4). Abuse means sexual abuse "as described in ORS chapter 163." ORS 419B.005(1)(a)(D).[107]

School employees are required to report what they have reasonable cause to believe is sexual abuse as described in ORS chapter 163. Sexual abuse is described in ORS 163.415 (sexual abuse in the third degree), ORS 163.425 (sexual abuse in the second degree), and ORS 163.427 (sexual abuse in the first degree). Both ORS 163.415 and ORS 163.427 require "sexual contact." "Sexual contact" between people is described as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party." ORS 163.305(6).[108]

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[106] *See, e.g.*, D-1 at 5.

[107] The District's charged facts refer only to "sexual abuse," *see* D-1 at 4. At the hearing and in their closing briefs, neither party argued that Appellant failed to report any assault, any non-accidental injury, or any mental injury, as described in ORS 419B.005(1)(a)(A) & (B). This panel did not, therefore, consider any of those definitions of abuse in its ruling.

[108] ORS 163.425 does not use the phrase sexual contact, but states that a person commits the crime of sexual abuse in the second degree when the "person subjects another person to sexual intercourse, deviate sexual intercourse or, except as provided in ORS 163.412, penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto[.]"

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The panel concludes that Appellant did not defiantly refuse to report sexual abuse to law enforcement or to the Department of Human Services, as required by ORS 419B.010 and District policy.[109] It is not true and substantiated that Appellant had "reasonable cause to believe" that AV's younger brother had sexual contact with AV "for the purpose of arousing or gratifying the sexual desire of either party." *See* ORS 163.305(6). It is true and substantiated that AV told Appellant that her younger brother "molested" her, and that, when asked by Appellant whether AV's brother touched her, AV indicated in the affirmative by waving her hand in a circular motion in front of her upper torso area and chest area. Appellant asked AV clarifying questions. AV did not say that her brother touched her breasts. AV did not tell Appellant anything that resulted in Appellant concluding that sexual contact had occurred. AV seemed comfortable talking to Appellant, and did not object when Appellant said she was going to contact AV's mother. This panel concludes that Appellant, based on her many years as a school counselor and the training she had received, reasonably concluded that AV's statement to Appellant was a description of AV's brother teasing AV or, as Appellant described it, AV's brother "being a pill."[110] AV's statement did not, however, give Appellant reasonable cause to believe that AV's brother had sexually abused AV. No report to law enforcement or DHS, therefore, was required. It follows that Appellant was not insubordinate in failing to report AV's disclosure.

In addition, the panel also notes that there are no true and substantiated facts that Appellant's non-report to law enforcement or DHS was defiant or marked by a defiant intent. This panel believes that Appellant's conduct was inconsistent with defiance. Appellant called her direct supervisor, Assistant Principal Sue Smith, the same day AV told Appellant that her brother "molested" her. Appellant told Smith she planned to tell AV's mother about the conversation. Appellant's call to Smith is inconsistent with a defiant attitude.

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[109] *See, e.g.*, D-15 at 3.

[110] TR2 69, 73, 110.

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Similarly, Appellant's ready acknowledgement to AV's father in October 2012 that AV had visited her office and told her that her younger brother had "molested" her is also inconsistent with a defiant attitude. The panel also concludes that Appellant cooperated with Lt. Lance Inman when he interviewed her. These acts by Appellant are consistent with the fact that Appellant genuinely believed that AV had told her about her younger brother "being a pill." The panel finds it unlikely that Appellant would have so readily shared information with her direct supervisor, with AV's father, and with Lt. Lance Inman if in fact she was defiantly refusing to report sexual abuse to law enforcement or DHS.

Finally, the panel notes that it was unpersuaded by the District's argument that Appellant violated a District policy by asking AV clarifying questions when AV visited her office in May 2012. Debbie Joa, the District employee who prepares and presents the District's training on child abuse reporting, acknowledged that an educator asking clarifying questions to determine if abuse has occurred is appropriate in some circumstances. Specifically, Joa testified that it would be appropriate for a District to ask follow-up questions of a student who reported being touched by her brother.[111]

2. Insubordination: Informing AV's Mother of AV's Visit.

The panel also concludes that the true and substantiated facts are inadequate to support dismissal on the basis that Appellant defiantly told AV's mother about AV's statement. To establish insubordination, there must be credible evidence that the District imposed a lawful order or directive, that it clearly communicated that order or directive, and that the teacher willfully refused to obey the order. *Sherman v. Multnomah Education Service Dist.*, FDA-95-4, p. 23 (1996). The panel concludes that (a) the District did not impose an order or directive that

[111] TR1 188. Ms. Joa testified that it would be appropriate to ask open-ended questions if a student reported that "my brother touched me," as opposed to "'My brother touched me on a certain place on the body.' Just, 'My brother touched me.'" This panel concludes that even considering this dichotomy, as described by Ms. Joa, Appellant's clarifying questions to AV were consistent with the District's policy.

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prohibited Appellant from talking to AV's mother after AV's disclosure to Appellant, and (b) even if it had such an order or directive, the District did not clearly communicate it to Appellant.

This panel concludes that there is no evidence that any District policy prohibited Appellant from calling AV's mother in May 2012 under the circumstances in this case. The District relies on a policy identified as KLG-R-1.[112] The language in that policy, however, prohibits staff members from informing parents about child abuse reports *to law enforcement or DHS*:

> 2.01 Any school employee having reasonable cause to believe that any student with whom he/she comes in contact in an official capacity has suffered abuse, or that any adult with whom he/she comes in contact has abused a student, shall report immediately to Services to Children and Families or a law enforcement agency.
>
> 2.01.01 Staff members may not inform parents of *such reports.*[113]

This policy did not, as the District maintains, direct Appellant not to discuss with AV's mother what AV told Appellant in May 2012. If Appellant had reported to law enforcement or DHS, this policy would have prohibited Appellant from disclosing that report to AV's mother.

The District also relies on a fact sheet entitled, "How Do I Report Suspected Child Abuse or Sexual Conduct Involving a District Employee or Student."[114] Like the policy discussed above, however, this fact sheet instructs staff not to tell the victim's parents about a law enforcement or DHS investigation. This panel concludes that the fact sheet did not direct Appellant not to call AV's mother or not to tell AV's mother about her conversation with AV.

In addition, this panel also concludes that even if the District did have a policy or directive that prohibited Appellant from talking with AV's mother after AV's disclosure to Appellant, the District did not clearly communicate that directive to Appellant. The evidence is consistent that late in the afternoon on the day AV visited Appellant's office, Appellant called her direct supervisor Assistant Principal Sue Smith. Both Appellant and Smith testified that

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[112] D-15.

[113] D-15 at 9 (emphasis added).

[114] D-15 at 10.

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Appellant told Smith she intended to call AV's mother. Smith testified that she did not attempt to dissuade Appellant from making this telephone call. Smith testified that Appellant's proposed call to AV's mother was "a normal reaction." Specifically, Smith testified, "From what she had told me AV had reported, it sounded like a normal reaction. It's just an issue with brother and sister, you know, 'I'm calling the mom.'"[115]

This panel concludes that the District did not have a policy or directive prohibiting Appellant from contacting AV's mother to disclose what AV had told her. This panel also concludes that even if the District did have such a policy or directive that applied in the specific circumstances presented by AV's disclosure to Appellant, the District did not clearly communicate that policy or directive to Appellant. Therefore, Appellant was not insubordinate when she called AV's mother after AV visited her office in May 2012.

3. Insubordination: Failure to Report to any Administrator or the SIRC Team.

The panel also concludes that the true and substantiated facts are inadequate to support dismissal on the basis that Appellant was insubordinate when she did not report AV's disclosure to any administrator or to the Sexual Incident Response Committee, which the District refers to as "SIRC." In support of this charge, the District relies on its procedure entitled, "Child Abuse or Sexual Conduct: Reporting Suspicions, PAP-P001."[116] That procedure states, in relevant part:

> 3.4 If the suspected abuser is a student in the district, the *reporting* employee notifies the school administrator or supervisor immediately *after making the report.*
>
> 3.4.1 If the administrator or supervisor is unavailable, the employee immediately notifies the Sexual Incident Response Coordinator.[117]

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[115] TR2 38.

[116] D-15 at 3, cited in District's Post-Hearing Brief, p. 3.

[117] D-15 at 3 (emphasis added).

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For two reasons, the panel concludes that the facts are inadequate to demonstrate that Appellant was insubordinate when she did not report AV's disclosure to any administrator or to the SIRC pursuant to this procedure. First, the District did not demonstrate that this procedure required Appellant to report AV's disclosure. By its own terms, this procedure required Appellant to notify a school administrator or supervisor "immediately after making the report" to the school resource officer, law enforcement or DHS. Here, Appellant made no such report; therefore, this procedure did not require her to notify an administrator or the SIRC. Moreover, this procedure requires district employees to report child abuse or sexual conduct, both of which are defined in the procedure. For all the reasons discussed above, this panel concludes that Appellant reasonably believed that AV did not disclose abuse or sexual conduct. Therefore, Appellant was not required by this procedure to make any report.

Second, this panel concludes that to the extent this procedure did require Appellant to notify a school administrator, Appellant did so. The panel was persuaded that Appellant called her direct supervisor, Assistant Principal Sue Smith, and accurately reported her conversation with AV and her proposed plan to call AV's mother. In light of Appellant's call to Assistant Principal Smith, this panel cannot conclude that Appellant was insubordinate with regard to this District procedure.

4. Insubordination: Failure to Follow SIRC Protocols.

The panel also concludes that the true and substantiated facts are inadequate to support dismissal on the basis that Appellant was insubordinate when she did not follow the SIRC protocols. As the panel understands this charge, the District is arguing that Appellant was insubordinate in not initiating the first step in the SIRC protocols. The first step is contacting the School Resource Officer. In support of this charge, the District relies on a number of charts and documents, all of which indicate that a "sexual incident" is the event that triggers the SIRC protocols.[118] "Sexual incident" is defined in the District's protocols as follows:

[118] *See* D-17, D-18, and D-25.

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> **Sexual Incident:** Any verbal or physical (contact or non-contact) sexual behavior that occurs on school grounds, or during a school sponsored activity, or which otherwise impacts learning or student access to education. The following is an incomplete list of situations that constitute a sexual incident: sexual harassment, sexual bullying, exposing genitalia, mutually agreed to sexual touching, coerced or unwanted sexual touching, viewing/distributing pornography, sexting, etc.[119]

This panel concludes that Appellant was not insubordinate when she did not follow the SIRC protocols. The SIRC protocols are relevant only when there is a sexual incident. This panel acknowledges that a "sexual incident," as it is used in the District's protocols, is a broad concept. Dr. Jeremy Wilson Kenney, who facilitated the District's SIRC protocols from 2009 until approximately 2011, testified to the intended broad definition:

> Q: [By District's Counsel]: What constitutes a sexual incident?
>
> A: [By Dr. Wilson Kenney]: So a sexual incident could be anything as mundane as, like, we've got an elementary school student peeing in the bark dust, is what I always used to say to school counselors. It can be relatively mundane sexual behavior all the way up to highly concerning sexual behavior.
>
> And a sexual incident refers to any kind of concerning sexual behavior that occurs inside or outside of school. So this could be something that happens off campus, outside of school hours, or something that occurs on campus.
>
> The idea of defining it in that way was to make sure that *whenever any school official had the knowledge of some concerning sexual behavior*, they understood there was liability around that and that they would address those behaviors whether they occurred at school or on campus or off campus.[120]

The panel concludes that Appellant was required to initiate the SIRC protocols if she was aware of a sexual incident. For all the reasons discussed above, this panel concludes that Appellant reasonably believed that AV did not disclose a "sexual incident" even under the broad definition of sexual incident testified to by Dr. Wilson Kenney. Moreover, even if reasonable minds could disagree about whether Appellant should have initiated the SIRC protocols,

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[119] D-17 at 10.

[120] TR1 259-60 (emphases added).

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Appellant's failure to do so was not accompanied by defiance, as required to support dismissal on the basis of insubordination. Appellant's call to her direct supervisor the same day as her conversation with AV obviates any finding of defiance in the circumstances presented by this case.

5. Insubordination: Failure to Inform the Non-Custodial Parent.

The panel also concludes that the true and substantiated facts are inadequate to support dismissal on the basis that Appellant was insubordinate when she did not report AV's disclosure to AV's non-custodial parent, her father. The evidence did not demonstrate that the District had a clearly communicated rule or policy that required Appellant to call AV's non-custodial parent to discuss AV's disclosure. When Appellant called her supervisor after AV's visit to Appellant's office, for example, and discussed her plan to call AV's mother, her supervisor did not direct her to call AV's father as well. There are no true and substantiated facts supporting a finding that Appellant was required to call AV's father. Even if Appellant were so required, there are no true and substantiated facts in the record that Appellant defiantly refused to do so.

B. The Charged Facts Are Not Adequate to Justify Dismissal for Neglect of Duty.

This panel concludes that the true and substantiated facts are inadequate to support a dismissal for neglect of duty within the meaning of ORS 342.865(1)(d). Neglect of duty means the "failure to engage in conduct designed to result in proper performance of duty." *Wilson v. Grants Pass School District,* FDA 04-7, p. 9 (2005). Neglect of duty can be demonstrated through evidence of "repeated failures to perform duties of a relatively minor importance or a single instance of a failure to perform a critical duty." *Id.,* p. 10, *citing Enfield v. Salem-Keizer School District,* FDA-91-1 (1992), *affirmed without opinion,* 118 Or App 162 (1993), *rev. denied,* 316 Or 142 (1993).

The true and substantiated facts are not adequate to demonstrate that Appellant repeatedly failed to perform minor duties or failed to perform a critical duty. The District and Appellant

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agree that the duty to report child abuse is a critical duty. For all the reasons discussed above, however, this panel concludes that Appellant reasonably believed that AV disclosed only that her brother had engaged in non-sexual horseplay and had attempted to touch her in her upper torso or breast area. AV's disclosure was not a disclosure of sexual contact, and Appellant had no duty to report it to law enforcement or DHS. This panel believes that Appellant did report what she heard to her supervisor, Assistant Principal Sue Smith, as was appropriate.

Further, when there is evidence that the employer has not previously considered the conduct at issue as grounds for immediate termination, a single failure to perform a duty does not rise to the level of neglect of duty within the meaning of ORS 342.865(1)(d). *See, e.g., Wilson*, FDA 04-7, at p. 10 (conduct "which is tolerated or dealt with only by discussion, comments on evaluations, or memos of concern show that a district does not consider the conduct to require any special remedial action and thus is not of special significance with respect to continued employment"). Here, Principal John Honey testified that a classified employee who failed to report a possible sexual assault was not terminated, and received only a letter of directive.[121] This evidence undermines any conclusion that Appellant's conduct constitutes a sufficient neglect of duty to warrant dismissal. In addition, this panel is also persuaded by Appellant's argument that the evidence shows that the District has previously imposed lesser discipline on other District employees who have failed to report claims of possible abuse.[122] In short, this panel concludes that the true and substantiated facts are inadequate to support dismissal for neglect of duty.

C. The Charged Facts Are Not Cause Constituting a Ground for the Revocation Of a Contract Counselor's License Under ORS 342.865(1)(i).

This panel concludes that the true and substantiated facts are not adequate to support a dismissal on the basis that Appellant has engaged in conduct constituting a ground for the

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[121] TR1 97-102.

[122] A-7 through A-11.

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revocation of her counseling license, within the meaning of ORS 342.865(1)(i). Failure to report child abuse is not itself a mandatory ground for revocation of an educator's license. Instead, the Teacher Standards and Practices Commission may revoke an educator's license for "gross neglect of duty." OAR 584-020-0040(3)(c). Gross neglect of duty is "any serious and material inattention or breach of professional responsibilities," which *may* include failing to report child abuse pursuant to ORS 419B.010. OAR 584-020-0040(4)(s). Appellant presented evidence of multiple cases in which the TSPC did not revoke or suspend an educator's license for failure to report child abuse.[123] Neither party presented evidence that as of the hearing date Appellant's license had been suspended or revoked.

For all the reasons discussed above, this panel does not believe that Appellant engaged in any serious and material inattention or breach of professional responsibilities. Appellant made a decision, based on multiple factors, that AV's description of her younger brother's conduct did not constitute a disclosure of sexual contact. Even if Appellant's decision could be considered an example of poor judgment (which this panel does not find), this panel nonetheless does not believe that Appellant's exercise of her judgment, under the circumstances in this particular case, was tantamount to a gross neglect of duty constituting grounds for the revocation of her license. The true and substantiated facts are not, therefore, adequate to support a dismissal pursuant to ORS 342.865(1)(i).

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[123] A-12, A-13, A-14.

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Order

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this 8 August 2013

David Krumbein, Panel Chair

Dennis Ross, Panel Member

Carolyn Ramey, 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.

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Order

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this 8 AUGUST, 2013

David Krumbein, Panel Chair

Dennis Ross, Panel Member

Carolyn Ramey, Panel Member

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Order

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position and shall be paid full back pay from the date of dismissal to the date of reinstatement.

DATED this August 8, 2013

David Krumbein, Panel Chair

Dennis Ross, Panel Member

Carolyn Rapney, 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.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013 served a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

John S. Bishop, II McKanna Bishop Joffe & Arms, LLP 1635 NW Johnson Street Portland, OR 97209	[ ] [X] [ ] [ ] [ ]	HAND DELIVERY U.S. MAIL - CERTIFIED OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Rebekah Jacobson Attorney at Law Garrett Hemann Robertson PC 1011 Commercial NE, Ste 210 PO Box 749 Salem, OR 97308	[ ] [X] [ ] [ ] [ ]	HAND DELIVERY U.S. MAIL - CERTIFIED OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

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