BEFORE THE FAIR DISMISSAL APPEALS BOARD

OF THE

STATE OF OREGON

In The Matter of the Appeal of KEITH BROWN, Appellant, *v.* PORTLAND PUBLIC SCHOOL DISTRICT, District.	**Case No.: FDA-24-05** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Keith Brown ("Appellant"), a high school counselor, was dismissed from his employment with the Portland Public School District (the "District") on February 20, 2024 based on (1) a sexual harassment and gender discrimination complaint by a graduate student intern and (2) Appellant's cell phone communications with a sixteen-year-old high school student. A hearing on the matter was held February 18-20, 2025 in Portland. As explained below, the Fair Dismissal Appeals Board ("FDAB" or the "panel") finds that the District did not prove sufficient facts to sustain Appellant's dismissal based on the discrimination allegations by the intern. However, the panel finds that the District proved – and Appellant himself admitted – that he corresponded with a teenage student using his private phone and, after learning that the student's parents complained, asked the student to delete texts, which is conduct constituting a neglect of duty severe enough to justify dismissal.

PROCEDURAL MATTERS

Before parties presented evidence on the merits of the case, the panel heard evidence on a motion to dismiss brought by the District asserting lack of jurisdiction by FDAB due to Appellant's position as a counselor, rather than a teacher. The panel rejects this argument.

The Oregon statute setting forth the procedure for appeals to FDAB states that "[i]f the district school board dismisses the teacher or does not extend the contract of the contract teacher, the teacher

or the teacher's representative may appeal that decision to the Fair Dismissal Appeals Board[.]" ORS 342.905(1). A contract teacher is defined for purpose of this section as "any teacher who has been regularly employed by a school district for a probationary period of three successive school years, and who has been retained for the next succeeding school year." ORS 342.815(3). The statutes go on to define teacher to mean "any person who holds a teaching license ... and who is employed half-time or more as an instructor or administrator," ORS 342.815(3). The statutory definition of 'instruction' explicitly includes counseling: "'Instruction' includes preparation of curriculum, assessment and direction of learning in class, in small groups, in individual situations, online, in the library and in guidance and counseling[.]" 342.120(6).

Appellant's position was designated as "contract teacher." He was hired by the District 1999 as a probationary teacher, elected to contract status in March 2002, and has maintained active teaching and counseling licenses through TSPC throughout his tenure. Appellant most recent contract teacher renewal was in March 2023. (Exhibit 1 to Response to Motion to Dismiss). As a counselor, Appellant provided instruction and assistance to students in the classroom, in both small group and individual settings.

FDAB has previously found that licensed teachers with additional licenses who have various position titles fall under FDAB's jurisdiction. In *Meier v. Salem-Kaizer School District*, FDA-13-01 (2013), the parties stipulated and FDAB found a high school counselor to be a "contract teacher" within the meaning of the statutes. In *Seeley v. Portland Public Schools*, Case No. 21-01 (2021), FDAB found a school psychologist to fall under its jurisdiction. Similarly, in *Jacquelyn Hallquist v. Hillsboro Sch. Dist.*, FDA-23-02 (Or. Fair Dismissal Appeals Bd. 2023) the panel found that a case manager was considered a contract teacher and asserted jurisdiction.

Appellant's position even more clearly falls within definition of teacher, as the duty of counseling is explicitly within the definition of teacher which forms the basis for FDAB jurisdiction. As a counselor, more than half of Appellant's job was to provide classroom, individual, and small group instruction on a wide variety of academic and social development topics including study skills,

prioritization, college and other post high school planning, safe dating, interpersonal communication, conflict mediation, suicide prevention, goal setting, and more. He presented curriculum to classes and, as school counselor, was an important part of the teaching team.

For these reasons, the panel finds that it has jurisdiction over this appeal.

FINDINGS OF FACT

1. Appellant was hired by the District as a math teacher in 1997, and became a high school counselor in 2002, starting at Roosevelt High School in 2002, moving to Ida B. Wells High School (then known as Woodrow Wilson High School) in 2006. Tr. 40:8-11. He was a well-respected high school counselor for the District, working with hundreds of students on his caseload every year and assisting colleagues in various programs, including weekend courses, for over two decades. Tr. 613:4-9; Tr. 831:1-10.

2. In fall 2022, Appellant accepted a position as counselor at Lincoln High School ("LHS"), where he was directly supervised by Principal Peyton Chapman. Tr. 832:25-833:14.

3. Appellant was known for being able to work effectively with a variety of students, particularly those with academic or other challenges. He worked with diverse high school student populations of varied academic and socioeconomic levels, acted as a mentor/site supervisor for numerous graduate student interns working to become counselors, and received excellent evaluations. Tr. 831:23-832:12; Exs. A-14, A-15, A-16.

4. Appellant was recognized by colleagues, supervisors, students and interns as being a talented and committed counselor who centered students' needs, established strong and healthy rapport with students, had excellent graduation rates among the students on his counseling load and supported colleagues. *See, e.g.,* Tr. 830:15-831:16, 831:21-832:15; Exs. A6-A9.

District Policies

5. All PPS Staff are required to follow district policies on workplace harassment, anti-harassment/nondiscrimination, and professional conduct between staff and students.

6. The District's Workplace Harassment Policy defines workplace harassment as unwelcome and offensive conduct that creates an intimidating, hostile or abusive work environment. Harassment includes, but is not limited to, conduct that constitutes discrimination based on race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, age, disability, expunged juvenile record, and any other discrimination prohibited by law and includes sexual assault. Ex. D-19b.

7. This District policy also prohibits unwanted conduct of a sexual nature that is inflicted upon a person or compelled through the use of physical force, manipulation, threat, or intimidation and includes any unwelcome sexual advances, requests for sexual favors, physical contact, or any other unwelcome conduct, verbal or nonverbal, of a sexual nature when.... (b) The conduct by supervisors or other District employees, school board members, contractors, and volunteers, that has the purpose or effect of substantially interfering with an individual's work performance; or (c) The conduct by supervisors or other District employees, school board members, contractors, and volunteers, that has the effect of creating an intimidating, hostile, or offensive working environment. Ex. D-19b.

8. The District's Anti-Harassment/nondiscrimination policy prohibits discrimination and harassment on the basis of sex, sexual orientation, gender expression or identity. Discrimination and harassment are prohibited in all of the District's programs and operations, including but not limited to, employment and educational opportunities. Ex. D-19c.

9. The District's Professional Conduct between Staff and Student policy prohibits inappropriate interactions with students, and identifies specific "Boundary Violations/ Prohibited Conduct" as including inviting individual students to the adult's home without parental notice and approval unless otherwise noted in an "exceptions" section of the policy; telling a student to keep something secret from other adults; and engaging in prohibited social media and electronic communications between adults and students as defined by the District's Acceptable Use Policy (8.60.40) and Social Media Administrative Directive 8.60.045-AD. D-19a.

10. Examples of prohibited conduct include inappropriate online socializing with students, including phone calls, texting, skyping, instant messaging, or use of any other telecommunications method, or engaging in any conduct that violates the law, or other generally recognized professional standards. Adults shall not communicate with students, for any reason, through use of a medium, blog, or app (software or phone application) that is designed to eliminate all traces or records of the communication (*e.g.*, Snapchat). Ex. D-19a.

11. District employees may not communicate with current students through social media directly or through private messaging tools without both written District approval and parental notice. Ex. D-19a, pp. 9-12.

12. Appellant acknowledged that he was aware of these policies. Tr. 206: 21-25; Tr. 207: 1-16. He attended annual trainings and was provided an employee handbook yearly which spelled out the expectations of professional conduct for district staff. Tr. 631: 6-12.

13. Appellant was also aware that the District required that all communications be made on District-approved platforms such as Google Voice and Remind; however, he didn't use them because he found them inconvenient and cumbersome. Ex. D-17, p. 8; Tr. 521: 6-21; Ex. D-19.

14. The District also had a school counselor manual that provided expectations, links to resources, and ethical standards adopted by the American School Counselor Association (ASCA). Tr. 410: 23-25; Tr: 411: 1-12. The District expected all school counselors to follow these ethical standards, which includes engaging in professional relationships and maintaining appropriate boundaries with students. Ex. D-20; Tr. 416: 17-25; Tr. 417:1-20.

15. As Marquita Guzman, Assistant Director of School Counseling, Social Work and Health Services, testified, communicating with students without informing school administrators and parents is not maintaining appropriate boundaries. Tr. 425: 2-7. Likewise, texting students outside of the school day is not appropriate and falls outside of the District's expectations of maintaining appropriate boundaries. Tr. 444: 1-2.

Interactions with "E.R."E

16. In January 2023, Appellant agreed to be site supervisor/mentor for three graduate school interns, including E.R. Tr. 86:8-16. Appellant had successfully supervised and mentored numerous graduate student interns in the past. Tr. 90:18-91:1; Tr. 838:21-839:8; Ex. A-7.

17. Graduate student E.R. testified that they preferred being around women and that they were uncomfortable with men. E.R. also testified they had specifically chosen a male site supervisor to challenge themselves and learn how males interacted with students. Tr. 382:16-23, 383:8-17.

18. On January 20, 2023, the first day E.R. was on campus for their internship, E.R. accompanied Appellant on Appellant's errands at lunch, to pick up lunch and medication for his dog, and to give the dog her medicine at Appellant's apartment.

19. Both testified that they talked about tattoos, and E.R. "brought up the idea of [getting tattoos] as a therapeutic practice." Tr. 118:13-119:4; 342:4-5. E.R. also brought up considering piercing their ears. Tr. 342:15-21. Appellant told E.R. that his self-care also included getting piercings, including a P.A. (abbreviation for "Prince Albert," a term for a penis piercing), as well as time in the hot tub at Common Ground, a spa and wellness center. Tr. 118:20-119:10.

20. Appellant and E.R. also talked about furniture and aesthetics; E.R. shared that their grandfather was a well-known furniture designer. Tr. 341:3-10 (E.R. testimony); Tr. 118:13-119:12.

21. E.R. testified that Appellant "mentioned like going out for a drink or grabbing a drink. And at the time it seemed pretty [normal] to me in the way that I've gone out for drinks with a lot of co-workers after the workday." Tr. 343:25-344:4. Appellant believed it was a very collegial conversation. Tr. 119:25-120:1.

22. On March 3, 2023, Appellant sent E.R. a text stating that Appellant could not come in to work that day because he had had COVID but that he was now testing negative and considering going to Common Grounds wellness center to sit in the "outdoor hippie tub." Appellant then asked "if it's not too hippie-ish or Portland to invite you, would you care to come... I'm through with my body-shit for

2023...I wanna sit in the tubs and have a steam.. and I'm happy to treat you as I am the older and wiser one ...supposedly... It's an hour followed by a post hippie tub margarita as is customary." Ex. D-16, p.5.

23. E.R. rejected the suggestion by responding, "I appreciate the offer but I'm fucking swamped with grad school work right now, so I think I need to take the afternoon to get shit done." E.R. did not indicate in any way that the invitation made them uncomfortable or upset. Ex. D-16, p. 5. Appellant responded: "Ok. The offer was made. Maybe a drink another time then." Ex. D-16. Appellant testified that the offer was not repeated after those texts. Tr. 122:17-23.

24. One week later, Appellant and E.R. worked together at school on a student's educational plan document. The issue of the student's preferred pronouns came up in the context of preparing the document, which repeatedly used pronouns. The student had used both they/them and, more recently, she/her pronouns.

25. Appellant had prepared the document using she/her pronouns before the student reviewed the document and before the student requested that the pronouns be changed back. Appellant made the edit but missed several occurrences of pronouns in the document, which E.R. caught and Appellant corrected immediately before giving the edited document to the student. Tr. 123:22-124:11; 123:17-20.

26. That same day, in the context of the pronoun discussion, E.R. told Appellant that they were questioning their own gender identity and proceeded to volunteer information about deeply personal family issues. Tr. 124:22-125:13; 125:17-126:6; 126:10-14.

27. E.R. called in sick their next workday at LHS. Tr. 364:13-365:6. Within a few days, E.R. quit their internship. Appellant was copied on E.R.'s email terminating their internship. Appellant was concerned about E.R. and reached out to the graduate program administrators named in the email to ask if E.R. was okay, but did not receive any response. Tr. 127:14-19.

28. On March 24, 2023, Appellant received an email informing him that there were allegations that he "had been making comments of a sexual nature to a colleague in violation of the District's Workplace Harassment Policy and Non-Discrimination Policy," and instructing him not to be in

contact with E.R. Ex. D-4. Appellant was distressed and horrified, as he believed he had made no comments of a sexual nature to E.R. Tr. 120:12-121:3; 127:22-25.

29. E.R. was unclear in their testimony regarding the frequency of invitations from Appellant to socialize, testifying that it was an almost daily occurrence (Tr. 356:17) but also that " I -- I can recall at least two or - - for the first day, that text message and at least one other conversation the week before that text message about -- about going out....So yeah, three-something; yeah, three-ish/four-ish times. Tr. 386:24-387:5.

30. Upon examination, E.R. acknowledged they had spoken openly with Appellant about personal issues of their (E.R.'s) life, including their divorce, gender, and polyamory. E.R. conceded that Appellant may have thought they were becoming friends. Tr. 399:3-9.

31. E.R. initially testified that Appellant brought up piercing and his P.A., then corrected themselves to state that it came up in the context of tattoos and after E.R. shared that they were working toward getting their ears pierced. Tr. 342:17-20.

32. Another graduate intern, G.L., testified that on a day that he was not regularly at LHS, he had gone into the counseling center and seen Appellant and E.R. sitting in Appellant's glassed-in office, talking and smiling. The door was closed, but Appellant saw Mr. Leonard, opened the door and gestured for him to come in. Mr. Leonard testified that the atmosphere was very relaxed, there was laughter and he stayed and talked with them for about 15 minutes. Tr. 733:12-20, Tr. 734:6-735:6.

33. According to Maria Ceniceros, the investigator assigned to E.R.'s complaint, E.R. stated that they did not say or do anything to alert Appellant to their discomfort. E.R. claimed they were just determined to "endure" and at the end "drop the hammer" on Appellant. Ex D-14, p. 4.

34. On April 2, 2023, the day before school was to start after spring break, Appellant received a letter signed by Ms. Ceniceros, informing him that he was being placed on Paid Administrative Leave ("PAL") pending investigation into allegations that he had violated the District's Workplace Harassment Policy and Non-Discrimination/Anti-Harassment Policy and ethical educator and professional conduct standards by allegedly: "discussing your penis piercing with a graduate school

intern under your supervision who is also a PPS employee on multiple occasions; encouraged the same individual to get their penis pierced; discussed your sexual history with them on multiple occasions; discussed your sex life with them on multiple occasions; asked them out on multiple occasions; asked them about their sex life; questioned them about their gender identity and sexual orientation; misgendered a student multiple times; discussed a student's sexual orientation; and questioned whether that student is a "receptive gay male" with your intern." Ex. D-5.

35. The letter also gave notice that two other matters which had arisen the week before spring break would be part of the investigation; these were eventually dismissed – one as a blameless mistake on the part of Appellant, the other as an error by the District. Tr. 226:19-228:3.

36. Appellant acknowledged that he mentioned having a P.A. in the context of that conversation, but testified that he did not repeatedly mention it, and that he did not encourage, much less pressure, E.R. to get a P.A. Tr. 85:20-86:7. Both Appellant and E.R. testified that piercing and other body art was mentioned in the context of stress responses and self-care. Tr. 117:2-21; Tr. 120:2-121:4.

37. Throughout the investigation and subsequent hearing, Appellant denied that he discussed his sexual history or "sex life" with E.R. or asked E.R. about their sex life. Tr. 120:23-121:4; Ex. A-26. E.R.'s initial allegations were that Appellant discussed his sex life multiple times, but E.R. testified that Appellant only mentioned sex once. Tr. 373:23-374:2.

38. E.R. also acknowledged that they voluntarily shared their own nonbinary gender identity and polyamory in conversation with Appellant and felt a "desire to try and connect to [Appellant] on a personal level." Tr. 345:25-346:1. E.R. testified that they were in a phase of trying to understand their own sexuality and wanted the opportunity to connect with someone who might help him understand themself. Tr. 346:25-347:4.

39. Appellant testified that he had socialized with other interns and colleagues. Tr. 121:5-25. He had not previously invited an intern to the wellness center, but he had only done so with E.R. because it related to their conversations about self-care. Appellant also said he would not do so again as he was mortified at how it was received and how it made E.R. feel. Tr. 90: 8-12; 91:7-9.

Interactions with "P.M."

40. In winter of 2023, Appellant was asked by a French teacher who was going out on maternity leave to check in on student P.M., who needed extra support. Appellant became part of the team working to support P.M.'s success.

41. P.M. began to stop into Appellant's office regularly. Tr.132:1- 6. Appellant had a good rapport with P.M., but P.M. often skipped classes, was involved with substances, and described a difficult home life, particularly in their relationship with their father. Tr. 98:12-18; Tr. 208:23-25; Tr. 790:3-792:4.

42. In March, Appellant began to use text messages as a means to contact P.M. and offer support, including keeping them on task with classes ("Keith here. Why aren't you in second period?" Ex. 29, p. 1). Other texts from Appellant reminded them of tests and appointments ("Very important to be at school tomorrow for that appointment." *Id.*), encouraged them to study ("You'll have to study. You can do it." *Id.*), or to discuss educational opportunities with their parents ("Talk to our mom at some point. She may want to hear options from me." *Id.*)

43. Contrary to District policy and rules, Appellant was using his personal cell phone to text P.M. According to Appellant, he had received grudging permission from his supervisor, Principal Peyton Chapman, to use his personal phone to text students, after she was unable to procure a District-provided cell phone for him due to budget constraints. Tr. 136:10-137:5; 756:4-19.

44. Appellant was aware of the District-provided Remind and Google Voice platforms which could be installed on a personal cell. However, as he complained to Principal Chapman, he found these applications to be prohibitively cumbersome. Tr. 136:10-137:5.

45. Appellant believed that Principal Chapman had directly, or at minimum tacitly, given him permission to use his personal phone to communicate with students without insisting he use the Remind or Google Voice applications. Tr. 138:14-15; 836:5-14 850:22-851:2; 756:4-19.

46. On April 4, 2023, the parents of P.M. contacted LHS Vice-Principal Steven Pape to request a meeting about Appellant's private texts with their child. Ex. D-6.

47. T.M., P.M.'s father, testified that P.M. was not doing well in the 2022-23 school year. Tr. 98:14-25; Tr. 99:1-2. P.M. was struggling educationally and interpersonally.

48. T.M. reported that he had never communicated with Appellant until March 20 when there was a meeting to discuss transitioning P.M. out of school and into a G.E.D. program. *Id.* at 104. Because P.M. was in a vulnerable position and had previously experienced an adult stalking P.M., P.M.'s mother began looking at P.M.'s text messages. This was when they learned that Appellant had been texting their child. *Id.* at 105-6; Ex. D-6.

49. After meeting with the parents and reviewing the text messages exchanged between P.M. and Appellant, Vice-Principals Steven Pape and Chris Brida reviewed the texts and thought that they were inappropriate or at least questionable. Tr. 793: 23-25. Appellant was placed on administrative leave pending a review of the texts by Mr. Pape.

50. On March 13, 2023, there was a text conversation between Appellant and P.M. in which Appellant suggested that P.M. stop by his apartment building to meet with the foreman of a construction project at the building. Appellant believed this would help P.M. practice interviewing for construction jobs.

51. In the message, Appellant shared his home address with P.M. Appellant also suggested that P.M. walk with his father to Appellant's residence so that he could apply for a summer construction job, which would be in the neighborhood and a good resume builder.

52. On April 3, 2023, Appellant texted P.M. on 9:58 pm, "I'm on leave. Likely 2-3 weeks at the minimum. I can't say why. You lose your phone at 10:30? P.M. replied, "Yup...Damn ok understandable...Well who should I be moving forward with on my school stuff...With"

53. Appellant then responded, using Siri, "Can you delete these texts? I shouldn't say. Let's catch each other in the neighborhood. I can't be on campus. Hey man, can you have a pedo [sic] conversation? If you just call me it's easier." P.M. responded, "Yea I can call." P.M. then called Appellant and they spoke for 7 minutes. Ex. D-13.

54. In addition to the content, especially the instruction to delete texts, Mr. Pape noted that one of the texts was sent in the evening, which concerned him. Tr. 796:19-22. Mr. Pape knew that P.M. had a history of abuse and was potentially vulnerable to further abuse. Tr. 798:10-14. After reviewing the texts, Mr. Pape made a report to the State Department of Human Services' child abuse hotline. Tr. 794: 8-12; Ex. D-7.

55. Appellant testified that he got P.M.'s number from the contact information the family listed in the District's Synergy platform, and that he believed that including that number in the school directory indicated that it was an accepted contact number and provided general approval to use it for legitimate educational purposes. Tr. 56:17-57:3. Appellant did not give P.M.'s parents notice that he was communicating via direct text to the student. Ex. D-19.

56. However, all PPS staff are expected to use Google Voice or Remind when interacting with students. In 2019, the District adopted a practice of providing district-issued cell phones to social workers and requiring all other staff to use Google Voice or Remind when interacting with students. Tr. 445:19-25; Tr. 348:1-12.

57. Vice Principal Lamont testified that Mr. Brown would have been able to use his personal phone to contact students if he had used either the Google voice or Remind apps. He refused to use them. Tr. 401: 14-20; Tr. 444:15-25. Tr. 490: 10-15; Tr. 492:13-16; Tr. 744: 12-13; Tr: 856: 15-20. Tr. 870: 1-6.

58. Although Principal Chapman admitted to knowing about Appellant's refusal, and only mildly if barely engaging with him about it, she testified that she and Vice Principal Lamont had repeatedly advised Appellant that he could not use his personal phone without using the Remind app. Tr. 772: 7-15. She also testified that the Teachers Standards and Practices Commission ("TSPC") were training staff not to contact students on their personal devices. Tr. 773: 1-5. None of the LHS administrators were aware that Appellant was privately texting students without parental notification. Tr. 772: 16-19.

59. After Mr. Pape contacted the DHS child abuse hotline, DHS' Office of Training, Investigations and Safety ("OTIS") initiated an investigation to determine whether Appellant had threatened or

caused harm to student P.M. and assigned Michelle Bryant to conduct the investigation. Tr. 459:17-21. OTIS informed the district that it was to put their investigation on pause pending its investigation. Tr. 460: 17-20.

OTIS Investigation

60. At the conclusion of its investigation, OTIS investigator Bryant found the text messages between Mr. Brown and P.M. to be very concerning. In her testimony, she stated that in her five and a half years as an investigator she had "never seen any messages between a school employee and a student of this nature." Tr. 464: 6-8. She also stated that he didn't provide direct answers to some of her questions, as when asked whether it was normal to meet children off school campus and whether it was okay to text students. Tr. 473: 22-25; Tr. 474:1-5.

61. Ms. Bryant also testified that student P.M. described Appellant as "a little creepy." Ex. D-9; Tr. 464: 6-8.

62. Appellant acknowledged that he had conversations with P.M. about his sexuality and that Appellant had asked P.M. if he was going to gay hookup dating sites like Grindr and Sniffies. Tr. 465: 9-15; Tr. 604:1-18; Ex. D-9. According to Appellant, P.M. brought up the topic of sexuality and Appellant advised him not to go on Sniffies. Tr. 604: 24-25. Appellant also talked to the student about not liking males in his age group and warned P.M. that there were a lot of people on "hook-up apps" that are not in his age group. Tr. 466.

63. Appellant testified he texted the "pedo conversation" phrase to P.M. while at the Goodwill with his friend and that he did not intend to say pedo but believed the text autocorrected. Tr. 470: 8-10.

64. Appellant admitted he had given P.M. his apartment address but said that he was trying to get the student a job at the construction site outside of the building. Tr. 209: 3-18; Ex. D-13; Ex. D-17; Ex. A-26. He also admitted to suggesting that he and the student should meet up in his neighborhood, but he said he suggested this because he was on leave at the time. *Id.*

65. Ultimately, the OTIS investigation was unfounded for threat of harm; however, Ms. Bryant found that Appellant's actions demonstrated boundary violations. Tr. 203: 3-21; Tr. 475: 14-18; Ex.

D-9; Ex. D-24. All in all, Appellant texted with P.M. approximately 41 times between March 13 and April 3, 2023. Tr. 208: 12-16.

66. Appellant also acknowledged texting P.M. to delete their messages from his phone. He explained he was frazzled while standing in the Goodwill and because of past negative experiences with Human Resources and prior investigations and disputes with the District. *Id.* Appellant characterized his texts requesting that P.M. delete prior texts as a deeply regretted lapse of judgment. Tr. 146:21-147:10.

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 true and substantiated facts are not sufficient to support the charge of neglect of duty based on alleged sexual harassment and gender discrimination of graduate intern E.R.

3. The true and substantiated facts are adequate to support the charge of neglect of duty as a ground for dismissal based on Appellant's text to student P.M. requesting him to delete texts after Appellant became aware of a complaint against him.

4. The District's dismissal of Appellant was not arbitrary, unreasonable, or an excessive remedy within the meaning of ORS 342.905(6).

DISCUSSION

I. Applicable Legal Standard.

In Oregon, the permissible grounds for terminating a contract teacher are (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). 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).

II. The True and Substantiated Facts Are Not Adequate to Justify the Statutory Ground of Neglect of Duty Based on Alleged Harassment of E.R.

The panel concludes that the District did not establish facts adequate to support the statutory ground of neglect of duty based on Appellant's conduct toward E.R. FDAB 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 at 30 (2013), *aff'd,* 284 Or. App. 497, 508-509 (2017), *rev den*, 362 Or. 175 (2017).

Here, Appellant was expected to comply with anti-harassment and anti-discrimination policies designed to address and avoid intimidating and offensive work environments and/or harassment on the basis of sex, sexual orientation, and gender expression. Here, E.R.'s own testimony indicated that, during an off-duty (lunch-time) conversation with Appellant, it was E.R., not Appellant, who brought up very personal topics, including body art, piercings, self-care, gender, and sexuality. Appellant responded in kind and in a context where, according to E.R., Appellant believed he was establishing rapport and possibly a friendship with E.R.

Likewise, Appellant's one-time invitation to E.R. to visit a wellness facility may have demonstrated questionable judgment, especially in hindsight and in light of E.R.'s discomfort and subsequent complaint. However, given that Appellant did not repeatedly issue the invite after E.R. politely declined, and given that Appellant was not given any reason to believe that E.R. was uncomfortable or would not welcome the invite, the District failed to establish facts sufficient to demonstrate that Appellant engaged in conduct that could be characterized as "hostile" or "discriminatory" – certainly not to a degree and frequency that would constitute neglect of duty justifying dismissal.

III. The True and Substantiated Facts Are Adequate to Justify the Statutory Ground of Neglect of Duty Based on His Correspondence with Student P.M.

The panel concludes that the District established facts adequate to support the statutory ground of neglect of duty based on Appellant's conduct toward P.M., specifically when Appellant, in an admittedly severe lapse of judgment, requested P.M. to delete private texts after becoming aware of a potential investigation. Appellant was aware of policies seeking to enforce appropriate communications and boundaries with children, including engaging in private text messaging with students (without explicit permission and circumventing the District's ability to capture or review those texts).

Moreover, as a school counselor, Appellant had special ethical responsibilities to maintain appropriate boundaries with students. The District expected all school counselors to follow the ASCA ethical standards, including "engaging in professional relationships and maintaining appropriate boundaries with students." Witness Guzman, the Assistant Director of School Counseling, Social Work and Health Services, testified to the importance of establishing rapport and trust with students, which requires maintaining appropriate boundaries. Appellant's position as a counselor placed him in a position of significant trust, which he violated when he: (1) shielded communications from District oversight by engaging P.M. on his private cell and (2), ultimately, did in fact violate that trust by asking P.M. to delete prior texts, placing a child in the unacceptable, damaging position of keeping interactions with an adult secret.

As this panel has previously held, 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-04-07, at 9 (2005). "FDAB has interpreted 'neglect of duty' to mean the failure of a teacher to engage in conduct designed to bring about a performance of his or her responsibilities." *Bellairs v. Beaverton Sch. Dist.*, 206 Or App 186, 196 (2006) (internal citations omitted). Clearly, safeguarding a child's sense of trust in adults constitutes performance of an instructor's responsibilities. In *John Bishop v. Riddle School District*, FDA-13-08, the FDAB panel found the true and substantiated facts of a teacher's text messaging of students to be adequate to support a dismissal for neglect of duty where

such texts eroded effective relationships with students and parents" *Bishop* at 24 (citing Bellairs, 206 Or App at 196, quoting Jefferson County Sch. Dist. No. 509-J v. FDAB, 311 Or 389, 397 (1991)).

Here, explicitly asking a child to hide communications with a non-custodial adult erodes the effective relationship with, as well as between, a child and their parents. By Appellant's own admission, his impulsive text to P.M. to delete correspondence risked making P.M. feel there was something wrong with their communications before then. Whether or not that was the case (the panel is not inclined to view the content of previous correspondence as egregiously problematic, although the method violated policy), the instruction to hide such correspondence from other adults was risked instilling the idea in P.M.'s mind that it was appropriate to hide important information, especially potentially harmful interactions, from other adults.

IV. The Dismissal Decision Was Not Unreasonable, Arbitrary, or Clearly an Excessive Remedy.

Because the panel finds that the true and substantiated facts are adequate to support the statutory ground of neglect of duty, the panel next considers whether the dismissal was arbitrary, unreasonable, or clearly an excessive remedy. If so, the panel may reverse the dismissal for reasons stated with specificity in this opinion. ORS 342.905(6). When the facts justify the grounds stated for dismissal, however, the panel may engage in "only a deferential review" of the school board's decision to dismiss. *Ross v. Springfield Sch. Dist*., 294 Or. 357, 363 (1982). The panel may not set aside a dismissal unless it can say, as a matter of law, that no reasonable school board would have found the relevant facts sufficient for dismissal. *Bergerson*, 194 Or. App. At 313, *aff'd*, 341 Or. 401 (2006); *Lincoln County Sch. Dist. v. Mayer*, 39 Or. App. 99 (1979).

Here, the panel does not conclude that the dismissal was unreasonable, arbitrary, or clearly an excessive remedy. As discussed above, Appellant was expected to maintain appropriate boundaries and engage in safe interactions with students. Appellant violated that fundamental obligation in a single, but severe, way when, after a series of communications with P.M. that could not be tracked or monitored by the District, made a request to the student to delete such communications. Based on the

evidence in the record, the panel cannot say that no reasonable school board would have found that fact alone sufficient for dismissal.

Nor was Appellant's dismissal arbitrary. When evaluating arbitrariness, FDAB considers whether the decision was "based on preference, bias, prejudice, or convenience rather than reason or fact. *Id.* Multiple witnesses testified to the District's robust multidisciplinary team process in which employee conduct matters are examined by a cross-department team to determine among other things, whether additional information is needed before making a recommendation; whether there are comparators to ensure a consistent application of corrective actions; whether the investigation was biased in its approach. The District provided multiple comparators of employees who were dismissed/resigned in lieu of dismissal for inappropriate boundaries.

Finally, the issue of whether termination of Appellant was an excessive remedy, based on the narrower set of facts than those claimed by the District, is a closer question. On review, the panel cannot conclude that termination was excessive, in light of the severity of the violation and potential impact on a child who was instructed by a trusted adult to engage in secretive behavior. Further, Appellant appeared to deliberately, or at minimum knowingly and recklessly, circumvent district communication policies because he found them too "cumbersome." This, in combination with the final request to delete communications, undermined Appellant's core duties as a school counselor to provide a safe, supportive environment for children and maintain appropriate professional boundaries.

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ORDER

The appeal is dismissed.

DATED this_____day of_____ 2025 _____
Laura O. Latham, Panel Chair

DATED this 12 day of December 2025 John Hartsock
John Hartsock, Panel Member

DATED this_____day of_____ 2025 _____
Sami Al-Abdrabbuh, 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.

DATED this 12 day of December 2025 Laura Latham
Laura O. Latham, Panel Chair

DATED this_____day of_____ 2025 _____
John Hartsock, Panel Member

DATED this_____day of_____ 2025 _____
Sami Al-Abdrabbuh, Panel Member

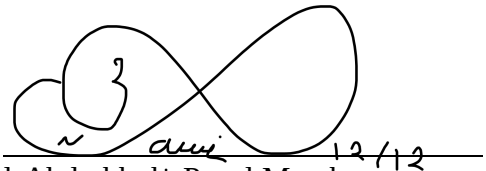
Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this order.

ORDER

The appeal is dismissed.

DATED this_____day of_____ 2025 _____
Laura O. Latham, Panel Chair

DATED this_____day of_____ 2025 _____
John Hartsock, Panel Member

DATED this 12th day of December 2025 
12/12
Sami Al-Abdrabbuh, 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 December 12, 2025, I served a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by email:

Yael A. Livny

Yael A. Livny
Sr. Assistant Attorney General
Labor & Employment Section
General Counsel Division
Oregon Department of Justice
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