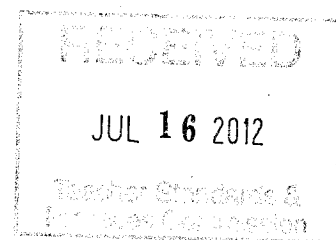


**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION**



IN THE MATTER OF:) **PROPOSED ORDER**
)
DAWN M. CUMMINGS) OAH Case No. 1202655
)

HISTORY OF THE CASE

On February 9, 2011, the Teacher Standards and Practices Commission (TSPC or Commission) issued a Notice of Opportunity for Hearing, proposing to discipline Dawn M. Cummings for gross neglect of duty based on the conduct alleged therein. On February 28, 2011, Ms. Cummings requested a contested case hearing. On January 25, 2012, TSPC referred the hearing request to the Office of Administrative Hearings (OAH).

On March 22, 2012, Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw held a telephone prehearing conference. Ms. Cummings represented herself. Assistant Attorney General Judith K. Anderson represented TSPC.

On May 31, 2012, ALJ Rackstraw held a hearing in Tualatin, Oregon. Ms. Cummings represented herself and testified. Ms. Anderson represented TSPC. Kelvin Webster, director of instructional services for Multnomah Educational Service District, and Jeffery Van Laanen, legal liaison for TSPC, testified for TSPC. The record closed at the conclusion of the hearing.

ISSUES

1. Whether Ms. Cummings committed gross neglect of duty, in violation of ORS 342.175(1)(b), OAR 584-020-0040(4)(n) and (o), OAR 584-020-0025(2)(c), and OAR 584-020-0035(1)(a).
2. If Ms. Cummings committed gross neglect of duty, what is the appropriate sanction?

EVIDENTIARY RULINGS

Exhibits A1 through A7, offered by TSPC, and Exhibits R1 through R4, offered by Ms. Cummings, were admitted into the record without objection. TSPC's objection to Exhibit R5, which was offered by Ms. Cummings, was sustained and that exhibit was not admitted into the record. Ms. Cummings' written argument, dated May 31, 2012, is admitted into the record as her closing argument.

FINDINGS OF FACT

(1) TSPC has licensed Ms. Cummings as a teacher in Oregon since 1999. Her Initial I Teaching License, which TSPC issued on February 6, 2007, expired on December 4, 2010. (Ex. A1 at 1-2.)

(2) From approximately August 2003 to August 15, 2007, Multnomah Education Service District (MESD) employed Ms. Cummings as a Special Education consultant and instructor at Donald E. Long, a youth detention facility.¹ (Test. of Cummings, Webster; Ex. R2.) On August 15, 2007, Ms. Cummings resigned from MESD. (Ex. R2.)

(3) On or about December 14, 2007, Ms. Cummings signed and submitted a Request for Complaint Investigation to the Oregon Department of Education (ODE). (Ex. A4.) In a two-page document titled "Complaint and Supporting Facts," Ms. Cummings alleged that Sandra Stanley, the former coordinator of Special Education at Donald E. Long, committed numerous violations of special education law record keeping. Ms. Cummings then listed the names of 14 students, along with details of their Individualized Education Plans (IEPs),² with the recommendation that ODE investigate the students' IEP files. (*Id.* at 2-3; test. of Cummings.)

(4) On or about January 14, 2008, Ms. Cummings signed and submitted an Educator Complaint Form and four pages of supporting documentation to TSPC. (Ex. A3.) On the Educator Complaint Form, she named Ms. Stanley and Mike Funderberg, the principal of Donald E. Long, as the persons against whom she was lodging the complaint. The Educator Complaint Form states, in part:

"Nature of Complaint – Summarize your complaint in this space. Attach a detailed explanation (up to two pages) including conduct dates, witnesses and list of relevant evidence. Enclose documentation if available.

(*Id.* at 1; emphasis in original.) In a two-page document titled "Complaint and Supporting Facts," Ms. Cummings alleged that Ms. Stanley committed numerous violations of special education law record keeping. Ms. Cummings then listed the names of 14 students, along with details of their IEPs, with the recommendation that TSPC investigate their IEP files.³ (*Id.* at 2-3.)

(5) Ms. Cummings did not have consent from any of the 14 students, or from their parents or guardians, to disclose to ODE or TSPC the students' names, the fact that they had

¹ Ms. Cummings testified at hearing that she began her employment at Donald E. Long as a guard, but the record is unclear as to how long she performed that work.

² Each student who receives special education services has an IEP. (Test. of Webster.)

³ Although TSPC subsequently redacted the students' names for purposes of this contested case proceeding, Ms. Cummings did not redact the names prior to submitting her complaints and supporting documentation to ODE and TSPC in 2007.

IEPs, or any details of their IEPs. (Test. of Cummings.) Disclosing that a student has an IEP identifies that student as a recipient of special education services. (Test. of Webster.)

(6) At the time she submitted the complaints and supporting documentation, Ms. Cummings did not believe that she needed consent to disclose the names of the students and details of their IEPs to TSPC and ODE. She reasoned that those entities had a legitimate purpose in receiving that information and a vested interest in the details of her complaint. (Test. of Cummings.)

(7) If TSPC requires additional information after receiving a complaint, TSPC has various mechanisms of obtaining that information, including subpoenaing records. (Test. of Van Laanen.)

(8) In a letter dated March 10, 2008, Ron Hitchcock, MESD Superintendent, reported to TSPC that he believed Ms. Cummings may have violated the provisions of the Family Educational Rights and Privacy Act (FERPA) by disclosing confidential student information to ODE and TSPC without consent from the students or their parents. (Ex. A2.)

CONCLUSIONS OF LAW

1. Ms. Cummings committed gross neglect of duty, in violation of ORS 342.175(1)(b), OAR 584-020-0040(4)(n) and (o), OAR 584-020-0025(2)(c), and OAR 584-020-0035(1)(a).

2. Reprimand is the appropriate sanction.

OPINION

TSPC has proposed to reprimand Ms. Cummings for gross neglect of duty, in violation of ORS 342.175(1)(b), OAR 584-020-0040(4)(n) and (o), OAR 584-020-0010(5), OAR 584-020-0025(2)(c), and OAR 584-020-0035(1)(a). TSPC must prove its allegations by a preponderance of the evidence, and it must also establish that the proposed penalty is appropriate. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Under ORS 342.165(1), TSPC has the authority to "adopt rules necessary for the issuance, denial, continuation, renewal, lapse, revocation, suspension or reinstatement of licenses or registrations issued under ORS 342.120 to 342.430."

1. Gross Neglect of Duty

ORS 342.175 provides, in part:

(1) The * * * Commission may suspend or revoke the license or registration of a teacher or administrator, discipline a teacher or administrator or suspend or revoke the right of any person to apply for a license or registration if the licensee, registrant or applicant has held a license or registration at any time within five years prior to issuance of the notice of charges * * * based on the following:

*- * * *

(b) Gross neglect of duty[.]

* * * * *

(6) Violation of rules adopted by the commission relating to competent and ethical performance of professional duties shall be admissible as evidence of gross neglect of duty[.]

OAR 584-020-0040(4) defines “gross neglect of duty” as “any serious and material inattention to or breach of professional responsibilities.” TSPC has specifically alleged that Ms. Cummings committed gross neglect of duty, in violation of OAR 584-020-0040(4)(n) and (o). Under those subsections, the following conduct may be admissible as evidence of “gross neglect of duty”:

(n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030; [and]

(o) Substantial deviation from professional standards of ethics set forth in OAR 584-020-0035[.]

TSPC has adopted Standards for Competent and Ethical Performance of Oregon Educators. See OAR Chapter 584, division 20. TSPC determines whether an educator’s performance is ethical or competent “in light of all the facts and circumstances surrounding the educator’s performance as a whole.” OAR 584-020-0000(3).

There is no dispute that Ms. Cummings disclosed to TSPC the names of 14 special education students, the fact that they had IEPs, and certain details of their IEPs, without first obtaining consent from the students or their parents or guardians.⁴

⁴ In its February 9, 2011 notice, TSPC does not discuss Ms. Cummings’ disclosure of information to OED, nor does TSPC propose discipline related that that particular disclosure. Therefore, my analysis in this case will be confined to the disclosure made to TSPC only.

First, TSPC contends that Ms. Cummings's conduct in disclosing such information without consent constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(n), as it incorporates OAR 584-020-0025(2)(c).

OAR 584-020-0025(2)(c) provides that a competent⁵ educator demonstrates skills in "[u]sing and maintaining student records as required by federal and state law and district policies and procedures." TSPC contends that the release of the names and IEP details of the 14 students without consent violates the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, because the information was protected information and the release of the information was not permitted under any of the exceptions set forth in the statute.

FERPA does not regulate school districts or teachers directly. Rather, the statute prevents the federal Department of Education from providing federal funding to school districts that violate its provisions. Absent the specifically enumerated exceptions, the statute generally prohibits school districts that receive federal funding from disclosing a student's educational records without advance written consent from the student's parents. 20 U.S.C. §1232g(b).

While FERPA explicitly applies solely to educational agencies, its protections would be meaningless unless they reached the conduct of individual educators and school administrators. As a matter of common sense, a school district is incapable of acting other than through individual employees and officers. If the school district were to allow individual teachers to ignore FERPA privacy protections, the district would be in violation of FERPA and would likely lose eligibility for federal funding.

TSPC contends that Ms. Cummings' disclosure⁶ of 14 students' names, and details of their IEPs, violated OAR 584-020-0025(2)(c), which required Ms. Cummings to use and maintain student records in a manner consistent with federal law. Thus, under TSPC's rule, Ms. Cummings could not ignore FERPA protections, even if she would not face personal liability for a violation of the federal statute.

20 U.S.C. §1232g(b) provides, in part:

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records⁷ (or personally identifiable

⁵ OAR 584-020-0005(2) defines "competent" as "[d]ischarging required duties as set forth in these rules."

⁶ Federal regulations at 34 C.F.R. §99.3 define a "disclosure," for purposes of FERPA, as follows:

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

⁷ 34 C.F.R. §99.3 defines "educational records" as records that are "[d]irectly related to a student" and that are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution."

information contained therein other than directory information * * *) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll[;]

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes[;]

(D) in connection with a student's * * * financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute[;]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions[;]

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency[;]

(J)(i) the entity or persons designated in a * * * [subpoena;]

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service[.]

Ms. Cummings contends that her disclosure to TSPC of student names and IEP details without the consent of the students or parents did not violate FERPA because TSPC is an "accrediting organization," and the disclosure was therefore exempt under 20 U.S.C. §1232g(b)(1)(G). TSPC argues that it was unnecessary for Ms. Cummings to disclose the names and IEP details of the 14 students in the documentation she submitted to TSPC. TSPC asserts

that to the extent it became necessary to have such information at some point during its investigation of her complaint, it could have obtained the information through means such as subpoena. TSPC argues that it did not require the protected information to act on Ms. Cummings complaint, and that the exception set forth in 20 U.S.C. §1232g(b)(1)(G) therefore does not apply here.

I agree with TSPC that none of the exceptions set forth in the statute above apply in this matter. I therefore conclude that Ms. Cummings' disclosure of 14 students' names and details of their IEPs without parental consent was not consistent with federal law and constituted a violation of OAR 584-020-0025(2)(c). The issue now is whether that violation amounts to gross neglect of duty, in violation of OAR 584-020-0040(4)(n).

As noted above, the "gross neglect of duty" standard requires a "serious and material" breach of professional responsibilities. Based on the plain language of the rule, therefore, not *all* breaches or deviations from professional standards constitute "gross neglect of duty." Rather, only serious and material breaches may give rise to TSPC discipline. See *Britton v. Board of Podiatry Examiners*, 53 Or App 544, 554 (1981) (recognizing that "gross negligence," as the term is generally used, "connotes an act beyond mere inadvertence or error in judgment; it must be error 'of such magnitude or recurrence' that a willful indifference to the consequences of the act may be inferred"). The issue thus becomes whether TSPC has proven that the conduct at issue here constitutes a *serious and material* breach of professional responsibilities.

Although it appears that Ms. Cummings acted in good faith in disclosing the names and IEP details of students in connection with her complaint to TSPC, I nonetheless find that the violation of student confidentiality was a serious and material breach of her professional duties. Thus, her conduct constitutes gross neglect of duty, in violation of OAR 584-020-0040(4)(n).

Second, TSPC contends that Ms. Cummings's conduct constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(o), as it incorporates OAR 584-020-0035(1)(a). OAR 584-020-0035(1)(a) provides:

(1) The ethical educator, in fulfilling obligations to the student, will:

(a) Keep the confidence entrusted in the profession as it relates to confidential information concerning a student and the student's family[.]

As previously discussed, Ms. Cummings failed to adhere to federal law concerning the disclosure of confidential student information. I am persuaded that, by so doing, she deviated from the professional ethical standard set forth in OAR 584-020-0035(1)(a), above. As previously stated, I find that the violation of student confidentiality was a serious and material breach of her professional duties. Thus, her conduct also constitutes gross neglect of duty, in violation of OAR 584-020-0040(4)(o).

2. Sanction

OAR 584-020-0045 sets forth various factors that TSPC may consider in determining the appropriateness of a sanction based on a violation of OAR 584-020-0040. Those factors include the following:

- (1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series of incidents;
- (2) The likelihood of a recurrence of the misconduct or violation;
- (3) The educator's past performance;
- (4) The extent, severity, and imminence of any danger to students, other educators, or the public;
- (5) If the misconduct was open and notorious or had negative effects on the public image of the school;
- (6) The educator's state of mind at the time of the misconduct and afterwards;
- (7) The danger that students will imitate the educator's behavior or use it as a model;
- (8) The age and level of maturity of the students served by the educator;
- (9) Any extenuating circumstances or other factors bearing on the appropriate nature of a disciplinary sanction; or
- (10) To deter similar misconduct by the educator or other educators.

While there is no evidence as to what extent, if any, TSPC considered and weighed the above factors, it has proposed that Ms. Cummings receive the lightest sanction available—reprimand. Given that the record reflects that Ms. Cummings' violation of professional and ethical standards was inadvertent and in good faith, I believe that any sanction beyond a reprimand would be inappropriately harsh.

ORDER

I propose that the Teacher Standards and Practices Commission issue the following order:

Dawn M. Cummings is reprimanded for committing gross neglect of duty, in violation of ORS 342.175(1)(b), OAR 584-020-0040(4)(n) and (o), OAR 584-020-0025(2)(c), and OAR 584-020-0035(1)(a).

Jennifer H. Rackstraw

Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS

This Proposed Order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this Proposed Order, you may file written objections, called "exceptions," to the Proposed Order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the Proposed Order** to:

Teacher Standards and Practices Commission
250 Division Street NE
Salem, Oregon 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the Commissioners in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.