

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

MAILED
MAY 19 2014
SEATTLE-OAH

IN THE MATTER OF

RUSSELL SEATON

CERT. NO.: 374935E

TEACHER CERTIFICATION
CAUSE NO. 2012-TCD-0004

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter on July 22 - 26, July 29 - August 2, and August 7 - 9, 2013 at Spokane, Washington. The Appellant, Russell Seaton, appeared and was represented by Kevan T. Montoya, attorney at law. The Office of the Superintendent of Public Instruction (OSPI) was represented by Aileen B. Miller, assistant attorney general. Also present was Catherine Slagle, director of OSPI's Office of Professional Practice (OPP).

STATEMENT OF THE CASE

On November 19, 2012, OSPI issued a Final Order of Revocation concerning the Appellant's Washington State teaching certificate. On December 10, 2012, the Appellant filed an appeal of that revocation order pursuant to Washington Administrative Code (WAC) 180-86-150.

On December 17, 2012, the Office of Administrative Hearings (OAH) mailed the parties a Scheduling Notice assigning Administrative Law Judge (ALJ) Matthew D. Wacker and setting a prehearing conference for January 8, 2013, and an administrative hearing for February 19, 2013. The prehearing conference was held on January 10, 2013, pursuant to an Order Resetting Prehearing Conference. A Prehearing Order was entered January 30, 2013, continuing the administrative hearing to July 22 - 26 and July 29 - August 2, 2013. A Notice of Reassignment of ALJ was entered January 30, 2013, reassigning the case to ALJ Anne Senter.

A readiness prehearing conference was held on July 8, 2013, and another prehearing conference was held on July 18, 2013. The administrative hearing was held on July 22 - 26, July 29 - August 2, and August 7 - 9, 2013.

Pursuant to prior order, the parties agreed and were granted time to file post-hearing briefs. Rather than simultaneous filing of post-hearing briefs, the parties agreed to a schedule by which OSPI's opening brief would be postmarked by December 16, 2013, followed by the Appellant's brief postmarked by January 30, 2014, and then OSPI's reply brief postmarked by February 14, 2014. OSPI's reply brief was postmarked on February 14, 2014, and was delivered via U.S. mail to the Office of Administrative Hearings (OAH) on February 18, 2014.

Under the Administrative Procedure Act (APA), chapter 34.05 Revised Code of Washington (RCW), the final order in this matter must be served in writing within ninety days

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after conclusion of the hearing, or after submission of memos, briefs, or proposed findings of fact. RCW 34.05.461(8). Filing of a document or pleading, including post-hearing briefs, means delivery of the document to the place designated by the agency, in this case, the OAH office of the presiding administrative law judge (ALJ). RCW 34.05.010(6).

OSPI's reply brief was delivered to the presiding ALJ at her office on February 18, 2014. Ninety days from February 18, 2014, is May 19, 2014. Therefore, the due date for the final order in the above matter is **May 19, 2014**.¹

EVIDENCE RELIED UPON

Exhibits Admitted:

Joint Exhibits: J1-J8;

OSPI's Exhibits: S1-S2, S4-S31, and S33-S45; and

Appellant's Exhibits: A50, A52, A54-A55, A56 (except p. 13), A57, A59-A65, and A67-A74.

Witnesses Heard (in order of appearance):

Russell Seaton, Appellant

Student 3²

Student 2

Student 2's Mother

Student 28's Mother

Student 8

Mother of Students 14 and 25

Abbie Lentz, University High School teacher

Student 5's Mother

Student 10

Student 11

Katie-Sarah Phillips, freelance theater seamstress and "child wrangler"

Student 26

Student 5

Student 15

Michael Saccomanno, teacher

Kenneth VanSickle, University High School assistant principal

Student 1

Student 19

Student 20

Student 53

Student 12

Student 6

¹ The Corrected Order Setting Additional Hearing Dates entered August 12, 2013, incorrectly identified the due date as May 15, 2014, based on the mailing date of OSPI's reply brief.

² No names of students are used to protect their privacy. The hearing record contains an identifying list.

Jay Rowell, Central Valley School District assistant superintendent
Student 61
Student 25
Student 30's Mother
Student 1's Father
Student 2's Stepmother
Daryl Hart, former University High School principal
Student 7's Mother
Catherine Slagle, OSPI director of professional practices
Briane Green, University High School teacher
Student 4
Charles Pschirrer, Lewis and Clark High School teacher
Elizabeth Mosback, former University High School student teacher
Student 27
Tammy Seaton, Appellant's wife
Shelby Hopkins, Washington Education Association staff lawyer
Student 26's Mother
David Smith, University High School teacher
Student 67
Student 30
Student 34
Student 7
Charles Seaton, Appellant's father
Student 3's Father

ISSUES

As set forth in the Prehearing Order of January 30, 2013, the issues for hearing are whether OSPI has established by clear and convincing evidence that the Appellant has violated RCW 28A.410.090, WAC 181-87-060, WAC 181-87-080, WAC 181-86-013, and/or WAC 181-86-014, and whether the Appellant's Washington Education Certificate No. 374935E should be revoked.

FINDINGS OF FACT

Background

1. The Appellant was 30 years old in the fall of 2005 and he turned 35 in February 2010. Appellant, Tr. 58-59. The Appellant received his initial teaching certification in 2000 and a continuing teacher certification in 2004. Exhibits S1, A59.
2. The Appellant began teaching at University High School ("U-High") in the Central Valley School District in 2001. Appellant, Tr. 59. The Appellant taught a number of choir and music-related classes and was the music director for school musicals.
3. The Appellant was evaluated by the District each school year from 2001-2002 through 2008-2009. Exhibit A50. In each evaluation, he was found to have met expectations, the

highest available rating, in every category in which he was evaluated. *Id.* Every comment in each evaluation was positive. *Id.* The following are the comments from his 2008-2009 evaluation, the most recent "long form" evaluation:

Russ is always prepared and pushes his students to perform. He uses a variety of teaching techniques to reach a wide variety of student learners. Russ is one of the top teachers in the Spokane area and is an outstanding educator/choir director.

Russ's specialty is classroom management. He is fair and consistent and rarely has any discipline problems. His incredible work ethic is a great example to everyone in our building.

Russ is very knowledgeable and uses various teaching strategies. He is prepared and professional. Russ teaches a wide range of students in various groups.

Russ is very easy to work with and has established a great rapport with his colleagues. He is open to recommendations and is willing to try anything to improve his instruction. Russ is a great team player that the entire staff looks to for guidance and leadership.

Russ is fair and consistent. He sets clear expectations and rarely has any issues. Russ has built a feeling of mutual respect in all of his classes. He is a veteran teacher that knows how to handle all types of students.

Russ truly cares about his students and they know it. He is respected by his peers as well as the students. Russ is one of our most popular teachers and has built an incredible choir program.

Russ's knowledge and pursuit of the essential learning's [sic] is outstanding. He is very knowledgeable in his field of Fine Arts/Music.

Russ is one of our most dependable teachers. He works effectively with parents and staff. He follows procedures and has built great relations with staff. Russ is not only a leader in our building but also the entire District.

SUMMARY OF EVALUATION: Russ is an outstanding teacher that has become an icon in our District. He is well respected in our building and in the community as an excellent teacher/director. He is a valuable asset to our school as he has impacted many students in a very positive way. His hard work and dedication have made him a leader in our school. Mr. Seaton is an incredible teacher/director that [sic] has built our choir program into one of the best in the state.

Exhibit A50, pp. 1 – 2.

4. The Appellant was never disciplined by the District. See VanSickle, Tr. 1183-84 (stating that the other U-High teacher involved in an exchange about an email received a verbal warning, but the Appellant did not).

5. The Appellant was counseled, but not disciplined, about not becoming too involved in students' non-academic issues. Principal Hart, Tr. 1855-56; VanSickle, Tr. 1161-62. An

example of this is when the Appellant had mentioned to Vice Principal VanSickle that he had talked to Student 3 about some poor choices she was making outside of school related to a party and alcohol! VanSickle, Tr. 1161-62, 1214. Mr. VanSickle told the Appellant to be careful about getting involved in Student 3's personal life, and asked him if her parents were aware of the decisions she was making. VanSickle, Tr. 1162.

6. A one-page document entitled "Risky Practices" was included in a staff handbook the school provided to teachers each year beginning in 2005. Exhibit S2; VanSickle testimony, Tr. 1148. It stated the following:

Even the appearance of impropriety may significantly damage an educator's reputation. The best way for educators to protect themselves from false accusations is to avoid behaviors that could be misconstrued. Following is a list of recommendations that may prevent both the opportunity for molestation and the likelihood that innocent acts could be misconstrued:

- Do not meet with a student alone in your classroom outside of the regular school day.
- Do not meet with a student behind a closed door.
- Do not make a habit of meeting a student outside of school for a meal, cup of coffee, etc.
- Be careful about counseling students in nonacademic matters. (If a teacher becomes aware that a student is in some kind of trouble, then the student should be referred to a counselor or administrator.)
- Do not regularly transport students in your own vehicle or allow students to have access your vehicle. [sic]
- Do not engage students in conversations regarding their romantic or sexual activities.
- Do not entertain students in your home unless it is a school-sponsored activity.
- Do not make sexual comments, make comments about the students' bodies, tell sexual jokes, or share sexually oriented material with students.
- Do not touch students in a manner that a reasonable person could interpret as inappropriate.

Exhibit S2. The Appellant received the handbook each year. Appellant, Tr. 61.

7. The Appellant attended a "safer relationship training" in October 2005. Exhibits S28, p.13; S33; Appellant, Tr. 73. The training was required by U-High and presented by Jerry Painter, then an attorney for the Washington Education Association (WEA). VanSickle testimony, 1151-52; Appellant, Tr. 73. The training was about relationships with students. Appellant, Tr. 73, 2967-68.

8. At the time, the U-High band teacher had recently been investigated by OSPI regarding boundary issues with a student. Appellant, Tr. 74-75. The Appellant was interviewed by OSPI as part of their investigation. Appellant.

9. On May 7, 2010, the District notified the Appellant or his union representative that it was investigating a report he had kissed Student 2 on the lips. Appellant, Tr. 3243. The Appellant had already requested and been granted medical leave to begin soon after that through the end of the school year for a family matter. Exhibit A52. The District allowed him to begin that medical leave early, rather than be placed on administrative leave. Appellant, Tr. 3289; Rowell, Tr. 1535.

10. The District conducted an investigation of the Appellant regarding at least three complaints against him by students or former students, including concerns about kissing Student 2, his behavior with respect to Student 5 on an overnight choir trip, and kissing and "spooning" with a former student, Student 3. Rowell, Tr. 1535-1559. After interviewing other witnesses, the District prepared a list of questions for the Appellant and arranged for him to be interviewed as part of its investigation. Rowell, Tr. 1559-62.

11. The Appellant and his union representative appeared for the interview, but the Appellant elected to resign from the District rather than participate. Appellant, Tr. 3290; Rowell, Tr. 1562. The Appellant and his wife had previously decided in November 2009 that they would return to Western Washington. Appellant, Tr. 3243. The Appellant had announced this to students in March 2010 and had already begun looking for work there. Appellant, Tr. 3243-44. The Appellant submitted notification of his intent to resign as of that day, May 27, 2010, listing the reason for leaving as "moving/relocation." Exhibit J1.

12. Because the Appellant resigned before the District concluded its investigation of the complaints against him, it did not determine whether to discipline him. Rowell, Tr. 1564.

13. On June 3, 2010, the District's superintendent informed OSPI that sufficient reliable information existed suggesting that the Appellant may have engaged in acts of unprofessional conduct. Exhibit J3. Following an investigation, OSPI issued an Amended Proposed Order of Revocation of the Appellant's teaching certificate dated August 28, 2012. Exhibit J5. The order concluded that the Appellant's education certificate be revoked. *Id.* The Appellant had already filed an appeal to an earlier Proposed Order of Revocation. Exhibit J6.

14. A Final Order of Revocation was issued on November 19, 2012. Exhibit J7. It concluded that OSPI had shown by clear and convincing evidence that the Appellant had violated RCW 28A.410.090, WAC 181-87-060, WAC 181-87-080, WAC 181-86-013, and/or WAC 181-86-014, and that his Washington Education Certificate should be revoked. *Id.* The Appellant filed a Notice of Appeal dated December 10, 2012. Exhibit J8.

15. There is no evidence of the Appellant having any criminal history.

The Appellant's Credibility

16. The Appellant has denied that he engaged in conduct alleged by students until confronted with evidence to the contrary. One example is the matter of Student 8, a female student who became intoxicated on a choir trip to Ireland. Another student had called the Appellant to Student 8's hotel room, where she was wearing only underpants and a bra or camisole, presumably because she had vomited on her clothing. Appellant, Tr. 3164-66.

17. When interviewed by OSPI, the Appellant stated that he was "never in the room" with Student 8 and that he was "on the door threshold . . . never actually in the room." Exhibit S26, p. 40. The Appellant used the opportunity to make changes to his statement and then signed it under penalty of perjury. Exhibit S26, pp. 84-85. It was not clear from the statement whether the room the Appellant denied entering was Student 8's hotel room or the bathroom inside her hotel room, as he stated that Student 8 was in the bathroom throwing up when he got there. Exhibit S26, pp. 39 - 40.

18. At the hearing, witnesses testified to seeing the Appellant physically assisting Student 8 inside her hotel room. Student 7, Tr. 2866, 2902 (saw Appellant walking Student 8 to the bathroom as if a mom helping her child); Student 28's Mother, Tr. 369 (Appellant was guiding Student 8 to the bathroom when she arrived). No witness testified that the Appellant was acting inappropriately with Student 8 under the circumstances. Only after these witnesses testified did the Appellant acknowledge that he had been in the same room as Student 8. Appellant, Tr. 3166. He then described in detail what he did while he was in the room - guided Student 8 using his right hand on her right elbow and his left hand on her right shoulder into the bathroom and wrapped her in a towel. Appellant, Tr. 3166.

19. Similarly, when interviewed by OSPI, the Appellant stated that it was not appropriate for a teacher to kiss a student on the cheek or the forehead. Exhibit S26, pp. 20-21. He denied ever kissing a student on the cheek. Exhibit S26, p. 21. With respect to kissing on the forehead, he identified one time when he gave a student, Student 1, "a quick paternal peck on her forehead" in a crowded hall in front of her father after a concert. Exhibit S26, p. 20. He immediately regretted this and apologized to Student 1's father. *Id.* He told OSPI that it was appropriate for him to have shown paternal support to the student, but he should not have done so in that manner. Exhibit S26, p. 21. He also identified a time where he was consoling a student who had lost her parent in a group hug with her boyfriend and their "foreheads may have touched." Exhibit S26, p.20. He did not identify any other instances of kissing a student on the forehead at that time. As set forth below, he acknowledged a number of other kisses on the forehead and cheek when presented with the evidence at the hearing. His explanation that he did not mention these other times when interviewed by OSPI because they were not sexual is not credible because OSPI specifically asked him about kisses on the cheek and forehead, as opposed to just kisses, and because there is no indication that he believed the one kiss on the forehead and the one forehead bump he did identify to OSPI were sexual. Exhibit S26, p. 20.

20. Because of this, the Appellant's testimony is generally not credible, and this is considered when the Appellant's testimony is inconsistent with that of other witnesses and/or not supported by other evidence.

Kissing on the Lips - Students 2 and 4

Findings regarding the Appellant's interactions with Students 2 and 4

21. This section sets forth the ultimate findings of fact, under the clear and convincing evidence standard, regarding the Appellant's conduct with Students 2 and 4 after considering all the evidence and weighing the credibility of witnesses. The section that follows this one examines the contradictory contentions of the parties and discusses why some were found more credible than others.

22. Student 2 attended U-High from the 2007-2008 school year through the 2010-2011 school year. Student 2, Tr. 228. She participated in a number of U-High choirs and musicals with the Appellant during her freshman, sophomore, and junior year of high school, which was the year the Appellant resigned. Student 2, Tr. 228-229. She also took voice lessons from the Appellant's wife in their home.

23. The relationship between Student 2 and the Appellant grew closer over time as she became more involved in the music department. Student 2, Tr. 231. Her freshman year, she and other students feared and respected him. Student 2, Tr. 231. By her junior year, the Appellant and Student 2 were very close, partly because she was in Lirico, a small elite female choir, and the Appellant was usually close with that group. Student 2, Tr. 231.

24. In the fall of the Student 2's junior year, she was in Sweeney Todd, a U-High musical for which the Appellant was the musical director. The Appellant kissed her on the lips twice during the run of this musical. Student 2, Tr. 277, 279-80.

25. The first time took place before a performance. Student 2, Tr. 276. Cast members were in the choir room warming up, and the Appellant pulled Student 2 aside into his office. Student 2, Tr. 276. The Appellant's office was inside the choir room with unobstructed windows. Student 2, Tr. 275-76. The Appellant told Student 2 how proud he was of her, congratulated her on how far she had come, and told her how excited he was to go to Germany with her. Student 2, Tr. 276. Student 2 perceived this as a pep talk. Student 2, Tr. 276. The Appellant and Student 2 were each sitting in chairs in his office. Student 2, Tr. 277. At the end of the talk, they both stood up and hugged. Student 2, Tr. 278. The Appellant then took Student 2's face between his hands, pulled her towards him, and kissed her on the lips. Student 2, Tr. 278. The kiss was very brief, two seconds at the most. Student 2, Tr. 278. The Appellant then pulled the Student back and again congratulated her and said how proud he was of her. Student 2, Tr. 278.

26. Student 2 described the kiss as an out-of-body experience; it was difficult to register that it had really happened. Student 2, Tr. 278. She determined that the Appellant did not mean anything by it and was just being paternal. Student 2, Tr. 278. She considered the kiss to be congratulatory and encouraging rather than sexual. Student 2, Tr. 279. Student 2 did not report the kiss at the time because she did not view it as noteworthy. Student 2, Tr. 278-79.

27. The second kiss took place later during Sweeney Todd when Student 2 was in the shop just off the backstage having an emotional and sisterly talk with Student 4. Student 2, Tr. 279. The Appellant joined them and told him he was very proud of them. The Appellant then kissed Student 4 on the lips and then turned and kissed Student 2 on the lips. Student 2, Tr. 279. Like the first kiss, this was a quick kiss on the lips. Student 2, Tr. 281. Student 2 observed Student 4 when the Appellant kissed her and saw that she did not act like it "was a big deal." Student 2, Tr. 279. Student 4's lack of reaction cemented Student 2's earlier understanding that the kiss did not mean anything. Student 2, Tr. 279. Student 2 did not report the second kiss at the time because it just did not appear to her to be anything that should be reported. Student 2, Tr. 283.

28. Later, in the spring of her junior year, Student 2 told the Appellant that she could not go on a scheduled choir trip because she had to study for her advanced placement exams, which would take place soon after the trip. Student 2, Tr. 234, 236. The Appellant was not pleased that she would not be going, and Student 2 and her parents perceived that he was bullying her about it. Student 2, Tr. 234, 235, 283. Student 2's Mother and Father met with a U-High vice principal to talk about how the Appellant was treating her about not going on the choir trip. They did not yet know about the kisses when they met with her. They did not feel satisfied by the meeting with the vice principal and intended to move their complaint forward to Principal Hart.

29. In the meantime, Student 2's Stepmother was concerned about a phone conversation she had with Appellant that had not made sense to her. Student 2's Stepmother, Tr. 1774. The Appellant said that Student 2's Stepmother should not believe the things Student 2 said, that he did not feel comfortable with having Student 2 in his class, and that this was why teachers quit teaching. Student 2's Stepmother, Tr. 1770, 1827. Student 2's Stepmother asked Student 2 to think back about other things that might have happened that would explain the Appellant's statements. Student 2's Stepmother, Tr. 1772-73.

30. This prompted Student 2 to think about the kisses in the fall and to be concerned that the Appellant might use them against her somehow, such as by saying she was romantically involved with him or was alleging he was bullying her in class as part of a jealous rage. Student 2, Tr. 284, 323. She decided that her parents should know about the kisses in case he brought them up when her parents met with Principal Hart. Student 2, Tr. 285. Student 2 disclosed to her Stepmother that the Appellant had kissed her twice on the lips during Sweeney Todd, but told her parents she did not want them to report it or make a big deal out of it. Student 2, Tr. 85; Student 2's Stepmother, Tr. 1774, 1815; Student 2's Mother.

31. Student 2's parents wanted to report the kisses to the administration, but Student 2 believed they were going to respect her request that they not do so. Student 2, Tr. 286. They told her that if it came up in the meeting with the administration, they would acknowledge that they already knew about it, but they would not bring it up themselves. Student 2, Tr. 286.

32. Despite Student 2 asking her parents not to tell U-High administration about the kisses, they did so. Student Tr. 286-87. Student 2 was very angry because she knew it would turn into a "huge mess." Student 2, Tr. 287.

33. After Student 2's parents disclosed the kisses to U-High administration, Student 2 and her parents met with Principal Hart. Student 2, Tr. 299; Hart; Student 2's Stepmother, Tr. 1776. Principal Hart described Student 2 as "reluctant" when she told him about the kisses. Hart.

34. Student 2 and her family later attended a meeting with Principal Hart as well as Assistant Superintendent Jay Rowell and another District representative. Student 2; Exhibit S12; Hart. She reported, among other things, that the Appellant had kissed her twice on the lips during Sweeney Todd. Exhibit S12. At some point during this meeting, Student 2 started crying and said that she did not want to be responsible for the Appellant losing his job and felt that it would divide the choir. Student 2's Stepmother, Tr. 1778.

35. Student 4 was interviewed by the administration and denied that the Appellant had kissed her or Student 2. Hart.

36. After word got out of her report, Student 2 felt ostracized. People accused her of being a liar and of ruining the Appellant's life. Student 2, Tr. 288-89. Student 2 lost friends over the situation. Student 2, Tr. 289.

37. A current or former female choir student sent a group message through Facebook to a number of current and former choir students, stating that an unnamed girl had accused the Appellant of kissing her during a play backstage. Exhibit S27, p.1. She encouraged current and former choir students to let the District know that they had never heard, seen, or experienced anything of this sort, and that nothing like this would ever happen because the Appellant is a good man. *Id.* She noted that this was especially important for "Lirico girls" because there had been many allegations from other girls toward Lirico girls because the other girls do not understand how close the Lirico girls were to the Appellant. *Id.* The student sending the message noted that "this girl is obviously disturbed" and the sender of the message had learned that the student who made the report had "a motive to make a bogus accusation." *Id.*

38. Student 4 responded to the group message stating:

I am making an announcement on Monday to all the choirs. I am involved in this because she also said that he kissed me at the same time. Completely untrue. I've already been interviewed and I said flat out that she is a liar. But yes, I am making the announcement on Monday to everyone.

Exhibit S27, p. 2. A male student responded that he hoped the "anonymous girl gets what she deserves" and that there will be "no sympathy shown to her." *Id.* A female student responded that, hopefully, if enough students speak up it would "show that this girl is bogus and needs a psychiatric evaluation." *Id.*

Credibility Findings

39. Student 4 reported to Principal Hart that she had not been kissed with Student 2, and maintained this position when interviewed by Assistant Superintendent Rowell. Hart, Tr. 1895-96. When interviewed by OSPI, Student 4 stated that the Appellant had approached Student 2

and 4 in the scene shop backstage when they were talking, and told them they were going to be great. Exhibit S9, p. 8. He gave them each a side hug and left. Exhibit S8, p. 8. Soon after that statement, the OSPI investigator asked her if the Appellant had ever kissed her during Sweeney Todd, and she responded that he had "never" kissed her. Exhibit S9, p. 8. At the hearing, however, Student 4 testified that he had kissed her before a show for Sweeney Todd in the scene shop with Student 2. Student 4, Tr. 2235-36. Student 4 described that he said some encouraging words and then gave her a hug on the side and then kissed her on the forehead at the hairline. Student 4, Tr. 2237. He then turned to Student 2 and she could not tell if he just hugged or kissed her on the forehead because she could not see Student 2's head and could only see the back of the Appellant's head. Student 4, Tr. 2237. Student 4 also testified that the Appellant had kissed Student 4 on the forehead another time, during her junior year during the Taffetas show. Student 4, Tr. 2233. The Appellant had come up to her after the show, congratulated her, and kissed her on the top of the head. Student 4, Tr. 2233.

40. Student 4 explained that she had forgotten about the kiss during Sweeney Todd when she talked to the District and OSPI but that her parents reminded her before the hearing that she had told them he kissed her on the cheek during Sweeney Todd back when Student 2's parents had called them to talk about whether the Appellant had kissed her. Student 4, Tr. 2238-39. This is not credible a credible explanation because Student 4's parents had reported to Student 2's parents that Student 4 had denied being kissed. Moreover, this was in the same general time period that Student 4 was interviewed by the District and when she denied on Facebook that the Appellant had kissed her. Student 4 additionally explained that when she was asked by OSPI if the Appellant had kissed her, she had interpreted the question as meaning a romantic, sexual, inappropriate kiss, especially on the lips so she did not consider the quick kiss on the forehead as applying. Student 4, Tr. 2239. This explanation also is not credible because OSPI asked Student 4 this question almost immediately she described the incident with Student 2 in the backstage shop and Student 4 later acknowledged at the hearing that he had indeed kissed her there. Student 4's credibility is severely compromised by her previous denials that the Appellant kissed her and her affirmative statements that Student 2 was lying.

41. Similarly, the Appellant's credibility is compromised as discussed above related to other allegations and specifically with respect to his interaction with Students 2 and 4 during Sweeney Todd. The Appellant denied ever being alone with Students 2 and 4 in the shop. He described an interaction with Students 2 and 4 that took place before the opening of Sweeney behind the front curtain. Appellant, Tr. 106-07. He testified that Student 2 was having a panic attack about going on and that he held her hands to calm her down. Appellant, Tr. 106-07. And then he turned to Student 4, who was nervous because Student 2's role was important to the production, and held her hands as well. *Id.* He then gave them a group hug. Appellant, Tr. 107. At the beginning of the hearing, he expressly denied kissing either Student 2 or 4 on the lips, cheek, or forehead. Appellant, Tr. 110-11. Given Student 4's testimony that the Appellant had kissed her on the cheek during Sweeney Todd as well as another time, the Appellant's testimony is further compromised.

42. That Student 4 ultimately acknowledged the Appellant kissed her (albeit on the cheek) when she was in the backstage shop with Student 2 demonstrates that Student 2 and Student

2's stepmother did not concoct a story a story that he kissed the girls. Additionally, although Student 2 was frustrated with the Appellant because the choir trip to Germany was cancelled and because of the way he was treating her for not going on the spring choir trip, her reluctance to report the kisses further demonstrates that she was not motivated by revenge and was the more credible witness. Student 2, Tr. 306.

43. Student 2's reporting of the two kisses on the lips as well as the circumstances of those kisses was consistent from when she first reported to her stepmother through her reporting to the District, her interview with OSP1, and her testimony at hearing. And the ALJ has not identified any allegations made by Student 2 in this case that are directly disputed by credible witnesses.

44. The Appellant argues that Student 2 previously made a "false report" about Elizabeth Mossback, a student teacher for the Appellant during the fall of Student 2's junior year. Ms. Mossback testified that Student 2 overheard a private conversation between Ms. Mossback and another student, had "misread" things Ms. Mossback said, and reported to the Appellant that Ms. Mossback had been mean to the other student. Mossback, Tr. 2376. Ms. Mossback could not remember the specifics, but perceived that Student 2 had twisted her words, although she also acknowledged that she should have held her conversation with the other student in a more private place so Student 2 could not have "misinterpreted" what she had said. Mossback, Tr. 2379. Without further details about what Student 2 said, and with Ms. Mossback testifying both that Student 2 misheard and misinterpreted and that Student 2 "twisted" Ms. Mossback's words, it cannot be determined that Student 2 made a false report against Ms. Mossback.

45. The Appellant also argues that Student 2 told other students that she lied about the kisses, and that students overheard Student 2 telling others she lied. Students 30 and 67 both testified to overhearing conversations in which they believed Student 2 acknowledged she lied in accusing the Appellant. Student 30 testified that she overheard Student 2 talking to someone, perhaps Student 27, on the risers and telling that person that she was lying and had felt pressured by her parents. Student 30, Tr. 2787. Student 67 testified that she heard Student 2 talking to someone, possibly Student 27, and that she told her the kissing was not true, she felt terrible, and she did not know that all this would happen, meaning the Appellant taking a leave and going under scrutiny with his license. Student 67, Tr. 2729, 2735-36. When asked if Student 2 actually said something about the Appellant's license, Student 67 said no, but that Student 2 did not know that the school board would take her accusations so far. Student 67, Tr. 2736. This demonstrates how, when individuals overhear parts of conversations, they may fill in the details with their own understanding or what they surmise the conversation might be about. It is quite possible that witnesses heard Student 2 state that she felt bad about what had happened or that she had felt pressured to report the conduct by her parents, and assumed this meant she had lied about the content of the report. For this reason, this testimony is given little weight.

46. The Appellant argues that Student 27, who was Student 2's best friend in high school, said that Student 2 lied about the kiss. Student 27 testified that Student 2 told her the Appellant tried to kiss Student 2 on the cheek, it was an awkward "head turn thing," and it "ended up as a kiss on the lips." Student 27, Tr. 2445. Student 27 acknowledged that she did not remember

specifically what Student 2 said and that she could have told her something different. Student 27, Tr. 2445. She also testified that Student 2 told her that it was not creepy, but rather fatherly and that he did not mean anything by it. Student 27, Tr. 2445-46. Student 27 also testified that Student 2 told her that she did not want to report it but that her mom wanted her to. Student 27, Tr. 2446. Student 27 expressly testified that she did not believe Student 2 was lying about the kiss, "not then, not now," but that Student 2 had not told Student 27 the whole truth. Student 27, Tr. 3423.

47. Student 30 testified that Student 2 told her in their chemistry class that the Appellant had kissed her on the cheek. She testified that Student 2 had looked really upset and she had asked her if she was okay and she whispered that a teacher had kissed her on the cheek. Student 30, Tr. 2786. Student 30 asked her whether it was the Appellant, and Student 2 responded that it was. Student 30. Student 30 testified that she had previously told the assistant attorney general (AAG) representing OSPI that Student 2 told her the Appellant had kissed her on the lips and then inexplicably disavowed that statement, saying that she had told the AAG that Student 2 had said the cheek. Student 30. Student 2 denied having this conversation with Student 30, who was not a close friend. Student 2. Given the pressure Student 2 was under from other students for making the allegation against the Appellant, it is not logical that she would admit facts contrary to what she had reported to the District to someone who was not a close friend, especially when she had not made complete disclosures to her best friend, Student 27.

48. Similarly, Student 53 testified that Student 2 told her during class that Student 2's mother was upset that the Appellant had kissed her on the cheek after a performance, although she acknowledged that she did not recall specifics of the conversation. Student 53, Tr. 1358-59, 1361-1362. Student 53 and Student 2 were "close," but "not great friends." Student 53, Tr. 1362. As with Student 30, it is not likely that Student 2 would admit facts contrary to what she had reported to the District to someone who was not a close friend. Accordingly, the testimony of Students 30 and 53 is not determined to negatively impact Student 2's credibility.

49. Student 2 was not asked at the hearing on what days of Sweeney Todd the kisses took place. The District's notes from her interview state that she reported that the first kiss was the "night before opening" of Sweeney Todd, and her sworn statement to OSPI states that she "[thought] it was opening night." Exhibits S12, p. 1; S13, p. 13. Briane Greene, the U-High drama teacher, testified that, on Sweeney Todd's opening night, she had locked the door to the Appellant's office, and that she had seen the Appellant talk to Students 2 and 4 together in his classroom when Student 2 was very nervous about going onstage. Green, Tr. 2010-11. Because it is not clear that the night that the Appellant kissed Student 2 in the office was opening night, the office being locked that night does not mean that the Appellant did not kiss Student 2 there. And since Student 4 confirms that the Appellant kissed her when she was talking with Student 2 in the shop, Ms. Green seeing the Appellant interacting with them in the classroom without kissing them does not demonstrate that he did not kiss them.

50. Because of Student 2's reluctance to come forward against the Appellant, her consistent reporting of the events to her family, the District, OSPI, and at the hearing, Student 4's acknowledgement that she was kissed (albeit on the forehead) in the backstage shop and that

Student 4 could not see whether Student 2 was kissed contrary to her prior denials that either of them had been kissed, and Student 2's demeanor, it is determined that Student 2 is the most credible witness with respect to her reports of being kissed on the lips twice by the Appellant.

Kissing on the Lips and "Spooning" - Student 3

Findings regarding the Appellant's interactions with Student 3

51. This section sets forth the ultimate findings of fact, under the clear and convincing evidence standard, regarding the Appellant's conduct with Student 3 after considering all the evidence and weighing the credibility of witnesses. The section that follows this one examines the contradictory contentions of the parties and discusses why some were found more credible than others.

52. Student 3 attended U-High from 2003 to 2007, and graduated before Student 2 was a freshman. Student 3, Tr. 116; Student 2, Tr. 256. She was in choir with the Appellant each year in high school, participating in a number of U-High choirs. Student 3, Tr. 116-117, 119. She also took Music Theory from the Appellant, was his teaching assistant, and participated in two U-High musicals for which he was the music director. Student 3, Tr. 117-119. Her junior year, Student 3 played Belle in *Beauty and the Beast* at the Spokane Children's Theater. Appellant 3, Tr. 118. The Appellant directed this performance and cast her as the lead. Appellant, Tr. 3049. The Appellant also took voice lessons from the Appellant's wife in their home.

53. During the time that Student 3 was at U-High, she and the Appellant became progressively closer. While their relationship her freshman year was "normal" and "teacher-student professional," by her sophomore year, the Appellant felt "like a close friend" to her. Student 3, Tr. 119-120.

54. During Student 3's junior year, the Appellant "kicked" Student 3 out of class because she did not acknowledge the new computer lab he had added to the classroom. Student 3, Tr. 123. Later that day, the Appellant apologized to her in his office for asking her to leave the class. Student 3, Tr. 123. He explained that her opinion mattered a lot to him and that it had upset him when she did not appreciate the work he did. Student 3, Tr. 158-59. While he was apologizing, he held one of Student 3's hands between his two hands, told her he wished he was a 20-year-old in Spokane and not her teacher, that he really loved and cared about her, and that, when she walked into the room, it lit up for him. Student 3, Tr. 121-22, 159. He then said something to the effect of, "Don't get me wrong. I love my wife, but . . ." Student 3, Tr. 122.

55. Student 3 played Belle in *Beauty and the Beast* during the spring of her junior year. Student 3, Tr. 124. Before one of the productions, the Appellant kissed Student 3 in the greenroom, the area where actors wait backstage. Student 3, Tr. 125. The other actors had left the room when places were called, but the two of them stayed in the greenroom talking. Student 3, Tr. 125. As their conversation ended, the Appellant placed his hands on either side of Student 3's face and kissed her very briefly on the lips. *Id.* After the kiss, the Appellant said, "That's so I never have to think about it again," and left the room. *Id.* Student 3 took her place

to go on stage, and the Appellant came over to make sure that she was all right with the kiss. *Id.* Student 3 said she was fine and brushed it off. *Id.*

56. The Appellant also kissed Student 3 on the cheek a "handful" of times, usually before or after concerts. Student 3, Tr. 126. And he held her hand during a Harry Potter movie that the Appellant had gone to with Student 3 and Student 16, who was a male friend of Student 3, one day after school during Student 3's junior year. Student 3, Tr. 131. The Appellant and Student 3 exchanged backrubs on the bus on choir trips. Student 3, Tr. 191.

57. Following Student 3's junior year, during the summer of 2006, the Appellant took a group of current and former U-High choir students to Ireland to perform. Student 3, Tr. 134. The trip was not sponsored by the school. On one of the legs of the flight to Ireland, the Appellant sat by Student 3 on the plane, allowed her to sleep with her head against his shoulder, and held her hand underneath a blanket they were sharing. Student 3, Tr. 131-32, 135-36.

58. On the first day the group arrived in Ireland, Student 3 took a nap in her hotel room between arriving at the hotel and dinner. Student 3, Tr. 136. She was alone in the room and had propped the door open so her roommate, Student 7, could get back in. Student 3. She was sleeping on her bed on top of the covers, wearing jeans and a sweatshirt. Tr. 136-37. She had taken Benadryl earlier in the day to help her sleep on the long bus-ride from the airport. Tr. 137.

59. She woke up and became aware that the Appellant was lying behind her in the "spooning" position. Student 3, Tr. 137-38. She knew it was the Appellant because she could see his hand and she recognized his cologne. Student 3, Tr. 137. Rather than confronting him, she went back to sleep. Tr. 138. She did not know how long he was in the room, but she opened her eyes when he left and saw him leave the room. Student 3, Tr. 138.

60. Meanwhile, Student 7 had returned to the room while the Appellant was there. She walked in and saw Student 3 and the Appellant on the bed together in the "spooning" position, with the Appellant lying behind Student 3 and both of them facing the door. Student 7, Tr. 2858, 2857. She left the room quickly and waited outside the door. Student 7, Tr. 2859. She saw the Appellant leave the room shortly after she did. Student 7, Tr. 2859.

61. Student 7 confronted Student 3 about what she had seen and told her that Student 7's mother, who was a chaperone on the trip, had seen them together on the plane and wondered if there was something inappropriate between them. Student 3, Tr. 138. Student 3 was embarrassed because she had let the Appellant stay on the bed with her and just went back to sleep without confronting him. Exhibit S44. Student 3 was crying and visibly upset during this conversation. Student 7, Tr. 2859.

62. At some point later in the day, Michael Saccomanno, Student 3, and Student 7 were all in Student 3 and 7's hotel room. Student 3, Tr. 140. Mr. Saccomanno is a friend of the Appellant, and considers the Appellant to be his mentor. Saccomanno, Tr. 1122-23. At the time of the hearing he was a high school music and leadership teacher. Saccomanno, Tr. 1122. At the time of the Ireland trip, he was a student teacher. The Appellant invited him on the Ireland

trip because the Appellant's wife was pregnant and would not be able to make the trip as they had planned. Saccomanno, Tr. 1126.

63. Student 3 was talking about her concerns about her relationship with the Appellant, whether they were too close, and whether that was safe or appropriate. Student 3, Tr. 140; Saccomanno, Tr. 1129. The Appellant heard them talking from the hallway and entered the room. Student 3, Tr. 140; Saccomanno, Tr. 1129. The Appellant was agitated and his tone was a mix of anger, frustration, and fear. Saccomanno, Tr. 1130. The Appellant used a raised voice. Student 3, Tr. 140; Saccomanno, Tr. 1132. The Appellant said that Student 3 should talk to him if she had a concern. Saccomanno, Tr. 1130-31. Student 3 was upset by the Appellant entering the room and confronting her. Saccomanno, Tr. 1131.

64. Student 7's Mother was a chaperone on the Ireland trip. While they were in Ireland, Student 7 told her mother about seeing the Appellant and Student 3 on the bed together. Student 7, Tr. 2862; Student 7's Mother. Student 7 did this so Student 3 would have an adult to talk to about the situation if she wished. Student 7, Tr. 2862.

65. Prior to the Ireland trip, Student 3 had "felt fine" about the physical contact with the Appellant because he felt like her friend. Student 3, Tr. 141. After learning that Student 7's mother had raised questions, she was embarrassed about it. Student 3, Tr. 141.

66. Student 3 confronted the Appellant on the trip about their becoming too close. The Appellant told her that he had never gotten as close with a student as he had with her, and that he would not let it happen again. Student 3, Tr. 142.

67. Student 3 did not report the Appellant's physical conduct with her while she was in high school because she did not think it was "that big of a deal," and because she thought they had a "special friendship." Student 3, Tr. 145.

68. Student 3 stayed in touch with the Appellant after graduation and sought his advice about auditions. Student 3, Tr. 172.

69. Student 3 reported the Appellant's conduct only after learning that current students were asking alumni to come forward to support the Appellant against allegations that he had kissed a student backstage at a play. Student 3, Tr. 145. Because the same thing had happened to her, she did not feel it was right not to come forward if the Appellant's behavior was still ongoing. Student 3, Tr. 146. She did not want the Appellant to get in trouble. Student 3, Tr. 216. She wanted to call the school anonymously, "just to say maybe you should listen to this girl," but had to identify herself. Student 3, Tr. 146. Student 3 did not know the identity of the other girl who had been kissed backstage. Student 3, Tr. 146.

70. Student 3 was interviewed by OSPI as part of its investigation of the Appellant, but declined to sign her statement. Student 3, Tr. 144-45. She felt conflicted because the things in the statement were true, but she did not want anything negative to happen to the Appellant because of them. Student 3, Tr. 145. She was upset about the situation and did not want to be involved. Student 3, Tr. 145.

Credibility Findings

71. There is no evidence to support the Appellant's contention that Students 3 and 7 fabricated the spooning and kissing allegations after they heard of students rallying to support the Appellant after another girl accused him of kissing her. It is reasonable that they would feel responsible to come forward when they learned that the Appellant continued to engage in the inappropriate behavior such as that Student 3 experienced. That they spoke to each other to decide whether they would come forward does not prove that they fabricated the allegations. That they had concerns about the Appellant's behavior before this time is supported by Student 7's Mother's testimony that Student 7 told her about seeing the Appellant on the bed with Student 3 while they were in Ireland, and Mr. Saccomanno's testimony about Student 3 expressing concerns about being too close to the Appellant when they were in Ireland.

72. Similarly, with respect to whether Student 3 fabricated her account of the kiss and spooning only because she talked to Student 2, the record does not support a finding that they knew each other or communicated. Student 2 knew of Student 3 because the Appellant talked about what a great musician she was, and told Student 2 she reminded him of Student 3. Student 2, Tr. 256. But Student 2 did not know Student 3 personally. Student 2, Tr. 256. Student 3 denied knowing Student 2, although she had reported to OSPI that her name sounded familiar. Student 3; Ex. S26. The notes from Assistant Superintendent Rowell's interview of Student 3, which were not verbatim, stated that Student 3 had learned of the new allegations against the Appellant in a phone call from a student who had gone through something similar to what she had experienced. Exhibit S26, p. 6. Because no one questioned Student 3 about whether this is what she reported to Mr. Rowell or who the student was, and the two women denied knowing each other, this statement alone does not support a finding that Student 3 spoke with Student 2 and fabricated a story. Moreover, as discussed above, Student 7's reporting to her mother on the Ireland trip that she saw the Appellant on the bed with Student 3 and Student 3 raising concerns about her relationship with the Appellant in front of Mr. Saccomanno on the Ireland trip, support that the concerns existed before Student 2 made her report.

73. With respect to the motivation of Students 3 and 7, it is not credible that they would involve themselves in complaints against the Appellant, years after they graduated, simply because he had reported them for going to a party with alcohol in high school. Nor is it credible that Student 3 would have asked Student 7 to join her in this endeavor because she felt rebuffed by the Appellant in high school.

74. The Appellant argues that Student 7's testimony is inconsistent with what she originally reported to Vice Principal VanSickle at U-High. Mr. VanSickle testified at the hearing that Student 7 told him that Student 3 had been crying and the Appellant lay down beside Student 3 to comfort her while she was in her underwear. VanSickle, Tr. 1228. He testified that he could not recall whether Student 7 told him that Student 7 or Student 7's Mother observed the Appellant on the bed with Student 3. VanSickle, Tr. 1229-1230. Student 7 made her report to Mr. VanSickle long before the hearing. Mr. VanSickle did not take notes of the conversation because he knew he would be forwarding the matter to Assistant Superintendent Rowell to

interview her. Mr. VanSickle's memory of the general nature of the conduct Student 7 reported – the Appellant lying on the bed with Student 3 – is consistent with Student 7's testimony. That his memory of the details reported to him that Student 3 was in her underwear rather than fully clothed and that the Appellant was comforting her when she was crying - is different than Student 7's testimony does not support a finding that Student 7's testimony was not credible. Nor does Mr. VanSickle's failure to remember whether it was Student 7 or her mother who observed this behavior somehow demonstrate that Student 7 did not report to him that she saw it.

75. Soon after Student 7 made her report to Mr. VanSickle, she was interviewed by Assistant Superintendent Rowell and District employee Sue Brown. The notes of that interview, which are not verbatim, state that Student 7 reported seeing the Appellant in the room with Student 3 but do not state what Student 3 was wearing or what they were doing in the room when she saw them, and Mr. Rowell apparently did not question Student 7 on these points. Exhibit S10, p. 1. The notes also state that Student 3 told Student 7 that she had been sleeping and was shocked to find the Appellant lying next to her holding her. *Id.* The notes include the central statements that Student 7 saw Student 3 and the Appellant in the room and that the Appellant was lying next to Student 3 and holding her. That Mr. Rowell failed to ask or record whether Student 7 actually saw the Appellant on the bed with Student 3 does not demonstrate that Student 7's testimony at hearing was not credible. Nor does Student 7's purported report to Mr. Rowell that Student 3 was crying when she entered the room make this report so different from Student 7's hearing testimony as to negatively impact her credibility. S10, p.1.

76. With respect to Student 3's description of events over time, there was a change. Prior to being deposed by the Appellant's attorney, she had never claimed that she saw the Appellant in the hotel room on the bed with her. Rather, in her deposition, she explained that "maybe . . . someone was behind me, but I was half asleep." Exhibit S44, p. 54. She went on to say that "she honestly wasn't sure if it was real" and that she found out that it was real because Student 7 told her that was what she saw. Exhibit S44, p. 54. This deposition testimony is consistent with the information she provided in her OSPI interview, in which she said she knew it was the Appellant in the bed behind her, although she did not see him. Exhibit S5, p. 7.

77. It was only at the end of her deposition, that she testified she opened her eyes when she woke up. Exhibit S44, p. 94. And it was only then that she remembered that, when the Appellant left the room, she remembered opening her eyes and seeing him exit. Exhibit S44, p. 95. She acknowledged this was the first time she remembered seeing him exit. S44, p. 96. Prior to that time, she had been relying on Student 7's telling her she had seen him in the bed with her to know he was really there. S44, p. 54-55. She explained that she had only been testifying to things she was very sure of and it was only after spending a lot of time thinking about it on the day of the deposition that she felt sure that she had seen, as opposed to only felt, the Appellant in the room with her. While this change in testimony is unusual, what Student 3 reported seeing was consistent with what Student 3 had explained had happened all along and with what Student 7 had reported generally to the District and more specifically to OSPI. Accordingly, this change in position does not significantly affect Student 3's credibility.

They interacted as if Student 3 considered him as a friend more than a teacher. Saccomanno, Tr. 1125. And the Appellant did not seem uncomfortable around Student 3. Saccomanno, Tr. 1126. Additionally, Student 16 testified and the Appellant acknowledged that he had gone to a Harry Potter movie with Students 3 and 16 during Student 3's junior year. Appellant, Tr. 3062, 3064. A teacher attempting to distance himself from a student he perceived was getting too close would not wisely sit by her at a movie outside of and unrelated to school. Thus, it is not found that the Appellant attempted to distance himself from Student 3 because he perceived that she was becoming too attached to him or had a crush on him.

82. Similarly the Appellant testified that he initiated a conversation with Student 3 in Ireland about her behavior toward him. Again, Mr. Saccomanno's testimony that Student 3 raised this issue on the first day in Ireland discredits the Appellant's testimony, further eroding the Appellant's credibility.

83. The Appellant argues that there was no time for him to have been in Student 3's room on the first day in Ireland. The bus arrived at the hotel between 1:00 and 1:30 p.m. Appellant, Tr. 3089. The group had to wait some time for their rooms to be available, but the Appellant's room was ready so he took his luggage to his room. Appellant, Tr. 3089. Student 33 went to his room with him at that time and had a conversation about feeling homesick that lasted a few moments. Appellant, Tr. 3089-90. The Appellant and his father walked to a pub at approximately 4:00 and returned to the hotel between 5:00 and 5:15 p.m. Appellant, Tr. 3095; C Seaton, Tr. 2929. Because the only specific event that the Appellant described between 1:00 or 1:30 when they arrived at the hotel and approximately 4:00 p.m. when the Appellant and his father went to the pub was a conversation with Student 33 lasting just a few minutes, there was adequate time for the Appellant to enter Student 3's room while she was napping.

84. OSPI has not met its burden of proving that the Appellant's conduct toward Student 3 was the cause of her withdrawal and changes in behavior and grooming during her senior year.

Kissing on Foreheads And Cheeks

85. The Appellant admits kissing students on the cheek on "rare occasions" and on the forehead possibly five to ten times. Appellant, Tr. 83 - 84.

86. As one example, he recalled a student running up to hug him after a concert and he gave the student "inadvertently just a quick peck on the top of the head." Appellant, Tr. 2955.

87. Student 6 testified that the Appellant had kissed him on the head. Student 6. After hearing that testimony, the Appellant acknowledged that he recalled that kiss, which he stated took place when Student 6 was having a very difficult time at home and was crying in his office. Appellant, Tr. 2956. The student "leaned in" and the Appellant "just [gave] him a little kiss on the top of the head purely for comfort" and said, "Hang in there. I'm here for you." Appellant, Tr. 2956.

88. As discussed above, Student 4, who had been a staunch supporter of the Appellant and had previously adamantly denied that he had kissed her, testified at the hearing that he had

78. Nor does Student 3's testimony of actions that were more specific than those reported to OSPI significantly affect her credibility. Although Student 3 did not expressly report to OSPI that the Appellant held her hand on the plane to Ireland and in a movie, she did report that the Appellant was "kind of touchy with students on the plane" to Ireland and that he would "share a blanket, closely sitting" with students on the plane. Exhibit S5, p6-7. She also reported that the Appellant held hands with students and that this happened because the Appellant felt like one of our friends "when we were all hanging out." Exhibit S5, p. 11. Student 3 reported to OSPI that the Appellant had only kissed her "that one time." Exhibit S5, p. 8. When she had previously explained the kiss during Beauty and the Beast, the OSPI investigator had asked her if the kiss was on the lips. Exhibit S5, p. 5. That she did not think, without being asked, to include kisses on the cheek does not significantly affect her credibility.

79. A discrepancy between Student 3 and Student 7's testimony exists with respect to whether Student 3 told Student 7 that the Appellant had kissed her in Ireland. Student 3 only testified that the Appellant kissed her during Beauty and the Beast, but Student 7 testified that Student 3 told her when she came into the room after the Appellant left that he had kissed her in Ireland. Because Student 3 was upset when confronted by Student 7 about the Appellant being in her room and upon learning that Student 7's Mother had asked if something inappropriate was going on, it is possible that Student 7 misunderstood, or by the time of the hearing, misremembered whether the Appellant had kissed Student 3 in Ireland or before that trip. For that reason, this discrepancy in testimony does not significantly affect the credibility of either Student 3 or Student 7.

80. The Appellant stated that he knocked on Student 3's door when he was making the rounds to let everyone know it was time for dinner. Appellant, Tr. 3095. The door was propped open and he heard his name and a little bit of a raised voice. Appellant, Tr. 3095-96. He testified that he opened the door after someone said "come in," and then asked what was going on, is everything ok? Appellant, Tr. 3096. Student 3, Student 7, and Mr. Saccomanno were in the room. Appellant, Tr. 3097. There was no discussion while the Appellant was there of what they had been talking about, only a minute of small talk, and then he left the room. Appellant, Tr. 3097. This testimony is controverted by that of Mr. Saccomanno, a witness who is both a teacher and a friend of the Appellant, that there was a heated conversation about Student 3's concerns about her relationship with the Appellant. This further erodes the Appellant's credibility.

81. The Appellant contends that, during Student 3's junior year, she was spending a lot of extra time in his classroom such as doing her homework in the computer lab, and he started to distance himself from her because he questioned her motives. Appellant, Tr. 3048. He testified that he told Principal Hart, during that year, that he was uncomfortable with Student 3 spending so much time in his classroom, and that Principal Hart's response was not to worry about it. Appellant, Tr. 87-88. Principal Hart does not recall a conversation with the Appellant about female students having crushes on him, although he acknowledged that they "may have" talked about that. Hart, Tr. 1856-57. The Appellant's allegation that he was distancing himself from the Appellant is not supported by the testimony of those around them in that time period. Mr. Saccomanno, who worked on Beauty and Beast with both the Appellant and Student 3, observed that "they obviously had a comfortable relationship together." Saccomanno, Tr. 1124.

kissed her twice on the head. The Appellant denied any memory of those kisses, even after her testimony. Appellant, Tr. 2955-56. It is found that the Appellant kissed Student 4 on the cheek in relation to a Taffetas performance. As explained above, it is found that he kissed her on the lips, rather than the cheek, during Beauty and the Beast.

89. As found above, he also kissed Student 3 on the cheek several times.

Other Allegations

90. OSPI relies on a number of other allegations, including holding or clasping students' hands, linking arms with student, hugging students, exchanging back rubs with students, resting heads on should, using familiar descriptors, insubordination, angry outbursts, and inappropriate comments to students. Because of the serious nature of the findings found above, these less serious allegations are not addressed.

Generally Recognized Professional Standards

91. All witnesses, including the Appellant agreed that it is never appropriate for a teacher to spoon on a bed with a student.

92. Similarly all witnesses, including the Appellant agreed that it is never appropriate for a teacher to kiss a student on the lips (except, possibly, if the student was the teacher's own child or if they were in a play together under appropriate circumstances.

93. Three very experienced educational administrators testified that it is not appropriate for a teacher to kiss a student on the cheek or the forehead. Hart, Tr. 1861; Rowell, Tr. 1522; VanSickle, Tr. X. Similarly, the Appellant acknowledged that it is never appropriate for a teacher to kiss a student on the cheek or the forehead. Appellant, Tr. 82.

94. Accordingly, it is found that generally recognized professional standards prohibit a teacher from spooning with a student on a bed and from kissing a student on the lips, cheek, or forehead.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Washington Professional Educator Standards Board has the authority to develop rules determining eligibility for and certification of personnel employed in the common schools of Washington pursuant to Revised Code of Washington (RCW) 28A.410.010(1). OSPI administers these rules and has the authority to issue and revoke teaching certificates. RCW 28A.410.010(2). OSPI may delegate to OAH the authority to hear appeals of actions to suspend or revoke teaching certificates. Washington Administrative Code (WAC) 181-86-150. OAH hearings of those appeals are governed by Chapter 34.05 RCW, Chapter 34.12 RCW, and Chapter 10-08 WAC.

2. OSPI has the burden of proof in a suspension or revocation proceeding. WAC 181-86-170(2). In such cases, OSPI "must prove by clear and convincing evidence that the certificate holder is not of good moral character or personal fitness or has committed an act of unprofessional conduct." *Id.*

3. Clear and convincing evidence requires more than a mere preponderance of the evidence. *Nguyen v. Dept. of Health, Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904, 122 S.Ct. 1203 (2002). The evidence must show that the ultimate fact at issue is "highly probable." *In Re Welfare of C.B.*, 134 Wn. App. 336, 346, 139 P.3d 119 (2006).

Standards for Revoking a Teaching Certificate

4. RCW 28A.410.090(1)(a) authorizes OSPI to revoke a teaching certificate upon the complaint of any school district superintendent "for immorality, violation of written contract, unprofessional conduct, intemperance, or crime against the law of the state." Similarly, WAC 181-86-075(2) authorizes OSPI to revoke a teaching certificate if the certificate holder has committed an act of unprofessional conduct or lacks good moral character or personal fitness and revocation is appropriate.

5. Acts of unprofessional conduct include the following:

Any performance of professional practice in flagrant disregard or clear abandonment of generally recognized professional standards in the course of any of the following professional practices is an act of unprofessional conduct:

- (1) Assessment, treatment, instruction, or supervision of students.
- (2) Employment or evaluation of personnel.
- (3) Management of moneys or property.

WAC 181-87-060.

6. WAC 181-87-020 addresses private conduct versus professional conduct for purposes of an act of unprofessional conduct:

As a general rule, the provisions of this chapter shall not be applicable to the private conduct of an education practitioner except where the education practitioner's role as a private person is not clearly distinguishable from the role as an education practitioner and the fulfillment of professional obligations.

7. WAC 181-87-040 defines "student" for purposes of an act of unprofessional conduct as follows:

As used in this chapter, the term "student" means the following:

(1) Any student who is under the supervision, direction, or control of the education practitioner.

(2) Any student enrolled in any school or school district served by the education practitioner.

(3) Any student enrolled in any school or school district while attending a school related activity at which the education practitioner is performing professional duties.

(4) Any former student who is under eighteen years of age and who has been under the supervision, direction, or control of the education practitioner. Former student, for the purpose of this section, includes but is not limited to drop outs, graduates, and students who transfer to other districts or schools.

8. "[G]ood moral character and personal fitness" means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, character and personal fitness to have contact with, to teach, and to perform supervision of children. WAC 181-86-013 (emphasis added). It includes, *but is not limited to* having (1) no conviction of specific felony crimes including children; (2) no conviction of any crime within the last ten years that would materially and substantially impair the individual's worthiness and ability to serve as a professional within a school; (3) no "behavior problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting;" and (4) no practice in a professional position within the state for which certification is required without the appropriate certification. *Id.* (emphasis added)

9. It is determined that the Appellant's spooning a student on a bed and kissing students on the lips, cheeks, and foreheads constitutes a flagrant disregard or clear abandonment of generally recognized professional standards while supervising students.

10. Neither party explains what it means for a teacher to be in the "performance of professional practice" for purposes of identifying an act of unprofessional conduct. Nor does either party explain whether directing a play not sponsored by the District or taking a group of students on an international choir trip not sponsored by the District constitute the performance of professional practice.

11. Nor does either party explain when a behavioral problem endangering the educational welfare or personal safety of students is "within the educational setting" for purposes of good moral character and personal fitness.

12. These questions need not be decided here because spooning on a bed with a current student and kissing a current student on the lips demonstrates a lack of good moral character and personal fitness, regardless of where the conduct takes place.

13. OSPI has met its burden of proving by clear and convincing evidence that the Appellant lacks good moral character and personal fitness and has engaged in acts of unprofessional conduct.

Appropriate Level of Discipline

14. The following factors must be considered to determine the appropriate level and range of discipline in a disciplinary order:

- (1) The seriousness of the act(s) and the actual or potential harm to persons or property;
- (2) The person's criminal history including the seriousness and amount of activity;
- (3) The age and maturity level of participant(s) at the time of the activity;
- (4) The proximity or remoteness of time in which the acts occurred;
- (5) Any activity that demonstrates a disregard for health, safety or welfare;
- (6) Any activity that demonstrates a behavioral problem;
- (7) Any activity that demonstrates a lack of fitness;
- (8) Any information submitted regarding discipline imposed by any governmental or private entity as a result of acts or omissions;
- (9) Any information submitted that demonstrates aggravating or mitigating circumstances;
- (10) Any information submitted to support character and fitness; and
- (11) Any other relevant information submitted.

WAC 181-86-080.

15. *Factor One – Seriousness of the acts, and actual or potential harm to persons or property.* The Appellant's acts were serious. He flagrantly violated personal boundaries between teachers and students, including by entering a female student's hotel room in a foreign country without her permission and spooning with her on the bed while she slept. He caused harm to Student 2 because she was ostracized by her peers for reporting his inappropriate conduct. He created potential harm of emotional distress to all students with whom he engaged in inappropriate conduct, as well as potential harm to the District due to the risk of litigation for his conduct. This factor weighs against the Appellant.

16. *Factor Two – Criminal history.* The Appellant has no criminal history. This factor weighs in favor of the Appellant.

17. *Factor Three – Age and maturity level of participants.* The Appellant was in his thirties and was an experienced teacher at the time of the inappropriate activity. The students were impressionable girls who respected and admired him. The Appellant had received safer relationship training and was well aware of the risks of inappropriate relationships with students because of the investigation of the band teacher soon before the acts in this case took place. This factor weighs against the Appellant.

18. *Factor Four – Proximity or remoteness in time of the events.* The conduct took place over a five-year period before the Appellant's resignation. Thus, the conduct was not significantly remote in time and was ongoing. This factor weighs against the Appellant.

19. *Factor Five – Disregard for health, safety, or welfare.* The Appellant acknowledges in his brief that kissing on the lips and spooning show a disregard for the health, safety, or welfare of students. Appellant's Brief at 122. This factor weighs against the Appellant.

20. *Factor Six – Behavior problem.* The Appellant engaged in acts that he acknowledges are not appropriate between a student and a teacher over the course of several years. This demonstrates a behavioral problem. This factor weighs against the Appellant.

21. *Factor Seven – Lack of fitness.* The Appellant acknowledges that spooning or kissing on the lips on purpose is conduct that demonstrates a lack of fitness. Appellant's Brief at 123.

22. *Factor Eight – Discipline by government or private entity.* The Appellant was not disciplined by the District. However, because the Appellant resigned before the District completed its investigation, this factor does not weigh in favor of or against the Appellant.

23. *Factor Nine – Aggravating or mitigating circumstances.* No aggravating circumstances are found. This weighs in favor of the Appellant.

24. Mitigating factors are that the Appellant was, by all accounts, a very talented and popular choir teacher and musical director who built up the U-High music program. Additionally, numerous students and parents admired him and believed that he was a positive influence in the lives of many students. Because of the nature of the violations found, this weighs only slightly in the Appellant's favor.

25. *Factor Ten – Information in support of character and fitness.* Numerous parents and students testified in support of the Appellant and their belief that he has been a positive influence in their lives. Given the nature of the violations found, this weighs only slightly in the Appellant's favor.

26. *Factor Eleven – Additional relevant evidence.* As additional relevant evidence, the Appellant identifies OSPI's disregard of evidence favorable to the Appellant and its attempted enforcement of vague, unwritten community standards. Because the Appellant was found to have engaged in acts that the Appellant agrees are significant and inappropriate, these arguments are not relevant. Additionally, the Appellant offers that, if he goes back to teaching, he will not kiss or hug a student or hold a student's hand. This commitment to future behavior weighs in the Appellant's favor.

27. After applying the eleven factors, it is determined that revocation is appropriate.

ORDER

The Appellant's Washington State teaching certificate number 374935E is REVOKED. This final order takes effect upon signing.

Signed at Seattle, Washington on May 19, 2014.



Anne Senter
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a petition for reconsideration filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the ALJ at the address at OAH. The petition will be considered and disposed of by the ALJ. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The Petition for Judicial Review of this decision must be filed with the court and served on OSPI, the Office of the Attorney General, all parties of record, and OAH within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the thirty-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

In accordance with WAC 181-86-150(3), the decision of the ALJ shall be sent by certified mail to the Appellant's last known address and if the decision is to reprimand, suspend, or revoke, the Appellant shall be notified that such order takes effect upon signing of the final order.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.



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