

BEFORE THE TEACHER STANDARDS AND PRACTICES COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Teaching License of) FINAL ORDER
)
MARK ALLEN LEICHTY) Case No. 128296

On January 30, 2007, Administrative Law Judge (ALJ) Alison Greene Webster issued a Proposed Order in this case. Mr. Leichy filed exceptions to the Proposed Order and his attorney, Ralph E. Wisner, presented oral argument to the Commission on May 18, 2007.

On January 8, 2008, the Teacher Standards and Practices Commission issued an Amended Proposed Order adopting the Findings of Fact and Conclusions of Law contained in the Proposed Order, but rejecting the ALJ's proposed sanction and rationale for the proposed sanction. Mr. Leichy filed exceptions to the Amended Proposed Order on January 23, 2008. Mr. Leichy did not request oral argument.

After considering the record and the exceptions filed, the Commission now adopts in its entirety the Amended Proposed Order as the Final Order, and incorporates it into this Final Order by this reference.

It is so ordered this 11th day of February 2008.

TEACHER STANDARD AND PRACTICES COMMISSION

By: 
Victoria Chamberlain, Executive Director

NOTICE: You are entitled to judicial review of this Final Order pursuant to the provisions of ORS 183.480. Judicial review may be obtained by filing a petition in the Oregon Court of Appeals. The petition must be filed within 60 days from the date of service of this Final Order.

**BEFORE THE
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF THE TEACHING)**AMENDED PROPOSED ORDER**
LICENSE OF)
)
MARK ALLEN LEICHTY,) OAH Case No. 128296
Licensee)

This matter came before the Commission during its regularly scheduled public meeting of May 18, 2007 to consider the Proposed Order issued on January 30, 2007 by Administrative Law Judge Alison Greene Webster. Leichty appeared and was allowed to present oral argument in support of the exceptions he filed to the Proposed Order. After considering the record herein, TSPC issues this Amended Proposed Order. The Amended Proposed Order adopts the majority of the ALJ's Findings of Fact and Conclusions of Law, but rejects the ALJ's rationale in recommending the sanction. Any substantial changes to the Proposed Order are identified below.

HISTORY OF THE CASE

On February 3, 2006, the Teacher Standards and Practices Commission (TSPC or Commission) issued a Notice of Opportunity for Hearing charging Mark Allen Leichty with misconduct, including gross neglect of duty and gross unfitness. Specifically, TSPC alleged that Leichty inappropriately touched four female middle school students on or near their breasts. Leichty timely requested a hearing.

TSPC referred the hearing request to the Office of Administrative Hearings (OAH) on May 12, 2006. Administrative Law Judge (ALJ) Alison Greene Webster was assigned to preside at hearing. Prehearing conferences were held on August 11, October 10 and October 19, 2006. TSPC was represented by Assistant Attorney General Matthew J. Donohue. Leichty was represented by Attorney Ralph E. Wiser.

The hearing was held on October 23 through October 27, 2006 in Salem, Oregon. TSPC was represented by Assistant Attorney General Matthew J. Donohue. Leichty was represented by Attorney Ralph E. Wiser. The following witnesses testified at the hearing on TSPC's behalf: Detective Stephen Dorn, Albany Police Department; Detective Jerry Drum, Albany Police Department; Pam Foster; Steve Jensen; Heitho Reuter and former North Albany Middle School students AE, AC, AN and RK. The following witnesses testified on Leichty's behalf: Cody Bright; Kori Anderson; Conner McClain; Lisa Spires; Mina Soot; Bonnie Anderson; Peggy Kroessein; Chris McBride; Amanda Soto; Peggy Fosdick; Kathy Ebbs; Danon Kroessein; Tim Stewart; Doug Dobie; Kent Hickam; and Brian Braught. Leichty also testified on his own behalf.

The record remained open for receipt of written closing argument, and closed on January 9, 2007, upon receipt of TSPC's reply brief.

ISSUES¹

1. Whether Leichthy touched student AN on or near her breast in January or February 2004 and, if so, whether the conduct constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(f).
2. Whether Leichthy touched student AE on or near her breast in November or December 2002 and, if so, whether the conduct constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(f).
3. Whether Leichthy touched student AR on or near her breast in November or December 2002 and, if so, whether the conduct constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(f).
4. Whether Leichthy's touching of AN, AE and/or AR was criminal in nature and constitutes gross unfitness in violation of OAR 584-020-0040(5)(e).
5. If Leichthy's conduct violated OAR 584-020-0040(4)(f) or (5)(e), what is the appropriate sanction?

EVIDENTIARY RULINGS

Exhibits A1 to A48, offered by TSPC were admitted. Exhibits A8, A11, A12, A13, A14 and A15 were admitted over Leichthy's objections. Exhibits R1 through R54 and R56 through R69 were admitted. Exhibits R44, R45, R50, R56, R57 and R59 were admitted over TSPC's objections. Exhibit R55 was excluded as irrelevant.

FINDINGS OF FACT

1. At all times pertinent to this case, Respondent Mark Allen Leichthy was licensed as an educator by TSPC. Leichthy began his teaching career in Oregon in 1987 as an elementary school teacher. In 1993, he accepted a teaching position at North Albany Middle School (NAMS). He has taught science, math and social studies. (Test. of Leichthy.) Throughout his career, Leichthy consistently received positive teaching evaluations. (Ex. R30.) Many students appreciated his teaching style and his caring and compassionate demeanor. (Test. of Braught; test. of Soot; test. of McBride.)

2. In Fall 2002, Leichthy taught seventh and eighth grade science at NAMS. AE, AR and AM were among the approximately 30 seventh grade students in his fourth period science class. AE, AR and AM were friends. They sat together in a cluster of four desks near the front of Leichthy's classroom. Early in the school year, the girls were unhappy in Leichthy's class because

¹ TSPC charged Leichthy with having sexual contact with a fourth student, AM, but has since conceded that the evidence fails to demonstrate such contact occurred. Therefore, this order will only address whether Leichthy's conduct with regard to AN, AE and/or AR constituted gross neglect of duty in violation of OAR 584-020-0040(4)(f) or gross unfitness in violation of OAR 584-020-0040(5)(e).

of its timing. They wanted to switch classes so that they could have the later (second) lunch period. They contacted their counselor and asked to rearrange their class schedule and lunch period, but their request was denied. (Test. of AE; test. of AC.)

3. Chris McBride was a student teacher in Leichty's science classes during Fall 2002. In September 2002, he was working in the classroom full time. During October, November and December, he was there part-time, mostly in the mornings. He taught classes for two or three weeks during November 2002. (Test. of McBride.)

4. AE, AR and AM occasionally socialized and talked together during science class. When they did so, Leichty or McBride reprimanded them and asked them to focus on their class work. (Test. of McBride; test. of Leichty.)

5. If one of the girls raised her hand and asked for help in class, Leichty would approach her desk and provide the help. Leichty was friendly toward the girls, and helped them complete their class projects. He would occasionally touch the girls' backs or arms while helping them. He would also occasionally put his arm around the girls' shoulders. (Test. of AE; test. of AC; Ex. A2.)

6. During one class period in early December 2002, AE, AR and AM were talking together and being disruptive. Leichty became frustrated with them. He yelled at the girls and sternly reprimanded them. He also separated them by changing two of the girls' seats. He then felt bad for losing his temper. He approached the girls individually and had a private conversation with each. (Test. of Leichty.) During the conversations, Leichty put his arm around the girls' shoulders. When he put his right arm around AE's shoulder, his right hand came down over her shoulder and touched her chest below her arm pit, near her breast. When Leichty put his arm around AR's shoulder, his right hand also touched her in the chest area near her breast. (Test. of AE; test. of AC.) Although Leichty also put his arm around AM's shoulder, he did not touch her on or near her breast. (Ex. R40 at 37.)

7. On December 9 or 10, 2002, AE, AR and AM went to the Administration Offices to complain about Leichty. As the girls were making their initial report to the counseling secretary, Leichty came to Vice Principal Heitho Reuter's office to report that the girls had been disruptive in class. He asked Reuter if she could support "Saturday school" as a disciplinary measure for the girls. He explained that other measures he had taken, including having the girls write sentences, had not been effective. (Test. of Reuter; test. of Leichty)

8. After Leichty left Reuter's office, AE, AR and AM went in to talk with her. The girls told Reuter that they were feeling uncomfortable with the way Leichty touched them in class. They said the touching had been going on since the beginning of the school year. They explained that Leichty would kneel down beside their desks and wrap his arm around their shoulder with his hand dangling over their breast. They demonstrated how Leichty hugged them. One of the girls described it as "feeling like a seat belt." They also reported that Leichty drew them in close when he wrapped his arm around their shoulder. (Ex. A1; Ex. R39 at 2; test. of Reuter.)

9. Reuter talked with the school resource officer about the girls' complaints. Based on what the girls reported about how they had been touched, the resource officer determined that no crime had occurred. (Test. of Reuter.)

10. On December 10, 2002, Reuter met with Leichy and advised him of the girls' complaints. She told Leichy that he needed to keep his hands and body away from all students. Leichy acknowledged that he occasionally touches his students. With regard to AE, AR and AM, he explained that he had yelled at the girls in class, causing them to start crying. He acknowledged that, in an attempt to console AE, he knelt down next to her desk and put his arm around her. (Ex. R39 at 4; test. of Reuter.)

11. Reuter advised Leichy that he was not being reprimanded for this incident, but that she would be drafting a letter of expectation to document what had occurred and her expectation that he not touch any student in a way that makes the student uncomfortable. (Ex. R39 at 4; test of Reuter).

12. Over the next several days, Reuter spoke to the girls' parents to discuss the girls' complaints about Leichy. AE's mother asked that her daughter be removed from his class. She also advised that AE was very upset about the incident and scared to see Leichy at school. (Ex. A16 at 6; Ex. R39 at 5.) Reuter and Leichy also met with AR and her parents. He said he understood her concerns and apologized for making her uncomfortable. AR's parents also asked that she be removed from Leichy's class. Eventually, all three girls were transferred into other science classes. During a meeting with Reuter on December 17, 2002, Leichy denied rubbing the girls' backs or touching as described (the like a seatbelt). Reuter told him that this position was different than what he had said previously. Leichy did not explain the discrepancy and maintained that he had not touched the girls inappropriately. (Ex. R39 at 4-7; test. of Reuter.)

13. On December 19, 2002, Reuter gave Leichy a Letter of Expectation regarding the girls' complaints. The letter stated, in pertinent part, as follows:

This letter is to review an issue that surfaced on December 2, 2002, and the conversations that have occurred since that time. I informed you that three girls in your class reported to me that they were uncomfortable with being physically hugged by you. They reported that you had knelt beside them at various times during the year and had placed your arm around them, giving them a hug. The girls described the hug as "feeling like a seat belt" where they were "pulled close." They reported that this had happened several times over the course of the year. In addition they said that you have stroked girls on the back or shoulder.

You agreed that you sometimes do touch girls in the manners described. In addition, you mentioned that your former principal had talked to you about this manner. You also said that you do this as an act of caring or consoling behavior, and all parties agree that it was not interpreted as sexual in nature. This letter is intended to

inform you that touching of any kind that makes a child or staff member feel uncomfortable is inappropriate. In addition, it could be interpreted as sexual harassment which is against state law and district policy. Further incidents may result in employee discipline up to and including dismissal. (Ex. A2.)

14. Leichty accepted the letter and did not contest Reuter's description of the touching and/or the investigation that followed. He declined to attach his own explanation to the letter, stating to Reuter that he was comfortable with the letter as written. (Test. of Reuter; Ex. R39 at 7.)

15. During the 2003-2004 school year, AN and RK were students in Leichty's sixth period science class. They sat next to each other at the end of the third row on the right side of the class room, the same side as Leichty's desk. AN had the end desk, and RK sat to her left. (Test. of AN; test. of RK; Ex. A7.)

16. At the beginning of the school year, AN had been designated by the school's administration as a potentially "at risk" student, because of her poor academic performance. Leichty agreed to be an "invisible mentor" to several designated "at risk" NAMS students, including AN. Students in the invisible mentoring program were not supposed to know who their teacher-mentors were, but the teachers were expected to give these students more attention and assistance in class. (Test. of Leichty; test. of Spires.)

17. As part of his mentoring of AN, Leichty engaged her in conversation and asked how she was doing. Unbeknownst to Leichty, this special attention and questioning made AN uncomfortable. Leichty would often ask AN about her home life, a topic she was not comfortable discussing with him. (Test. of Leichty; test. of AN.) AN mentioned to RK on several occasions that Leichty's attention and questioning made her uncomfortable. (Test. of AN; test. of RK.)

18. At some point in January 2004, Leichty came to the side of AN's desk, leaned in close to her and put his arm around her shoulder. As he leaned in, his hand came into contact with AN's chest and breast. This physical contact and Leichty's close proximity made AN extremely uncomfortable. (Test. of AN; Ex. A9.)

19. RK noticed that Leichty treated AN differently from the other students in class. She saw him touch AN on the arm and shoulders when talking to her during class projects. AN mentioned to RK that Leichty's touching made her uncomfortable. (Test. of RK.)

20. On or about January 22, 2004, AN raised her hand for help, and Leichty walked over to her desk. He put his right hand on the desk and his left hand on the back of her chair. As she asked her question, Leichty leaned in closer to her. His foot came into contact with hers under the desk. She thought that he was trying to play "footsie." She moved her feet and body away from him. (Test. of AN; Ex. A9.)

21. During a class period about three weeks later, AN was upset over something involving her boyfriend. Leichty came up to her desk. He put his arm around her, leaned in towards her and asked "Is everything alright?" As in the prior incident, when he had his arm around her shoulders, Leichty's hand touched AN's chest and the top part of her breast. AN told Leichty that she was "fine." He then removed his arm from her shoulders and walked away. AN then turned toward RK and asked, "Did you see how close he was to me?" RK acknowledged that she had noticed the proximity. Later, during the same class period, Leichty called students to his desk one at a time to show them their respective grades. When AN was at his desk, Leichty placed his hands on her shoulders and ran his hands down her arms to about the elbow. He again asked her how she was doing. The touching and his inquiry added to her distressed mood. RK noted that AN was upset and in tears. (Ex. A4; test. of RK; test. of AN.)

22. On or about February 12, 2004, another student (LK) advised Reuter that Leichty was touching AN in class and making her uncomfortable. Reuter called AN to her office to ask about the touching. Another NAMS teacher, Pam Foster, was also present for this meeting.² Reuter and Foster spent several minutes questioning AN about Leichty. AN reported that Leichty had put his arm around her and, in doing so, touched her breast. She described how Leichty would come up to her desk, put his arm around the back of her chair and lean in close to her. AN appeared serious and a bit frightened as she described these incidents to Reuter and Foster. (Test. of Reuter; test. of Foster; Ex. A8; Ex. A3.)

23. Reuter asked AN to prepare a written statement. On a note dated February 16, 2004, AN wrote, in pertinent part, as follows:

I was working on my paper and Mr. Lieckty came over and leaned agens^t the counter next to me and he lend over me and put his left arm on my shoulder. Next he slid his hand closer to my brest. Slides hand down to brest above nibl [sic].

24. Reuter also talked with RK about AN's allegations against Leichty. RK confirmed that she saw Leichty put his arm around AN on the day in question. RK also stated that AN often complained to her about Leichty questioning and/or touching her. Reuter had RK write a statement about what had happened and what she saw. RK did so.³ (Ex. A4.)

² AN was a student in Foster's "Resource Room" class. Foster was also friendly with AN's stepmother. (Test. of Foster.)

³ RK's statement provides, in pertinent part, as follows:

Mr. Liechty [sic] came up and put his arm around her got like right up in her face and asked her "is everything alright?" She told him "yea fine" and he left. But in my opinion he was way too close to her and I am scared for her and all but he was like holding her close to him. And when he calls her to his desk he grabs her shoulders and runs his hands down her arms to about the elbow and then asks her stuff. (She never told me what he asks though). Alicia came back to me and was crying and she said she was really scared and was upset all the rest of the day.

* * *

25. After talking with AN and RK, Reuter believed that Leichty had violated the law by touching AN in a manner that made her feel uncomfortable. On February 13, 2004, she advised Leichty that a student had alleged that he had touched her inappropriately. On or about February 18, 2004, NAMS administrators and school district personnel met with Leichty and his attorney to discuss the allegations. Leichty denied touching AN, putting his arm around her shoulder or touching her breast. When he was asked about the incident involving AE, AR and AM the year before, Leichty denied hugging them and drawing them in close. After the interview with Leichty, Reuter reported the incident to the Department of Human Services (DHS). Reuter also advised DHS that three other girls had complained the year before that Leichty's touching made them feel uncomfortable. (Ex. A10; test. of Reuter; Ex. R61.)

26. On February 23, 2004, DHS referred the complaints about Leichty to the Albany Police Department. The police opened an investigation into whether Leichty had sexually abused AN or any other female students. Over the next few months, detectives interviewed Leichty, Reuter, AN, RK, AE, AR, AM and their parents, other NAMS students and their parents, and other NAMS teachers and administrators. (Exs. A11, A12, A13, A14, A15, A16.)

27. Albany Police Detective Dorn interviewed AN on the afternoon of February 23, 2004. She reported, among other things, that Leichty had touched her breast during class on two different occasions. She stated that when she raised her hand and asked for help, Leichty would kneel down beside her desk. She explained that on two occasions, he placed his right hand on her desk and his left hand on her shoulder and slid his hand down onto her breast. AN also advised Detective Dorn that she thought Leichty's questions about her home life were inappropriate, that she was not comfortable being around him and did not think that he should be a teacher. (Ex. A11.) Detective Dorn provided AN with an anatomically correct drawing of a teenage female and asked her to mark where Leichty had touched her. She marked an x on the chest, just above the breast. (Ex. A14.)

28. On March 1, 2004, Albany Police Detective Jerry Drum interviewed AR at school. She reported that Leichty would rub her back and touch her shoulder, and that this touching made her uncomfortable. She also indicated that Leichty had also touched her on the chest area, above her breast, but admitted that she could not recall clearly because it happened "a long time ago." During the interview, AR became increasingly upset. She refused to answer further questions about the incident, so Drum terminated the interview. (Ex. A12 at 2.)

Well when he put his arm around her and everything as soon as he walked away she slowly turned toward me and she said "did you see how close he was to me?" I said, "Yea, but what did he say?" "He asked me if my day has been going good" and she was trying so hard not to cry!

(Ex. A4.)

29. Detective Dorn interviewed AM on March 1, 2004. She reported that she felt uncomfortable around Leichty. She stated that Leichty put his arm around her shoulder and his hand came close to touching her breast. AM refused, however, to indicate on an anatomically correct drawing where Leichty had touched her. (Ex. A13 at 4.)

30. Detective Dorn also interviewed AE on or about March 1, 2004. She reported that Leichty had touched her "boob" on more than one occasion when she was working on projects during class. She indicated that he would put his arm over her shoulder by reaching around her back, and then slide his hand down onto the top of her breast. (Ex. A13 at 7.)

31. During March 2004, Leichty was arrested and charged with eight counts of first degree sexual abuse. (Test. of Hickam.) The indictment, filed in the Benton County Circuit Court, alleged that in December 2002 Leichty touched three female students inappropriately on or around the breast area, and did the same with another female student in February 2004. (Ex. A18.) The arrest made the news. The criminal charges shocked the NAMS faculty and many in the community who were familiar with Leichty. Several teachers came to Leichty's defense. They stated publicly that Leichty was innocent and the allegations against him were false. (Test. of AC; test. of RK; test. of P. Krossein.) This was very divisive, and upsetting to the students involved in the allegations. (Test. of RK; test. of AE.)

32. Leichty was placed on administrative leave during the investigation. On May 11, 2004, the Greater Albany Public School District recommended that he be dismissed. The basis for the recommendation was his alleged misconduct constituting immorality, insubordination and neglect of duty under ORS 342.865(1). (Ex. A18.)

33. In June 2004, AR's parents and AE's parents filed a Notice of Tort Claim on their daughters' behalf against the school district, asserting, among other things, that school officials were negligent in failing to protect the girls from unwanted and illegal touching by Leichty, and in failing to respond appropriately to their complaints in December 2002. (Exs. R41 and R48.)

34. In December 2004, AR's parents and AE's parents filed a civil action against the school district and Leichty on their daughters' behalf seeking damages resulting from Leichty's alleged unlawful sexual harassment of AR and AE. (Exs. R42 and R43.)

35. In the course of discovery in the civil lawsuit, Leichty's attorney took depositions of the four girls (AE, AR, AM and AN) and their parents. AM testified that Leichty put his arm around her shoulder, but did not touch her on or near her breast. (Ex. R40 at 37.) The other girls testified that Leichty touched them on or near their breasts, but their accounts of when and how often the touching occurred differed from their initial statements and complaints to Reuter and their statements to the police. (Exs. R46, R49 and R60.)

36. In July 2005, the Benton County District Attorney's office moved to dismiss the criminal charges against Leichty. The charges were dismissed without prejudice. (Test. of Hickam.)

CONCLUSIONS OF LAW

TSPC adopts the ALJ's Conclusions of Law, but rejects the conclusion that the appropriate sanction is a reprimand. TSPC's conclusion of law number 5 articulates the sanction that TSPC finds is appropriate in this case.

1. Leichty touched student AN on her breast in January or February 2004 in a manner that constituted gross neglect of duty under OAR 584-020-0040(4)(f).
2. Leichty touched student AE on or near her breast in November or December 2002 in a manner that constituted gross neglect of duty under OAR 584-020-0040(4)(f).
3. Leichty touched student AR on or near her breast in November or December 2002 in manner that constituted gross neglect of duty under OAR 584-020-0040(4)(f).
4. The evidence fails to establish that Leichty's touching of AN, AE and AR was criminal in nature. Therefore, no violation of OAR 584-020-0040(5)(e) has been proven.
5. The appropriate sanction for Leichty's gross neglect of duty is revocation of his teaching license.

OPINION

Under ORS 342.175(1)(b), TSPC is authorized to discipline educators licensed in the State of Oregon for "gross neglect of duty." TSPC may also discipline an educator for "any gross unfitness" under ORS 342.175(1)(c). In this case, TSPC alleges that Leichty had sexual contact with three female middle school students, AN, AE and AR, by touching them inappropriately on or near their breasts.⁴ TSPC alleges that this conduct constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(f) and/or gross unfitness in violation of OAR 584-020-0040(5)(e).

TSPC bears the burden of proving the allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

A. Gross Neglect of Duty

OAR 584-020-0040(4) describes "gross neglect of duty" as "any serious and material inattention to or breach of professional responsibilities." The rule further states that "any sexual conduct with a student" may constitute gross neglect of duty. OAR 584-020-0040(4)(f). "Sexual conduct" is defined in OAR 584-020-0005(5). It includes:

⁴ As noted above, TSPC has withdrawn the allegation that Leichty had sexual contact with student AM.

- (a) The intentional touching of the breast or sexual or other intimate parts of a student;
- (b) Causing, encouraging, or permitting a student to touch the breast or sexual or other intimate parts of the educator;
- (c) Sexual advances or requests for sexual favors directed towards a student;
- (d) Verbal or physical conduct of a sexual nature when directed toward a student or when such conduct has the effect of unreasonably interfering with a student's educational performance or creates an intimidating, hostile or offensive educational environment; or
- (e) Verbal or physical conduct which has the effect of unreasonably interfering with a student's educational performance or creates an intimidating, hostile or offensive educational environment.

TSPC asserts that Leichty had "sexual contact" with the three female students by touching them inappropriately on or near their breasts.⁵ TSPC contends that this contact constitutes "sexual conduct" under OAR 584-020-0005(5)(a) or (e). Leichty, on the other hand, denies touching the girls' breasts or other intimate parts. He also challenges the girls' credibility, noting their inconsistent accounts as to the manner in which, when and how often Leichty touched them.

In determining whether Leichty engaged in conduct constituting gross neglect of duty, the first question is whether he touched the girls on or near their breasts. If so, the next question is whether this touching rises to the level of "sexual conduct" as defined by TSPC's rules.

With regard to student AN, TSPC finds that the most reliable account of what occurred in January and/or February 2004 comes from Reuter's notes and the written statements of AN and RK. All of these accounts were written shortly after the events in question. There is no evidence that, at the time the statements were made and the documents were written, these two students or Reuter had any motive to falsely accuse Leichty of misconduct. Indeed, AN did not initiate the complaint. Another student reported the inappropriate touching to Reuter, prompting Reuter to question AN about it. When first questioned, AN indicated that on two occasions, Leichty put his arm around her and leaned in close. She stated that, on both occasions, his hand made contact with her chest and the top part of her breast. She reported that this physical contact and Leichty's close proximity to her made her extremely uncomfortable. RK confirmed that on at least one occasion she saw Leichty put his arm around AN's shoulders and draw her close. She also confirmed that AN was distressed by the physical contact and Leichty's close proximity to her. Based on this evidence, TSPC is persuaded that Leichty touched AN on her breast in January or February 2004.

⁵ The term "breast" is not defined by TSPC's rules, but is defined by Webster's Third New International Dictionary at 273 (unabridged 2002 ed.), as follows: 1 a: either of two protuberant milk producing glandular organs situated on the front of the chest or thorax in the human female * * * 2 a: the fore or ventral part of the body between the neck and abdomen: the front of the chest."

TSPC is also persuaded that this touching constitutes sexual contact under the provisions of OAR 584-020-0005(5)(e). The testimony of AN, RK and Reuter establishes that Leichty's touching of AN's breast unreasonably interfered with her educational performance and/or created an intimidating or offensive educational environment for her. AN's distress was apparent to RK, who sat next to her in class. RK noted that on the day she saw Leichty put his arm around AN and draw her close, AN was visibly upset by his actions. Reuter also noted AN's serious and frightened demeanor as she described the touching during the February 12, 2004 interview.

With regard to students AE and AR, TSPC finds that the most reliable account of what occurred in November or December 2002 comes from the girls' statements to Reuter in December 2002 and Reuter's investigatory notes written shortly thereafter. When the girls first complained about the touching, they clearly expressed their discomfort with it. They all sought to transfer to a different science class. The girls reported that Leichty hugged them and wrapped his arm around their shoulders with his hand dangling over their breasts. They described it as "feeling like a seat belt." Although the girls did not specifically indicate that Leichty touched their breasts, they demonstrated how his hand came into contact with their chests, near the top of their breasts. Based on this evidence, TSPC is persuaded that, on at least one occasion, Leichty touched both AE and AR on the chest area near their breasts.

Based on these findings, TSPC concludes that Leichty engaged in "sexual conduct" as defined in OAR 584-020-0005(5)(a).⁶ As mentioned above, the facts demonstrate that Leichty touched AN on her breast in January or February of 2004. This conduct falls within the definition of OAR 584-020-0005(a) as it constitutes "[t]he intentional touching of the breast." Leichty's conduct regarding students AE and AR also meets the definition of "sexual conduct" because he intentionally touched an intimate part of the students' bodies, namely, the area of their chest near their breasts. An "intimate part of the body" is a place on a person's body that the person ordinarily allows to be touched only by other people with whom the person has an intimate relationship. *State v. Meyrovich*, 204 Or App 385 (2005) (finding the touching of the victim's neck to be an intimate part); *see also State v. Woodley*, 306 Or 458, 463 (1988). (the part must be subjectively intimate to the person touched, and either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person). In this case, the facts demonstrate that both AE and AR found Leichty's touching of the area near their breasts to be inappropriate and offensive. In addition, it is objectively reasonable to conclude that the area of a woman's chest near her breast is a place where she would only allow touching from a person with whom she has an intimate relationship. Leichty's touching of AN, AR, and AE constitute "sexual conduct" as defined in OAR 584-020-0005(5)(a).

Leichty's touching of AE and AR also unreasonably interfered with the girls' educational performance and/or created an intimidating, hostile or offensive educational environment under 584-020-0005(5)(e).⁷ The girls made it clear to Reuter that Leichty's touching made them uncomfortable. Even though, at the time, the girls did not interpret the physical contact as sexual

⁶ This paragraph has been modified from the text in the Proposed Order in response to Leichty's exceptions 15 and 16 to the Amended Proposed Order.

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in nature,⁸ they nevertheless found it offensive and inappropriate. AE was very distressed by the incident and advised her mother that she was scared to see Leichty at school. As evidenced by Leichty's apologies to AR and her parents, he recognized that his touching made the girls uncomfortable. Because TSPC's definition of "sexual conduct" includes any touching that creates a intimidating, hostile or offensive educational environment, TSPC has shown that Leichty engaged in "sexual conduct" with the three students at issue when he touched them on or near their breasts.

Insofar as any sexual conduct with a student may constitute gross neglect of duty, OAR 584-020-0040(f), TSPC has proven that Leichty violated ORS 342.175(1)(b) with regard to students AN, AE and AR.

B. Gross Unfitness

"Gross unfitness" is defined by OAR 584-020-0040(5)(e) as follows:

[A]ny conduct which renders an educator unqualified to perform his or her professional responsibilities. Conduct constituting gross unfitness may include conduct occurring outside of school hours or off school premises when such conduct bears a demonstrable relationship to the educator's ability to fulfill professional responsibilities effectively. The following may be admissible as evidence of gross unfitness. Consideration may include but is not limited to:

* * * * *

(e) Admission of or engaging in acts constituting criminal conduct, even in the absence of a conviction; * * *.

TSPC asserts that by touching AN, AE and AR on or near the breast, Leichty engaged in criminal contact, namely sexual abuse in the first degree. Under ORS 163.427(1), a person commits the crime of sexual abuse in the first degree when the person "subjects another person to sexual contact" and the victim is less than 14 years of age. For purposes of the criminal statutes, "sexual contact" is defined as:

[A]ny touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

ORS 163.305(6).

A woman's breast is an intimate part of a person. *State v. Woodley*, 306 Or 458 (1988). An intimate part of a person also includes a body part that the person ordinarily allows to be touched only by other people with whom the person has an intimate relationship. *State v. Meyrovich*, 204 Or App 385 (2005) (finding the touching of the victim's neck to be an intimate

⁸ Reuter's December 19, 2002, Letter of Expectation states that the touching was not "interpreted as sexual in nature." (Ex. A2.)

part); *see also Woodley* at 463 (the part must be subjectively intimate to the person touched, and either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person).

In assessing whether Leichthy's touching of AN, AE and AR on or near their breasts constitutes sexual contact for purposes of ORS 163.305(6) and 163.427, one determinative question is whether this touching was for the purpose of arousing or gratifying sexual desire. Although a pattern of touching similar victims in a similar manner can be relevant to proving a person's *mens rea*, *see State v. Wert*, 144 Or App 581 (1996),⁹ the record in this case fails to establish any nefarious intent in connection with Leichthy's touching.

As documented in Reuter's December 19, 2002 expectation letter, the touching of AE and AR occurred as Leichthy was trying to console them following his reprimand of them. The girls were offended by the touching, but did not interpret it as sexual in nature. There is no evidence that Leichthy made any sexual or otherwise inappropriate comments to any of the girls. The touching of AN occurred as Leichthy asked her if she was okay, when she appeared upset during class. Again, although the touching and Leichthy's inquiry made her uncomfortable, the circumstances provide no basis for inferring that he touched the top of her breast for the purpose of arousing or gratifying sexual desire. No criminal conduct, and therefore no gross unfitness, has been established.

C. Response to Exceptions to Proposed Order

Leichthy filed exceptions to the Proposed Order in a timely manner. TSPC has considered the exceptions and rejects them for the following reasons:

Leichthy makes 12 exceptions to the order proposed by the ALJ. Leichthy's first exception is a general exception to any portion of the proposed order that is inconsistent with his written closing argument. Exceptions 2 and 8 pertain to findings that Leichthy touched the students on or near their breasts. Exceptions 3, 10, 11, and 12 relate to any finding, explicit or implicit, that the students were credible witnesses. Exception 6 challenges the finding that AR and AE did not have any motive to falsely accuse Leichthy of touching them. The remaining exceptions, 4, 5, 7, and 9 challenge individual factual findings of the ALJ.

TSPC rejects Leichthy's first exception as it finds the ALJ's findings to be more persuasive than Leichthy's closing argument. TSPC rejects Leichthy's second and eighth exceptions as it concludes that the ALJ correctly determined, from the evidence introduced during the contested case hearing that Leichthy touched AR, AE, and AN on or near their breasts. TSPC rejects exceptions 3, 10, 11 and 12 regarding the students' credibility because it finds the

⁹ In *Wert*, the defendant was charged with sexual abuse in the first degree for rubbing the buttocks of a nine year old girl. At trial, to rebut the defendant's claim that the touching was accidental and without sexual intent, the state offered evidence that two or three days after the alleged sexual abuse, the defendant touched the leg of a 12 year old girl, and rubbed it up to "the crease" where her leg joined the body. The trial judge admitted this uncharged misconduct evidence, and the defendant was later convicted of sex abuse. On appeal, he argued that the trial court erred in admitting the evidence under OEC 403 because it was more prejudicial than probative. The court disagreed, finding that evidence was relevant to prove *mens rea*.