

No. 68519-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS

Appellant,
v.

THE SEATTLE SCHOOL DISTRICT

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

Mr. John Cummings is a gifted special education teacher. He was nonrenewed after not being provided a reasonable opportunity to improve as required by RCW 28A.405.100. His primary evaluator assigned him to teach a curriculum that was inappropriate for his students and without following proper protocol. The assignment was made mid-year and was made even more difficult due to Mr. Cummings' ADHD, a disability the District failed to accommodate even though doing so would have assisted Mr. Cummings in being a better teacher.

Both the Superior Court and Hearing Officer made prejudicial and harmful errors by excluding the testimony of expert Pat Steinburg and by failing to require a court reporter for closing arguments.

II. REPLY TO RESTATEMENT OF FACTS.

Mr. Cummings taught only one year of low level math to learning disabled students prior to his employment by the District. His other previous experience included teaching special education U.S. History, Global Studies and English. (CP 881-883). The District incorrectly scored Mr. Cummings as "highly qualified" in math. Mr. Cummings was neither asked to verify this score nor informed of it. (CP 1046-1047).

The District inaccurately claims that the Superintendent met with the Ms. Medsker, its Education Director on May 6, 2010 to formulate a recommendation regarding the nonrenewal of Mr. Cummings. (Response at 15). Ms. Medsker testified that she **never** met with the Superintendent regarding this matter. (CP 434).

Psychologist, Dr. Arden Snyder testified it was his medical opinion that Mr. Cummings' ADHD diagnosis interfered with his ability to teach. (CP 414, 417-418). Contrary to the District's assertion, Dr. Snyder's requested accommodations were not specifically pertaining to Mr. Cummings' math instruction. Dr. Snyder testified with medical certainty that Mr. Cummings suffered from ADHD and that his overall teaching would benefit from specific medical accommodations. (CP 418). The District's determination to change Mr. Cummings' assigned curriculum mid-year and to maintain that assignment was in direct conflict with his disability.

III. ARGUMENT

A. NONRENEWAL OF TEACHERS' CONTRACTS REQUIRES SPECIFIC AND REASONABLE PLAN FOR IMPROVEMENT AND OPPORTUNITY TO IMPROVE.

A teacher who has remediable teaching deficiencies can be nonrenewed only after being placed on probation and given a meaningful opportunity to improve. RCW 28A.405.100 and

28A.405.210. *Wojt v. Chimacum Sch. Dist. 49*, 9 Wash.App. 857, 861–62, 516 P.2d 1099 (1973) (inability to maintain discipline and deficient teaching methods constitute remediable teaching deficiencies; meaningful opportunity to improve required).¹

Mr. Cummings' contract was nonrenewed following a probationary period, which did not meet the requirements set forth in RCW 28A.405.100, RCW 28A.405.210 and the collective bargaining agreement. Thus, the District cannot meet its burden to demonstrate that it had sufficient cause to nonrenew the employment of Mr. Cummings.

1. **The Requirement To Successfully Teach CMP2 Math To Special Education Students Was Not Reasonable.** (Assignments of Error Nos. 1, 3, 5, 7, 8, 9 and 11) (FF 4, 5, 6 and 7; CL 2, 4, 5, 6, 7 and 8).

RCW 28A.405.100(4) requires that the District provide the teacher with a specific and reasonable plan for improvement and a meaningful opportunity to improve. Requiring that Mr. Cummings successfully teach CMP2 math in his plan for improvement was not reasonable and violates RCW 28A.405.100.

It was not reasonable for the District to mandate Mr. Cummings teach CMP2 math to his special education students because

¹ *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 113–114 (1986) was both a discharge and a nonrenewal but provides a good overview of the law as it concerns termination of teachers with continuing contracts of employment.

of the ability of his students, his ADHD and his background. There is no testimony that the District mandated all of its special education middle school teachers to teach this curriculum at the middle school level. Rather, the District concedes that the curriculum was not mandated District-wide by stating that only McClure teachers were mandated to teach this curriculum. (Response, at 6).

The District's reliance on Marilyn Day for the proposition that the School District mandated CMP2 curriculum for special education students is specious. (Response, at 11). Ms. Day testified that CMP2 Math is not mandated by the District to be taught to special education middle school students. (CP 680-681). Rather, after Ms. Day reviewed the Individualized Education Plans ("IEPs") of Mr. Cummings' special education students, including their math level, Ms. Day explained that many tested at the first grade level and would not understand CMP2 Math. (CP 648).

Most of Mr. Cumming's special education students were below grade level. Mr. Cummings used Brigance, IEP's and the Prentice Hall Intervention Kit to assess the students. (CP 609, 2230). He had designed a program consistent with the IEPs of his students over the summer, after he was told prior to the start of the 2009-10 school year that he would be teaching special education math to these special

education students. (CP 647, 920 923-939). At the beginning of the school year, Mr. Cummings received confirmation that there was no mandated curriculum for special education math but was told rather that a special education teacher should teach to the students' goals and objectives. (CP 950-1, 1056). See also WAC 392-172A-01175.

The District erroneously relies upon WAC 180-44-010(1) and WAC 181-82A-202(1)(K) to argue that it was reasonable to require Mr. Cummings to teach CMP2 math. (Response, at 4, 32). Yet, neither regulation supports its argument. First, WAC 180-44-010(1) states: "It shall be the responsibility of the teacher to follow the prescribed courses of study and to enforce the rules and regulations of the school district." Since there is no reliable evidence that CMP2 was the required curriculum for the District's special education students, this regulation is inapplicable. Second, WAC 181-82A-202(1)(k) in pertinent part, provides:

Certificate Endorsements. ... Teacher certificates shall be endorsed as follows:

1. All levels:
...
(k) Special education.

This regulation does not require special education teachers to be able to teach all levels of math but rather requires that a special education teacher must be able to teach all levels (all grades) of special education.

Mr. Cummings' assignment to teach special education students CMP2 math violated the parties' Collective Bargaining Agreement (*hereinafter* "CBA"), Article III, 5:

No single instructional philosophy or technique is prescribed by the SPS for the instruction of a Special Education student." (SN8, Ex. R-1, p. 28).

There is no evidence that Mr. Cummings' self-designed math curriculum was not working or that he was teaching in a manner that inconsistent with the IEPs of his students in October 2009 when Assistant Principal Scarlett suddenly required that he teach CMP2 math to special education students. (CP 946, 949-952, 958-959). In fact, there is unrefuted testimony demonstrating Mr. Cummings' math students made adequate yearly progress and that their test scores improved. (CP 947-948).

By mandating that he teach CMP 2 math mid-year, the District did not provide Mr. Cummings with a reasonable plan for improvement as required by RCW 28A.405.100.

2. **Mandating Curriculum Mid-Year To Include CMP2 Math Required IEP Team Meetings.**
(Assignment of Error Nos. 1, 3, 5, 7, 8, 9 and 11)
(FF 6, CL 4, 5 and 6).

The District fails to respond to Mr. Cummings' claim that it could not mandate a change in the curriculum for its special education

students without holding meetings of the IEP teams. (Opening Brief, at 44-45). The District did not follow this protocol when it imposed the requirement mid-year that Mr. Cummings teach CMP2 math. As a result, the Hearing Officer should have found that it was unreasonable to require teaching of this curriculum. The Superior Court and the Hearing Officer erred by overlooking this significant violation.

Had the District wanted special education students to learn CMP2 math, IEP meetings with the IEP teams for each affected student were required. See offer of proof of Pat Steinburg. (CP 834-843, 868-869). There is no evidence that Ms. Scarlett either reviewed the students' IEPs prior to issuing the directive or considered the necessity of having meetings of the IEP teams of each student before unilaterally changing the curriculum.

The Hearing Officer also erred by failing to find that the District's primary evaluator was not competent to evaluate Mr. Cummings as a special education teacher. Ms. Scarlett did not understand his special education students or the purpose of the IEPs and consequently she held Mr. Cummings to inappropriate standards. Ms. Scarlett was not certified to teach special education and had never before evaluated any teacher, much less a special education teacher, through the probationary process. (CP 311, 316).

Mr. Cummings objected to the mandate for him to teach special education math using CMP2 (CP 949) in part because he was aware that changing a student's IEP required a meeting of the IEP Team. (CP 948-949, 1094, 1167-1168). Mr. Cummings must teach in accordance with federal and state laws and WAC 180-44-010. This court should not allow the District to disregard mandatory protocol and permit his nonrenewal when he was ordered to teach in violation of these laws.

While mandating CMP2 curriculum for special education students may violate students' rights under the Individuals With Disabilities Education Act of 2004 (*hereinafter* "IDEA"), contrary to the Hearing Officer's Conclusion of Law No. 6, Mr. Cummings has not claimed an individual right of action under the IDEA. Rather, Mr. Cummings claimed that mandating that curriculum not only violated the students' rights but was inconsistent with their IEPs and as a result, could not support a finding that the District provided him with a reasonable plan for improvement. As a result, Conclusion of Law No. 4 is not based on substantial evidence. The District placed Mr. Cummings on probation based on his ability to teach CMP2 math to special education students, an unreasonable requirement and then inappropriately nonrenewed his teaching contract based on his

teaching of this curriculum. The evidence supports that Mr. Cummings was set up to fail. Thus, the District cannot meet its burden that he was given a meaningful opportunity to improve.

3. **The District's Primary Evaluator's Conflict Of Interest Irreparably Damaged The Integrity Of The Probationary Process.** (Assignments of Error Nos. 1, 2, 7 and 11) (FF 5; CL 4)

The District mistakenly claims that Mr. Cummings did not advance any evidence to support its claim that the Assistant Principal Scarlett had a conflict of interest and could not effectively act as Mr. Cummings' math coach and primary evaluator. (Response, at 33). Yet, the record is clear that Ms. Scarlett indeed had a conflict of interest and that the conflict significantly compromised the integrity of the probation process.

Ms. Day, an expert evaluator, who has evaluated over 360 teachers throughout her career and an expert witness in this case testified that it was a conflict of interest for Assistant Principal, Scarlett, to serve as both an evaluator and math coach for Mr. Cummings. (CP 656-657). Mr. Cummings also presented testimony that he believed that statements he made to Ms. Scarlett when she was acting in her role as math coach were used against him in Ms. Scarlett's evaluations. (CP 957-959) Common ethical judgment also

supports this proposition: when a supervisor has a role to evaluate an employee's performance, the openness and trust necessary for a useful coaching relationship will be inhibited. Conversely, the openness that is necessary to the coaching relationship to permit a focus on weaknesses and the need to improve, if used in the evaluative process, takes inappropriate advantage of the coaching relationship.

The Hearing Officer erred in determining that there was no conflict of interest. Likewise, the Superior Court erred in determining that this is an issue of fact and not an error of law or a mixed question of fact and law. This Court should review this issue de novo and determine that this conflict of interest seriously compromised integrity of the probationary process and furthermore, that Mr. Cummings was neither provided a meaningful opportunity to improve in violation of RCW 28A.405.100(4) nor was his primary evaluator unbiased and objective.

4. Failure To Accommodate Mr. Cummings' ADHD Hindered His Ability To Improve. (Assignments of Error No. 3 and 6) (FF 6, CL 3)

The Hearing Officer and the Superior Court agree that Mr. Cummings has a disability, ADHD. Opinion at 59, CP 127, (FF No. 6) CP 2739. ADHD is a qualifying impairment which affected Mr. Cummings' ability to teach. The District had a duty to accommodate

him so that he could perform as a teacher. Yet, Mr. Cummings' requests for accommodation were not met.

The Hearing Officer and the trial court both erroneously found that Mr. Cummings' ADHD did not limit his ability to teach math or to deliver the CMP2 curriculum. Opinion at 60, CP128, (**FF No. 6**). As a result, both erroneously concluded that Mr. Cummings' ADHD did not trigger a duty to accommodate under RCW 49.60.180.² (Opinion at 54-63, CP 122-31; CL No. 3). By failing to accommodate, the District essentially handicapped Mr. Cummings as a teacher and failed to give him a meaningful opportunity to improve. As Mr. Cummings explained, his ADHD affected his ability to adjust the curriculum at the last minute and to teach new curriculum on short notice. (CP 964, 966-7). Thus, the District's change mid-year to his curriculum was directly opposed to the type of intervention that would help Mr. Cummings improve as a teacher.

Dr. Snyder submitted the documentation requesting specific accommodations in response to the District's request. (CP 1358). Dr. Snyder's testimony clearly demonstrated that these accommodations

² See also Americans With Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* and as amended by the ADA Amendment Act of 2008.

would have enhanced Mr. Cummings' overall teaching. (See Opening Brief, at 38).

Dr. Snyder testified that Mr. Cummings' teaching would have been enhanced had the District provided clerical support. (CP 405). Yet, the District did not provide this accommodation or others and as a result, Mr. Cummings' ability to teach was compromised. Incredibly, the District argues that it did not provide clerical support to Mr. Cummings because it could not afford to do so for 3,300 teachers. (Response, at 18). The District could have accommodated Mr. Cummings by providing him with clerical support, without providing it to anyone else. There is no evidence that the District investigated the cost and determined it was too expensive.³ The District made no showing that providing clerical support to Mr. Cummings constituted an undue hardship.

The Hearing Officer erroneously found that Mr. Cummings would not have had time to successfully use a clerk. (Decision, pp. 56-63, CP 124-131). Here, the Hearing Officer usurped the role of a medical provider in deciding that a particular accommodation would not have worked for Mr. Cummings.

³ The District's Human Resources Analyst, Ms. Lewis, who handled Mr. Cummings' request for accommodation, testified she had no knowledge how much it would cost to provide clerical support for Mr. Cummings and she had discussed it with no one in the District. (CP 1364).

The District failed in its statutory obligations to provide accommodations to Mr. Cummings, in violation of Washington law:

Employers have an affirmative obligation under law against discrimination to reasonably accommodate the sensory, mental, or physical limitations of disabled employees unless the accommodation can be shown to impose an undue hardship on the employer's business.

Snyder v. Medical Service Corp. of Eastern Washington, 145 Wash.2d 233, 35 P.3d 1158 (2001).

The flaw in both the Hearing Officer and the Superior Court's opinions is that both view the facts at the time of the hearing, after the work was performed, and determine, almost speculatively, that providing the requested accommodations would not have resulted in Mr. Cummings being able to teach CMP2 math curriculum to special education or general education students. However, the District's duty to accommodate arose at the time it received notice of the disability.

Dean v. Metro, 104 Wn.2d 627, 632-639, 708 P.2d 383 (1985).

Additionally, despite the District's arguments, the proper inquiry is not whether the accommodation would have resulted in Mr. Cummings being able to teach CMP2 math. The proper inquiry is whether providing the accommodation would have helped him succeed as a special education teacher and whether the District violated RCW 49.60.180 and/or the ADA when it failed to take Mr. Cummings' ADHD seriously. By making significant last minute changes to his

assigned curriculum mid-year, by failing to engage in an interactive process regarding the requested accommodations and by refusing his request for additional planning time and for clerical support, the District denied Mr. Cummings a meaningful opportunity to improve as required by RCW 28A.405.100 and discriminated against him based on his disability.

**B. IT WAS PREJUDICIAL ERROR TO DENY THE
EXPERT TESTIMONY OF MS. STEINBURG.
(Assignment of Error No. 10) (FF 7)**

The Hearing Officer erred in excluding the testimony of expert witness, Pat Steinburg. (CP 825). The District fails to respond to this error asserted in Mr. Cummings' Opening Brief and summarily argues that the testimony was properly excluded. (Response, p. 29). At the hearing, the District argued Ms. Steinburg's testimony should be excluded because it was not considered by the Superintendent. Yet, that is an incorrect standard. The Hearing Officer's ruling to exclude the testimony of expert witness Patricia Steinburg is in direct contravention of RCW 28A.405.310(3) which provides:

At the hearing, ..., the employee may produce such witnesses as he or she may desire.

A trial court's determination that expert testimony will be helpful in understanding evidence or determining a fact in issue, as

required by ER 702, may be overturned for abuse of discretion. *Group Health v. Department of Revenue*, 106 Wash.2d 391, 722 P.2d 787 (1986). Ms. Steinburg's testimony should have been admitted without question. Expert testimony is admissible under ER 702 and 703 if the witness' expertise is established by the evidence, her opinion is based on a test generally accepted in the scientific community, and the testimony is helpful in deciding an issue in the case. *Tennant v. Roys*, 44 Wash.App. 305, 722 P.2d 848 (1986).

Ms. Steinburg's vast experience working with teachers and school districts in the special education field as well as the bases for her opinions was established in her offer of proof. (CP 810-815, 832-858, 862-863). Ms. Steinburg's testimony would have been helpful in deciding a material issue: whether the plan for improvement was reasonable and whether the District gave Mr. Cummings a meaningful opportunity to improve. The District cannot meet its legal burden of sufficient cause without proving both elements. See Conclusion of Law No. 4.

Requiring Mr. Cummings to teach curriculum that was not uniquely tailored to the needs of his students, that was not referenced in their IEPs and about which neither their parents nor members of the IEP team of the relevant students were consulted indicates that the

plan was not reasonable. Additionally, Mr. Cummings' final evaluation was fundamentally flawed since his primary evaluator did not review the IEPs of his students yet determined that he did not teach the IEP-identified goals. (CP 1070, 1627-1631).

In her offer of proof, Ms. Steinburg explained that the purpose of an IEP is to design an individualized plan so that each student receives individualized instruction at their own individual level. She also stated that changing the curriculum required a meeting of the IEP team for each student, meetings that did not occur. (CP 834-843).

In the offer of proof, Ms. Steinburg further explains that the general education curriculum adopted for all students is irrelevant with regard to special education and that mandating curriculum such as CMP2 math to special education students is inconsistent with the tenets of special education:

The obligation of the special education personnel is to take the student at their present level of performance and instruct them at that level, using whatever curricula or materials they devise or can find that will help the student move forward. ... [E]very single district adopts curricula, and then that is not necessarily, in fact, rarely is it used for special education students who are in need of special designed instruction in the special ed classroom." (CP 866).

... [I]t is up to the teacher, who's certificated and endorsed in special ed, to determine and design that instruction. (CP 869).

The Hearing Officer erred because Ms. Steinburg's testimony was directly relevant to whether the District could meet its burden to prove that it gave Mr. Cummings a reasonable program for improvement when it required him to teach curriculum that was not appropriate for his students and in violation of the accepted legal procedures applicable to special education. Ms. Steinburg's testimony would have shown that the District's requirement that he teach CMP2 math to his special education students was not reasonable, and thus the District would not have established that it complied with the legal requirements of RCW 28A.405.100 causing the District's case to fail.

The specific curriculum that a special education teacher must be able to teach must be decided by the student's IEP team who is responsible for setting goals for students in the areas of math, reading and writing and provides timelines and strategies for achieving goals. See WAC 392-172A-03090 through WAC 392-172A-03110. The District inappropriately circumvented this process by directing that special education students be taught CMP2 math when it was not reflected in the students' IEPs. Had Ms. Steinburg been allowed to testify, she could have explained the appropriate practice and how the District's practices diverged from the requirements of the law.

It was not only an abuse of discretion and prejudicial error to exclude this testimony but it also violated Mr. Cummings' due process and statutory rights under RCW 28A.405.310(3).

C. ALLOWING THE HEARING TO CONTINUE WHEN NO COURT REPORTER WAS AVAILABLE CONSTITUTES AN ABUSE OF DISCRETION. (Assignment of Error No. 12) (CL § C).

The District's falsely claims that Mr. Cummings waived any objection to its failure to provide a court reporter for the closing argument. (Response, at 37). Mr. Cummings repeatedly objected to the conducting of closing arguments without a court reporter present. (CP 73 and 74, Superior Court Ex. FE 16, 4/14/2011 Transcript, p. 60). The District should not now benefit from its own error in neglecting to supply a court reporter for the closing argument hearing as is required by RCW 28A.405.310(10), which provides:

A complete record shall be made of the hearing and all orders and rulings of the Hearing Officer and School Board.

The opening and closing oral arguments are part of the hearing record. (CP 73, 74 and 2655). A complete record was not made in violation of RCW 28A.405.310(10).

The Superior Court found that the Hearing Officer violated RCW 28A.405.310(10) but did not find the error to be prejudicial. Superior Court Order, § C. Yet, approximately 45 minutes of the

closing argument was not transcribed. Mr. Cummings' procedural and substantive due process rights were violated. The Appellant is prejudiced since there is no ability to review the District's closing argument. The determination by the Superior Court is clearly erroneous and should be reversed.

Ironically, the District disingenuously asserts that had it known a court reporter was required for the closing argument, it would have asked one to attend. (Response, at 21). The District's argument is not credible since it objected to paying for the court reporter after Appellant, at the last second, successfully secured a court reporter to transcribe the last half of the closing argument. The District did not agree to pay for the court reporter until the Court ordered it to do so. (CP 74, 75, 2655). The District abrogated its statutory obligation. Its attempts to shift blame to Mr. Cummings is misplaced.

This violation of Mr. Cummings' due process rights as defined by RCW 28A.405.310(10) is prejudicial error. This Court should reverse the Hearing Officer's decision to avoid rewarding the District for its own intentional decision not to follow the requirements of RCW 28A.405.310(10).

D. THE DISTRICT DID NOT MEET ITS BURDEN OF PROOF BECAUSE MR. CUMMINGS DEMONSTRATED SUFFICIENT IMPROVEMENT.

(Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9 and 11) (FF 4, 5 and 7; CL 2, 4, 5, and 8)

1. **Insufficient Weight Was Given To Ms. Day's Exert Testimony.**

The Hearing Officer erroneously determined that the District met its burden to show sufficient cause to nonrenew Mr. Cummings for his failure to demonstrate sufficient improvement in (1) Instructional Skill and (2) Knowledge of Subject Matter. The Hearing Officer did not give sufficient weight to Ms. Day's testimony. *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 113–114 (1986) (sufficient cause to non-renew does not exist where a teacher's deficiencies are remediable).

Ms. Day testified that Mr. Cummings improved, referencing his fourth observation on April 20, 2010.

A I believed at that point that according to the plan that he had been given, the Performance Improvement Plan, that in all areas, I saw improvement on Mr. Cummings' part. He was attempting to the best of his ability to deliver this curriculum. He had good classroom management skills, coming down to cleaning up the classroom and making it look as good as it possibly could. He was attempting to get help from other teachers. I saw him discussing IEPs with other teachers, so I saw improvement in this teacher, and that to me is what the probation period is about, looking for improvement.

(CP 672).

In her final recommendation Ms. Day commented, in part:

I do not recommend termination of this teacher. I have seen enough change and growth over the past few weeks to believe that Mr. Cummings is really trying and has the ability to improve. (CP 2223)

Ms. Day also testified that Mr. Cummings **“in my professional opinion, is a gifted special education teacher.”**

(emphasis added) (CP715-716).

Given Ms. Day’s opinion and her working relationship with Mr. Cummings during the probationary period, this court must conclude the Hearing Officer erred as a matter of law in determining in that Mr. Cummings lacked necessary improvement.

The Superintendent did not give sufficient weight to the testimony of Ms. Day. In fact, at the hearing, the Superintendent did not even recall Ms. Day’s name or opinion. (CP 369-370). The Superintendent’s decision was also based on misinformation in that she was informed that Mr. Cummings was accommodated when none was provided. (CP 377-378).

2. **Mr. Cummings’ General Education Classes Were Inappropriately Considered In The District’s Decision To Nonrenew.** (Assignments of Error Nos. 1, 4, 7, 8 and 11) (FF 7; CL 4, 5 and 8).

Teaching general education classes was outside of Mr. Cumming’s teaching certificate’s special education endorsement. WAC 181-82-110 protects teachers from considering out-of-

endorsement classes as a basis for nonrenewal. Yet, the Hearing Officer inappropriately considered Ms. Scarlett's evaluation of Mr. Cummings' general education classes. (See Opening Brief, at 41-2).

His Performance Improvement Plan, the document which served as a guide for his probation pursuant to RCW 28A.405.100(4) referenced the general education math improvement classes. (CP 1561). Mr. Cummings' evaluations included criticisms for his teaching of general education math improvement classes. (CP 1626). The Hearing Officer referenced Mr. Cummings' teaching of math to general education students in the opinion (Opinion at 32, 33, CP 100-101). And, the District's letter of probable cause did not exclude any classes from its coverage and thus, necessarily includes consideration of the two general education classes taught by Mr. Cummings. (CP 1641). Consequently, the District and the Hearing Officer did consider his general education classes in violation of WAC 181-82-110.

3. The Hearing Officer Made Other Errors In Determining That The District Had Sufficient Cause To Nonrenew. (Assignments of Error Nos. 5, 7, 10 and 11) (CL 2, 4 and 8)

The Hearing Officer erred in considering the recommendation of a third evaluator, Ms. Pritchett, to the extent that it purported to represent her observations of Mr. Cummings' teaching. Ms. Pritchett

offered her observation of Mr. Cummings' teaching performance but did not document her observation, advise Mr. Cummings of any alleged deficiency, or prepare any written evaluation. Consideration of her testimony as an evaluator violates RCW 28A.405.100(3)(a) and (h). (CP 458, 505-506). The District failed to respond to this argument. (See Opening Brief, at 45-56).

Neither did the District respond to the argument that the Hearing Officer did not allow Appellant's counsel to cross-examine the Principal regarding Mr. Cummings' prior teaching experience. (See Opening Brief, at 29). That the Hearing Officer commented at the closing argument that he wanted to hear more about Mr. Cummings' prior teaching indicates that the Hearing Officer erred in refusing to allow the evidence. (Superior Court **Ex.** FE16, April 14, 2011 Transcript, p. 47, l. 8-25; p. 48, l. 1-11). The District's lack of response shows that it knew the exclusion was a fatal and harmful error.

The Hearing Officer also erred by considering the "Professional Responsibility" section of Mr. Cummings' evaluation when he was not placed on probation for "Professional Responsibility". (Opinion at 32, CP at 100). RCW 28A.405.100(4)(a) requires that the District notify the teacher of specific areas of

deficiency. The letter placing Mr. Cummings on probation did not list “Professional Responsibility” as a specific area of deficiency so his performance in that area should not been considered. (CP 1575-1576).

IV. CONCLUSION

“This is the longest and most troubling case, with more issues, the Hearing Officer has heard during the years he has presided at nonrenewal hearings.” (Opinion at 48, CP 116). The Hearing Officer also subsequently noted, “Suffice to say, if fairness was the standard by which the Hearing Officer was to decide this case, the outcome would have been different.” (Opinion at 65, CP 133).

We respectfully submit Mr. Cummings was not afforded fairness which includes receiving both substantive and procedural due process before Mr. Cummings was placed on probation, during the probation period, during the decision making process and presentations regarding any proposed non-renewal and during the decision on the non-renewal itself. This includes the hearing before the Hearing Officer which was based, as outlined above, on some procedural violations, some erroneous evidentiary rulings and some erroneous legal rulings.

This Court should reverse the Superior Court and the Hearing Officer and order that Mr. Cummings be reinstated to a teaching position with lost pay and benefits pursuant to RCW 28A.405.300, .310 and .350. At a minimum, this Court should remand to allow for testimony excluded by the Hearing Officer.

This Court should also award Mr. Cummings all costs and attorney's fees in pursuing this matter pursuant to RCW 28A.405.310(7), RCW 28A.405.350 and RAP 18.1.

DATED this 20th day of December, 2012.

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No. 68519-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS,

Appellant,

CERTIFICATE OF SERVICE

v.

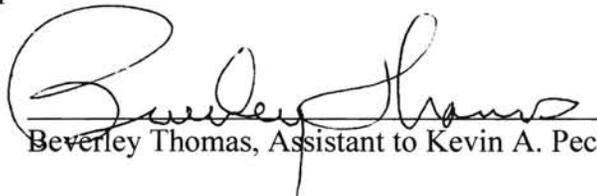
SEATTLE SCHOOL DISTRICT,

Respondent.

I certify that on this 20th day of December, 2012, I caused to be filed with the Court of Appeals, Division I, no later than December 21, 2012, the original and one copy of Appellant's Opening Brief via hand delivery to the Court Administrator/ Clerk's Office.

I further caused to be served on Respondent's counsel a copy of the Appellant's Reply Brief via Legal Messenger to be delivered no later than December 21, 2012 to the following:

Mr. Gregory E. Jackson, Esq.
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Beverley Thomas, Assistant to Kevin A. Peck

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