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STATE OF WASHINGTON

BY _____
DEPUTY

No. 45534-0-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JASON LEN,

Appellant,

v.

OFFICE of the SUPERINTENDENT of PUBLIC INSTRUCTION,

Respondent.

**ERRATA BRIEF OF THE APPELLANT
(SECOND SUBMISSION)**

James A. Gasper, WSBA #20722
32032 Weyerhaeuser Way South
P.O. Box 9100
Federal Way, Washington 98063-9100
(253) 941-6700

Attorney for Jason Len, Appellant

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4. Did the ALJ err in conducting a hearing *de novo* allowing OPP to put on a case that expanded upon its original investigation, upon which OPP proposed that Mr. Len’s teaching certificate be suspended for 1-year upon evidence it acquired during that investigation? *Assignment 4.*

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I. Introduction & Summary of the Case.

This appeal is brought by Jason Len, a resident of Lake Tapps, Washington and a teacher certified by the Office of the Superintendent of Public Instruction (OSPI) for the State of Washington, from the Office of Professional Practices (OPP) Proposed Order for a career-ending, twelve (12) month suspension of his teaching certificate. OPP contends that Mr. Len's after-school and summertime non-sexual relationships with students of the International School of the Bellevue School District during the period 2006 through 2008 were inappropriate, and that Mr. Len should not only not be allowed to teach in Washington (or any other state) for a one-year period, but that he should be psychologically evaluated and counseled prior to the reactivation of his license.

Mr. Len challenged that proposed outcome through the process prescribed by law. The matter was heard by Administrative Law Judge (ALJ) Mentzer of the Office of Administrative Hearings (OAH). In her amended decision of December 18, 2012 Judge Mentzer concluded that clear and convincing evidence supported OPP's proposed suspension. Mr. Len cites error in that determination, and asks this court to reverse the rulings below and enter an appropriate Order in resolution of the appeal.

II. Assignments of Error.

The appellant cites the following error in the disposition of Jason Len's appeal before the ALJ.

1. The ALJ erred as a matter of law in finding that Jason Len's conduct violated 'generally recognized professional standards' under regulation.
2. The ALJ committed error in her assessment of the facts in concluding that Jason Len was being deceptive both during the investigation and at hearing.
3. The ALJ erred as a matter of law in affirming OPP's directive that Jason Len submit to a psychological evaluation and counseling before his license may be restored.
4. The ALJ erred as a matter of law by holding the appeal hearing *de novo* against Jason Len, rather than requiring the OPP to prove and defend its investigative facts in support of the proposed discipline.

III. Issues on Appeal.

1. Did the ALJ misinterpret the 'generally accepted practices' language of the regulation governing teacher conduct where she failed to evaluate Mr. Len's conduct as egregious departures? *Assignment 1*. Did the ALJ ignore the District's low level of discipline in determining the seriousness of the conduct? *Assignment 1*. Did the ALJ fail to consider the impact and purpose of the regulations in conducting her analysis of the conduct? *Assignment 1*.
2. Did the ALJ disregard and misconstrue specific evidence at hearing concerning the 'truthfulness' of Jason Len's testimony as it related to his version of the facts, that the hearing took place years after the incidents, that the discrepancies between and among testimony was

demonstrably distinguishable, and that Mr. Len was offering his best recollection on incidents for which he had no reason to have a specific memory? *Assignment 2.*

3. Did the ALJ affirm the OPP's proposal that Mr. Len's behavior was of such a nature that any reinstatement of his license would require psychological assessment, when there was no evidence of behavior that met the standards recited with the applicable regulation? *Assignment 3.*
4. Did the ALJ err in conducting a hearing *de novo* allowing OPP to put on a case that expanded upon its original investigation, upon which OPP proposed that Mr. Len's teaching certificate be suspended for 1-year upon evidence it acquired during that investigation? *Assignment 4.*

IV. Statement of the Facts.

Jason Len was employed by the Bellevue School District to teach grades 6 through 12 at its International School (IS). CP 6 (F.o.F. 1). It was undisputed that due to approved atmosphere of informality between staff and students, the IS operated differently from other schools within the District. CP 7. Teachers were called by their first names. CP 624. Students and teachers interacted frequently in school-sponsored events that were off-site. CP 625. The interactions between students and teachers was akin to a pedagogical relationship found at a college. CP 624 & 626.

Over the course of several years Mr. Len developed a relationship a few of his male students that led to interactions away

from school. Some of these occurred during summer months, and were not part of any school sponsored event. See, "Amended Findings of Fact, Conclusions of Law and Order," Apx. A, pp. 2-6. Others occurred during the school year, but usually after school and on weekends. *Id.* Mr. Len would occasionally take several of his students for a meal at a nearby restaurant. *Id.* at 3-6. Sometimes only one student would accompany Mr. Len to these meals, held in public places. *Id.* at 4, ¶ 9. Mr. Len also would drive students to various events. *Id.* at 4-7, ¶¶ 9, 11, 20, 21 & 24. In all situations, the parents of the students were aware that Mr. Len was with their students and was responsible for their transportation. *Id.* at 4, ¶ 11 & 6, ¶ 24. Not until March 2008 did anyone express a concern about Mr. Len's interactions with students. *Id.* at 7, ¶ 25.

It was revealed at hearing the principal at IS, Peter Bang-Knutsen, was alerted by teacher Deborah Knickerbocker to Mr. Len's perceived interactions with students. CP 583. The principal investigated,¹ interviewing both students and their parents. CP 562-

¹ Mr. Len had previously received a Letter from Bang-Knutsen advising Mr. Len to interact with students in his classroom on a more professional level. CP 559-61.

92. The result was a multi-page report and the issuance of a Letter of Reprimand to Mr. Len.² CP 593-603.

The District filed a Complaint with the OSPI on December 9, 2008, citing the instances of conduct recited within the Letter of Reprimand. CP 687-92. After investigating OPP issued an Order May 9, 2011 proposing Mr. Len's certificate be suspended for one year. CP 816-22. A pre-condition of reinstatement was that Mr. Len not only serve the period of suspension but that he be cleared through psychological evaluation. CP 822.

Mr. Len appealed OPP's Proposed Order to the Admissions and Professional Conduct Advisory Committee (APCAC), a 9-member body that conducts an informal review of OPP's investigatory findings, considers a presentation from the teacher and then issues a Final Order. See, WAC 181-86-085; 181-86-095 & 181-86-140. APCAC's 'reviewing officer' issues a 'written decision' including 'findings of fact and conclusion of law.' WAC 181-86-145. APCAC's Final Order of Suspension adopted verbatim OPP's Proposed Order that Mr. Len's certificate be suspended for

² Under the collective bargaining agreement between the Bellevue Education Association and the District, this is the lowest level of discipline that may be imposed for alleged misconduct. CP 484.

one year and that he undergo psychological evaluation before his license could be reinstated. CP 824-30.

Mr. Len invoked his right of further appeal of the APCAC Final Order to the OAH proceeding under the Administrative Procedures Act (APA). WAC 181-86-150(1) & (2). ALJ Mentzer presided over the appeal. CP 227 & 204. After a week-long hearing in August 2012, and submission of post-hearing briefs, Judge Mentzer issued Amended Findings of Fact and Conclusions of Law on December 18, 2012. CP 5-33. She concluded the proposed 1-year suspension of Mr. Len's certificate was proper, because 'clear and convincing' evidence as well as the law supported the recommendation. WAC 181-86-170(2).

Mr. Len appealed this ruling to the superior court for Pierce County, which affirmed the ALJ's Decision. This appeal follows.

V. Argument.

A. Standard of Review

Appeals from proceedings subject to the Administrative Procedures Act (APA) are governed by RCW 34.05.558 and applicable provisions within RCW 34.05.570. Review is *de novo* in 'determining whether the decision contains legal error.' *Kittitas County v. Kittitas County Conservation*, 176 Wn.App. 38 (Div. 3, 2013). Where factual questions are intertwined with issues of law, "the clearly erroneous standard of review for factual questions governs." *State, Dep't of Revenue v. Martin Air Condition and Fuel Co., Inc.*, 35 Wn.App. 678, 682 (Div. 2, 1983) "An administrative finding is 'clearly erroneous' when, though there is supporting evidence, a reviewing court considering the entire record, and the public policy of the legislation concerned, is left with a definite and firm conviction that a mistake has been made." *Johns v. Employment Sec.*, 38 Wn.App. 566, 569-70 (Div. 2, 1984).

This court may reverse a hearing officer if the substantial rights of a person have been prejudiced by arbitrary or capricious decisional making. *Snider v. Bd. Of County Comm'rs of Walla Walla County*, 85 Wn.App. 371, 377 (Div. 3, 1997). Upon a finding that

there is error under any standard, this court may grant relief consistent with RCW 34.05.574(1), (3) & (4).

B. The ALJ Erred as a Matter of Law in Finding that Jason Len's Conduct Violated Generally Recognized Professional Standards under Regulation.

OSPI regulates and investigates the professional conduct of those persons certified to teach kindergarten through 12th grades in the state's public schools. RCW 28A.410.095. OSPI may suspend a teacher's certificate for, among the enumerated examples, unprofessional conduct.³ The law does not specify the length of suspensions or conditions of reinstatement. OSPI may only impose a suspension where:

(2) The certificate holder has committed an act of unprofessional conduct or lacks good moral character but the superintendent of public instruction has determined that a suspension as applied to the particular certificate holder will probably deter subsequent unprofessional or other conduct which evidences lack of good moral character or personal fitness by such certificate holder, and believes the interest of the state in protecting the health, safety, and

³ Any certificate or permit authorized under the provisions of this chapter, chapter 28A.405 RCW, or rules promulgated thereunder may be revoked or suspended by the authority authorized to grant the same based upon a criminal records report authorized by law, or upon the complaint of any school district superintendent, educational service district superintendent, or private school administrator for immorality, violation of written contract, *unprofessional conduct*, intemperance, or crime against the law of the state. . . .

RCW 28A.410.090(1) (emphasis added).

general welfare of students, colleagues, and other affected persons is adequately served by a suspension. Such order may contain a requirement that the certificate holder fulfill certain conditions precedent to resuming professional practice and certain conditions subsequent to resuming practice.

WAC 181-86-070 (emphasis added).

1. The Regulations Are Generally Stated & Provide No Specific Guidance as to the Meaning of its Terms.

In OPP's Proposed Order and the Final Order of Suspension issued by the APCAC, OSPI concluded generally that Mr. Len 'has violated RCW 28A.410.090, WAC 181-087-050, WAC 181-87-060, WAC 181-86-013, and/or WAC 181-86-014.' CP 822 & 830. The cited regulations prohibit 'unprofessional conduct' and a '[lack of] good moral character' and 'personal fitness' by the teacher. Neither OPP nor APCAC specified particular behavior that fell within each of the two cited prohibitions, however by considering WAC 181-87-050's enumerated examples of unprofessional conduct it appeared only §(7) applied.⁴

⁴ Information submitted in the course of an official inquiry by the superintendent of public instruction related to the following:

- (a) Good moral character or personal fitness.
- (b) Acts of unprofessional conduct.

Without any citation to specific examples OPP and APCAC further concluded that Mr. Len provided false statements during the investigation. CP 820 & 828.

OPP/APCAC also cited to WAC 181-87-060, which provides:

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.

(emphasis added).⁵

The “Good moral character and personal fitness” standards of WAC 181-86-013 expressly prohibit certification of teachers who exhibit extreme behaviors that are proscribed by state criminal law. By inference, the most egregious examples are not applicable therefore it was assumed that § 013(3), prohibiting “behavioral problem[s] which endanger the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting” was the provision cited by OPP. It was assumed from OPP’s recommendation, and APCAC’s affirmation, that Mr. Len must submit to psychological evaluation before his

⁵ It was assumed that §(1) was cited as violated.

certificate is reinstated is based upon this regulation. CP 822 & 830.

Neither the OPP nor APCAC designated which subparagraph(s) within the regulation supported their suspension Orders; both simply cite the regulation in its entirety. CP 822 & 830.

As to what constitutes 'unprofessional conduct,' the regulations first mandate that 'no act, for the purpose of this chapter, shall be defined as an act of unprofessional conduct unless it is included in this chapter.' WAC 181-87-025. Where 'disregard or abandonment of generally recognized standards' is the basis for OPP's finding, the regulation demands that there exists clear and convincing proof establish that either 'flagrant disregard or clear abandonment of generally recognized professional standards. . .in the assessment, treatment, instruction, or supervision of students.' WAC 181-87-060(1)

Neither 'flagrant disregard' nor 'clear abandonment' are elsewhere defined by statute nor regulation; no Washington appellate court has interpreted the meaning of those terms.⁶

⁶ In another teacher suspension appeal decided by OAH, *In the Matter of Michelle Taylor*, Cause No. 2011-TCD-0001 (OAH 2012), Appx. 2, the ALJ interpreted those terms using the common usage standard as articulated by our Supreme Court in *Hunter v. Univ. of Washington.*, 101 Wn.App. 288, 290-91 (2000). Appx. B. Consulting Webster's Seventh

In their aggregate these respective definitions each speak of conduct that is extreme and in defiance of and without consideration or acknowledgement for standards in the profession that are well known, recognizable and dominant. The individual must act in a manner that flaunts what is expected to be typically acceptable. As argued below, in their evaluation of the conduct of Mr. Len in each of the incidents of which he is accused, neither OPP/APCAC nor the ALJ performed such an analysis.

Likewise, 'good moral character and personal fitness' are not terms of art that have a meaning conferred by either the enabling law or relevant regulation. No appellate court in the State of Washington interpreted those terms. On its face WAC 181-86-013 reveals that the regulation proscribes extreme behavior to include felonies involving children, conviction of any crime in the prior ten years, or (3) behavioral problem(s) which endanger . . .the

New Collegiate Dictionary (1972 ed.), the ALJ found the term 'Flagrant' meant 'extremely or purposefully conspicuous, glaring, notorious, shocking.' *Id.* The term 'disregard' conveyed intent to 'pay no attention to; to treat as unworthy of regard or notice.' *Id.* Finally, the definition of 'abandon' conveyed an effort 'to forsake, desert' and 'to cease intending or attempting to perform.' *Id.* The use of the term 'abandon' clearly conveys the expectancy that not only did the individual depart in a blatant manner, but intended to continue with such inconsistent conduct.

educational welfare and personal safety of students, teachers, or other colleagues within the educational setting.

2. Principles of Statutory Construction Require that the Regulation Be Applied to its Express Examples.

While the foregoing regulation attempts to retain broader effect beyond the expressly mentioned examples of conduct, principles of statutory interpretation connect the express acts in such a way that the regulation's intent is to prohibit behavioral deficiencies of alarming proportions such that serious questions are raised about the suitability of an individual to not only provide a role model to children subject to the instructional supervision of the certificated individual, but to even interact with those same children without causing a danger to their development, as well as the co-workers of the individual at a professional level. See, *State v. Bauer*, 174 Wn.App. 59, 86-87 (Div. 2, 2013) (applying principles of *eiusdem generis* and *noscitur a sociis* in a criminal case), citing, *Bowie v. Washington Dep't of Revenue*, 171 Wn.2d 1, 12 (2011).

In order to find that Mr. Len's conduct suggests he lacks good moral character or personal fitness, the cited criteria must be proven by clear and convincing evidence. WAC 181-86-170(2). This heightened standard of review implicitly acknowledges the

career-ending consequence of a punishment such as a suspension.⁷

In *Nguyen v. State*, 144 Wn.2d 516, 523 (2001), our Supreme Court held that a professional licensure revocation proceeding is quasi-criminal in nature. *Cf.*, *Brunson v. Pierce County*, 149 Wn.App. 855, 865, 928 P.2d 1127 (Div. 2, 2009). 'Clear and convincing evidence' must be 'weightier and more convincing than a preponderance, but need not reach the level of beyond a reasonable doubt.' *In re Deming*, 108 Wn.2d 82, 736 P.2d 639 (1997); *Nguyen v. State, supra*. 'Clear, cogent and convincing [evidence has] sufficient persuasive impact as to cause the trier of fact to believe that the fact at issue is highly probable.' *Dombrosky v. Farmers Ins. Co.*, 83 Wn.App. 245, 256, 928 P.2d 1127 (Div. 2, 1996).

Because a license suspension proceeding is quasi-criminal in nature, applicable provisions of law must be strictly construed

⁷ In *Hoagland v. Mt. Vernon Schl. Dist.*, 95 Wn.2d 424 (1981), a teacher termination case, our Supreme Court acknowledged the impact of such an outcome with the following observation:

Where a teacher is discharged ... the consequences are severe. *Chances of other employment in the profession are diminished, if not eliminated. Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials.* It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is reasonably correctable.

Hoagland, at 430 (emphasis added).

and narrowly applied to accomplish their object. *Pacific Mutual Life Ins. Co. of Cal. v. State*, 161 Wn. 135, 138 (1931).⁸

The suspension of a teaching certificate has such grave consequences that the effect of the law is clearly a penal consequence. It is unlikely that even with his certificate re-instated Mr. Len will find employment in the teaching profession.⁹ Thus, the application of the clear and convincing standard requires that the nexus between the evidence and the law be significant.

3. The ALJ's Evaluation of the Facts Did not Properly Consider the Scope of the Regulation's Effect.

The ALJ's application of the regulation to the facts appear within several Findings of Fact, particularly ¶¶ 25-30. They also connect to truthfulness determinations concerning the math team sleepover in Spring 2007 (¶¶ 35 & 36), and the sleepover at the home of Student K after the 2007 school year had ended (¶¶ 37-

⁸ In his concurrence/dissent, Justice Sanders argued that the rule of lenity, requiring interpretation of ambiguous criminal statutes in a defendant's favor, should apply in quasi-criminal proceedings, such as disciplining an attorney for ethical misconduct. *Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 347-48 (2006).

⁹ At hearing Mr. Len introduced the testimony of a certificated teacher who had received lesser discipline, a Reprimand, from OPP and had been unable to find employment in her profession for a number of years. VR 1042-57. The ALJ considered this proof irrelevant and gave it no weight. CP 23 & 31.

38). The ALJ also found Mr. Len not credible as to whether he shared a bed during a camp-out with a student during a summer trip to Oregon. FOF 39-41. This led the ALJ to reach the following Conclusion in applying the regulations:

38. [I]f only the Appellant's original conduct were [sic] considered, *then the length of the suspension would have been somewhat reduced*. This is because he did not attempt to conceal his relationships with students at the time they were happening, and because the students testified to no sexual or exploitative behavior by the Appellant. However, the Appellant's violation of the Districts directives in order to continue his personal relationships with students shows he has a behavioral problem. His untruthfulness to this tribunal [sic] on several factual matters and his overall minimization and justification of his conduct during the hearing are additional reasons why the 12-month suspension is warranted.

Appx. A at 27.

Thus while this appeal turns, in significant part, on whether Mr. Len was truthful, it principally concerns the ALJ's failure to apply the record facts to the enunciated standards for assessing a teacher's continuing suitability under WAC 181-86-070.

In performing its task preventing inappropriate teacher-student contact, OPP operates under a regulation that imposes a time priority for completing its investigation. WAC 181-86-116(1). Twenty-seven months elapsed between receipt of the original Complaint from Bellevue School District superintendent and OPP's

Proposed Suspension. CP 687 and 816. Jason Len's conduct was subject to Level III priority under WAC 181-86-116(1) (c) suggesting, in itself, that Jason Len's conduct did not present cause for alarm.

Nonetheless, in assessing the fact under the factors within the applicable regulation, the ALJ concluded:

31. *Factor (6) – Whether conduct demonstrates a behavioral problem.* The appellant's repeated violation of the principal's directives regarding conduct with students demonstrates a behavioral problem. Even when warned and directed not to engage in certain interactions with students, the Appellant was unable to conform his conduct to those requirements. The Appellant's repeated untruthfulness to this tribunal about his interactions with students also demonstrates a behavioral problem. This factor weighs against Appellant.

Appx. A at 26.

Again, while the examples of unprofessional conduct codified at WAC 181-87-050 through -095, while requiring that the 'flagrant. . .disregard or clear. . .abandon[ment of] generally recognized professional standards' be established, it does not state what those might be. This is where WAC 181-86-070 provides an outline of factors for consideration. As argued above, because the consequences of violating this regulation are punitive and quasi-criminal, they are to be strictly and narrowly construed against the

enforcing agency. And since the regulations don't provide any guidelines governing interpersonal relationships with students beyond inappropriate physical and/or sexual contact through a citable Code of Conduct¹⁰ teachers operate at their peril in the exercise of common sense and good judgment. Thus, if Mr. Len exceeded the boundaries of interaction with students, it is his District's obligation to impose a consequence subject to its policies. Because the regulations guiding OSPI's supervision of conduct do not allow for expansive application that create significant consequences without prior advance knowledge, how a diversion from a first-level supervisor's directive constitutes unprofessional conduct is nowhere clarified in the regulation.

4. The Regulation Must Advise of their Intended Effect.

This Court recently held that legislative rules adopted by administrative agencies must be based upon and have the "same force and effect" as the statutes themselves. . . ." *Marcum v. Dep't of Social & Health Svcs.*, 290 P.3d 1045, 1048 (Wn.App.2 2012), *citing, Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 438-39 (2005). The statute that allows for certificate suspensions

¹⁰ See, WAC 181-78A-270 & Cf., WAC 181-78A-272(9)(a)(ix) imposing a referable Code of Conduct for school counselors.

includes unprofessional conduct, but the regulation punishes behavior constituting either a 'flagrant disregard or clear abandonment' of 'generally recognized professional practices.' Thus, if Mr. Len contravened his principal's directive, it must have been a 'flagrant' deviation from the restriction. Because the outcome is closely tied to a conclusion that Mr. Len was deceptive during the investigation and at hearing, the factual history must be reviewed in its totality.

However, there is no evidence to support the ALJ's conclusion that Mr. Len interacted with students after he was given a directive by his principal to have no contact with them post-March 13, 2008. CP 567. And the incident where Mr. Len alleged slept over at Student K's home without an invitation from the student's parents is also not supported by record evidence of a clear and convincing nature, as explained below.

The ALJ concluded that Mr. Len 'did not refute Ms. Knickerbocker's testimony in this regard' as to violating his principal's no-contact directive. FOF 48, Appx. A at 12. The record is clearly to the contrary and it comes from Bang-Knutsen's investigative notes. CP 581¶ 9.

Ms. Knickerbocker testified that she was concerned that Mr. Len was talking with students based upon her prior knowledge that Mr. Bang-Knudsen had instructed Mr. Len not to have this contact. VR. 853. Ms. Knickerbocker asserted that Mr. Len's conversations with the students took place in May, or perhaps April, of 2008. VR 854-55. She revealed learning that Mr. Len was being investigated by the principal from Lee Holt, another teacher who apparently was the principal's confidant. VR 863:12-14. The ALJ found this credible to her determination that Mr. Len was untruthful.

However, Principal Bang-Knudsen's notes clearly contradict Ms. Knickerbocker's recollection at hearing, thereby rendering the ALJ's conclusion that Mr. Len violated his principal's no-contact directive as error. CP 581. Page 4 of his April 4, 2008 interview notes with Mr. Len principal Bang-Knudsen records at ¶ 9 the following relevant notation:

"[Union representative] Kathleen Heiman. . .also wanted to know how this whole thing got started. I told her that someone had brought a concern to me that Jason was giving rides to students after school. Kathleen wanted to know who it was, and I said I didn't feel comfortable telling her. (*The person who first told me was Debra Knickerbocker, a fellow science teacher. Debra overheard Jason talking on*

his cell phone with the 3 sophomore boys about getting picked up after school).

CP 581 (emphasis added).

The exhibit further states on p.1, first paragraph "It was reported to me that Jason was speaking to students on a cell phone, and agreed to pick up students after school in the back parking lot..." *Id.* Since Mr. Bang-Knudsen's notes are entitled "Summary of Jason Len's personal interactions with students outside of school 3/11/08. . . .," it is undisputed that Ms. Knickerbocker reported Mr. Len's activities in March 2008, and that the reported episode preceded the non-contact directive given by Bang-Knudsen to Mr. Len of March 13, 2008. CP 567. Ms. Knickerbocker's decisive testimony 4 years later that her observation occurred later than the post-March 13th directive are disproven by Bang-Knutsen's note. The ALJ's finding that Mr. Len violated his principal's no-contact directive, including driving students in his personal vehicle or visiting them at their homes, is without factual support, especially as there is no other record evidence, other than Ms. Knickerbocker's testimony, that Mr. Len engaged in such behavior post-March 13, 2008.¹¹

¹¹ Ms. Knickerbocker's motives are also suspect and her testimony resultantly not credible. In the spring of 2008 she was a 'provisional' teacher, i.e.,

5. Mr. Len Did Not Violate Any Specific District Policy in his Interaction with Students Outside School.

Mr. Bang-Knudsen's Letter of Reprimand also fails to cite a single regulation, policy or standard of the District that was violated by Mr. Len, one that would have been known to either Ms. Holt or Ms. Knickerbocker. CP 599-603. Ms. Holt testified that the collective bargaining agreement 'probably' had such restrictions, but it was proven that document is devoid of anything to support her testimony. CP 253-462.

The Letter of Reprimand enumerates a litany of interactions between Mr. Len and various students, most reflecting hearsay from many of the sources, as well as a couple of teachers and some parents, concluding with the admonition 'The District cannot

probationary, with the district. VR 861:19-23. Under the law in effect at that time, she could be released by the District for no reason at the conclusion of her contract year provided she was given notice prior to May 15th. See, 28A.405.220 RCW (ver. 2008). Thus, it was highly relevant that in order to reach continuing contract status, 28A.405.210 RCW, and assure herself of continuing employment with the district, ingratiating herself with her principal was a primary motivation for Ms. Knickerbocker to report Mr. Len – and perhaps even to support Mr. Bang-Knudsen's testimony at this hearing. See, VR 861-862.

Ms. Knickerbocker's further testimony that she had learned that Mr. Len was the target of Mr. Bang-Knudsen's investigation from colleague Lee Holt is likewise not believable (VR 863), as Mr. Bang-Knudsen's notes attribute the initial report concerning Mr. Len's interaction with students to Ms. Knickerbocker. Ms. Holt would not have been approached about taking over Mr. Len's science program because of that investigation, an event which could only have occurred had Mr. Bang-Knudsen been informed of Mr. Len's activities by some other source. That source was Ms. Knickerbocker, and it was after she influenced Mr. Bang-Knudsen's investigation that Ms. Holt became aware of Mr. Len's release from his science program duties.

permit any elements of this alarming pattern of behavior to continue....” CP 602. Mr. Len was given specific instructions not to engage in enumerated examples of conduct. CP 602-03. And there was no record evidence that he violated any of these directives once presented with the Letter of Reprimand by his principal at IS.

6. Many Interactions Between Mr. Len & his Students were Outside School & With Parent Knowledge & Consent.

The trip to Oregon beach in the summer of 2007 was an outing without allegations of impropriety,¹² and with prior parental approval. What happened during this event should have been the excluded under WAC 181-87-020. If that approval had not been given, the children would not have gone. VR 459:23-25; 460:1-2. Such was the case in the matter involving Student K. *Id.* In every other respect, the trip was without event and appeared to be a fun outing for the participating students.¹³

¹² Though Student H testified that he and Mr. Len shared a sleeping board in a cabin while on the trip (VR. 718:15-24); however, Principal Bang-Knudsen’s investigation summary of March 21, 2008 notes that Student H recalled that ‘Mr. Len slept on the floor. . . I don’t think Mr. Len ever slept in a bed’ CP 574, ¶ 3.e. Student H also could not remember how many nights during the trip were spent in different facilities the group occupied during the night, nor the actual sleeping arrangements. VR 717:8-9; 19-24.

¹³ OSPI submitted as an exhibit the International Schools’ yearbook for 2007-08. CP 753 - 813. The yearbook includes a picture of the 4 students who accompanied Mr. Len to Oregon; all look upbeat and

7. No Flagrant Disregard of Generally Accepted Practices Occurred When Mr. Len Intervened in a Dance Dispute.

The ALJ concluded that Mr. Len's actions attempt to reconcile several boys with their female dates at the school's Tolo Dance went beyond the boundaries of acceptable professional conduct. Appx. A at 6, FOF ¶ 22. Mr. Len offered to take girls to meet their dates at a public restaurant after they had a disagreement. The two witnesses that testified for OSPI had a chance to discuss and compare their testimonies prior to hearing. VR 231-32. Student L testified, upon reflection, that she received a ride from the dance from the brother of Student M, Student W. VR 236:2-11. This clearly differed from Student N's testimony, which was that her mother had given them a ride from the dance. VR 202:14-16. Other than Mr. Len trying to rectify the situation, there is nothing to suggest that Mr. Len acted improperly or with an improper motive, nor that he was dishonest in his recollection. And with nothing actually happening, this episode in no way contradicts the provisions of the regulations defining unprofessional conduct.

happy. CP 755. The picture's inclusion in the yearbook suggests a degree of approval by the District for the trip, or at least an awareness that it had happened. It is easy to conclude that the students and faculty of a school the size and closeness of International School would not have known the details of trip.

8. The ALJ's Disregarded the Essence of the 11 Factors to be Considered in Evaluating a Teacher's Conduct.

WAC 181-86-070 provides eleven factors to be analyzed prior to the imposition of discipline upon an accused teacher. The ALJ's analysis of these factors is flawed as a matter of law and should be reviewed by this court in their totality.

The ALJ concluded that sub-section (1), entitled 'The seriousness of the act and the actual or potential harm to persons or property' was violated (Appx A at 26 COL ¶ 26) by Mr. Len's aggregate behavior. Yet not a single witness testified that they were harmed in any way either in their pursuit of educational opportunity or personal welfare. To the contrary, every student who testified, now adults in each instance, found Mr. Len a fine person, a man of high moral standards, someone they called Mr. Len and did not address him by his first name despite the informality attendant to the International School's environment. Conversations with Mr. Len were on educational topics and there was some fun as well (flying r/c helicopters) or playing video games.

In reaching her conclusion, the ALJ ignored the significant failure of the District to place Mr. Len on administrative leave during his principal's investigation thereby eliminating the threat of

continuing contact with the school and the students.¹⁴ Mr. Len continued to teach within the IS, and continued interacting with students and colleagues within the facility without incident. The District by its inaction found Mr. Len's conduct neither serious nor potentially harmful. This evidence was ignored by the ALJ.

Though Mr. Len was also accused of being alone with students on a few occasions, particularly with Students E and D, these episodes always occurred in a public place. Appx. A at 6-17. Regarding Student E, it is unclear from the testimony of this student whether his one-on-ones with Mr. Len occurred while he was a student at the IS or after he had graduated. Because they continued to interact after Student E's graduation in 2007, it is more likely than not that the one-on-one interaction mostly occurred during the summer of 2007, before Student E departed for Western Washington University. This was certainly the case during the Oregon and Hawaii trips taken by Student E.

Mr. Len had students at his home on only one occasion prior to a math team competition. Regardless of how the overnight

¹⁴ Cf., *In the Matter of Capo*, Appx. C; *In the Matter of Taylor*, Appx. B; both teachers were placed on administrative leave with pay while their respective Districts investigated the allegations against them; both received 1-year suspensions of their teaching certificates as a result of the OPP investigations and OAH hearings).

evolved, and whether non-specific District policy was assiduously followed, the facts are uncontested that Mr. Len slept in his room and the students in Mr. Len's living room. Appx. At 9-10. There was never an accusation or complaint that Mr. Len did anything improper. No parent testified that their child stayed overnight at Mr. Len's without their prior permission or knowledge. No student testified that they did not secure their parents prior permission. The absence of such testimony suggests that parent approval was more likely given than withheld and no other conclusion could be reached.

During the single episode that Mr. Len and the students were in the Park, presumably after dusk, no one was criminally sanctioned. Appx. A at 6 FOF ¶ 21. In fact, it was never established at hearing, other than Mr. Bang-Knudsen's testimony that there was an ordinance that may have been violated, that Mr. Len and the students were in the park illegally. No dates were provided, no times and no citation to local ordinance or use of the park at the unspecified time. As the ALJ was not presented with facts or any local ordinance to establish a violation of the law, the conclusions related to this event were without foundation.

In every respect, the students supported Mr. Len. Appx. A at FOF ¶¶ 43 & 64. None testified that today they are a lesser person or suffered some adverse consequence because of the attention he showed them on the occasions they had interaction. A violation of this factor, which is a serious consideration in the evaluation of conduct, has not been met. The ALJ's conclusions to the contrary are not supported by record evidence, and in fact the contrary conclusion is true.

9. The Absence of Related Criminal Inquiry was Ignored.

WAC 181-86-070(2) requires consideration of any related criminal history. While Mr. Len was not investigated by any law enforcement agency, this factor is not irrelevant to these proceedings, yet was treated summarily by the ALJ. An inverse appreciation of its absence actually supports Mr. Len's fitness and suitability as a teacher. Given the degree of interaction between Mr. Len and the students, and the suggestive nature behind OPP's accusations that something improper was developing in the relationships,¹⁵ the 'criminal history' that does not exist should have been given greater weight as a mitigating factor. It was not. Had Mr.

¹⁵ The ALJ gratuitously characterized Mr. Len's conduct as bordering on 'grooming' (Appx. A at 25 ¶ 23), though there are no facts that support such a conclusion sufficient to satisfy the scope of the applicable regulation. WAC 181-88-060(1)(d))

Len been investigated by a law enforcement agency, that would have been some degree of proof that his actions were at least suspicious under minimal probable cause standards. The fact that nothing of the sort ever occurred shows that his conduct was of no concern to his employer sufficient for them to take that further step. This factor should have been given greater weight in favor of Mr. Len; it was not properly considered in the evaluation of his conduct.

10. No Evidence Was Submitted to Prove that Mr. Len was a Threat to Any of the Students with whom he Interacted.

WAC 181-86-070(5) addresses 'Disregard for health, safety of welfare,' which has an implied tangential connection to 'fitness' requirements under WAC 181-86-013. Yes, no student or parent testified that any student was adversely affected in any way. All testifying students seemed to enjoy their interactions with Mr. Len and viewed them as a positive, challenging, educational experience. Mr. Len did not allow students to place themselves in danger in any cited episode. This factor was not given serious consideration by the ALJ, and her avoidance of this factor is error as a matter of law.

11. Substantial Mitigating Factors Were Ignored by the ALJ.

WAC 181-87-070(7) requires that 'Aggravating or Mitigating Circumstances' be assessed. The ALJ conclude that Mr. Len had violated the principal's directives on further interaction with students. The ALJ pointedly avoided record facts that demonstrated the IS conducted itself in many ways that was different from other schools as a mitigating factor. The fact that virtually all students who were interviewed by OPP or testified at hearing expressed dismay that Mr. Len would receive discipline for his interactions with them are a strong mitigating factor. This was given virtually no more than lip service by the ALJ. The fact that the record conclusively established that Mr. Len always conducted himself professionally when in the presence of his students outside school was another significant mitigating factor, ignored by the ALJ. The failure of any parent to object to Mr. Len's interactions with their students prior to Bang-Knudsen's investigation is a mitigating factor given no weight. And the fact that the District saw fit to only impose a mere Reprimand for all of the aggregated conduct should have been a significant factor in mitigation. Mr. Len followed the directive not to engage students as he done previously, and that is a mitigating factor also misinterpreted by the ALJ.

The record reveals substantial mitigating factors that may have outweighed the remainder of the proof against Mr. Len. The ALJ's ignoring of these is significant error and should be grounds by itself for vacating her Findings and Conclusions.

12. The ALJ Ignored the Character & Fitness Factor.

WAC 181-87-070(8) requires consideration of of 'Information submitted to support character and fitness.' The ALJ did not really consider this factor in any meaningful way. The record, however, is replete with student testimony equating Mr. Len as a teacher, mentor and person who gave them encouragement and support both in and outside of school thus strongly supporting Mr. Len's qualification to continue in the teaching profession. The students' unanimous disbelief that Mr. Len would lose his certificate over the complained of acts further supports a finding of fitness.

The comments of colleague Moore in his sworn statement to OPP also support Mr. Len's character. CP 623-27. In his sworn statement to OPP, Mr. King – the teacher who enlisted Mr. Len for the jazz field trip to Idaho University - stated that Mr. Len was an honorable, appropriate teacher. CP 674-75. All record evidence supported the character and fitness of Mr. Len to continue in the teaching profession, without any period of suspension. The ALJ's

disregard of this record evidence and summary dismissal of its value hides the absence of any suggestion of impropriety.

13. The Record was Replete with Relevant Information that was Simply Ignored, Including Comparable Caselaw.

WAC 181-87-070(11) entitled 'Other relevant information' should have included cases cited from OPP showing comparative 12-month or lesser suspensions and/or Reprimands. CP 485-548; *see also, Taylor, supra., Appx. B Capo, supra., Appx C.* Instead, the ALJ found this information not relevant. APPX AT A 27 COL ¶ 37. By comparison, however, Mr. Len's behavior does not even marginally approach the degree of misconduct cited in the cases provided, whether appealed or merely finalized through OPP/APCAC's processes. Given that Mr. Len's interactive behavior with students was with parents' consent is another factor that should have been given greater significance in the analysis. It was ignored.

In their aggregate, the ALJ erroneously applied the record evidence to the factors recited within WAC 181-86-070. Thus, there was insufficient proof under the clear and convincing evidence standard that Mr. Len had engaged in unprofessional conduct and that a suspension of his license was appropriate.

C. The ALJ erred in Finding that Mr. Len Was Dishonest During both the Investigation and At Hearing.

OPP, APCAC and the ALJ concluded that Mr. Len was dishonest in relating his version of facts during OPP's investigation and at hearing. First, it must be remembered that Mr. Len was invited to offer testimony at hearing in August 2012 for events that occurred 4 and 5 years prior. The passage of time is well-recognized for its affect upon an ability to accurately recall events. See, e.g., *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 360-61 (Div. 1, 2000); *State v. Jackson*, 75 Wn.App. 537, 544 (Div. 1, 1994) (remanding case for new trial where 2 & ½ years passed and jurors would not recall case details sufficiently to effectively re-hear matter); see also, 4 Wigmore, *Evidence* § 1109 (1972).

To attribute his testimony in so many instances as an attempt at deception after such a delay is clearly unreasonable where the differences are of minor distinction. The same assessment of credible reasoning should have been attributed to other those witnesses who testified contrary to Mr. Len's recollections. The ALJ did not perform such a comparison: every adverse fact was verifiable; Mr. Len's were deceptive. Given that the standard for review is 'clear and convincing evidence' the ALJ's

assessment of Mr. Len's testimony as motivated by dishonesty are not supported by substantial evidence. The record clearly reveals these inaccuracies.

The principal record evidence that led to OPP's conclusion that Mr. Len was dishonest concerned Student K's father's loss of his wallet. The primary connected fact was Mr. Len's statement that he was asked to stay overnight at the Evans' home ('Student K's house) while Mr. Evans searched for his missing wallet. VR 116:18-21. What emerged from the hyperbole and forgotten memories presented at hearing by Holly and Steve Evans are facts that cannot possibly be relied upon to conclusively establish that Mr. Len falsified his statement to the OPP on this episode.

For one thing the Evans had no problem inviting Jason Len to their home on at least two separate occasions. VR 274-75; 277-79. By those acts, the Evans plainly did not see Mr. Len as a threat or his presence as inappropriate. It is more likely than not that Ms. Evans' later pejorative characterizations of Mr. Len were based upon discussions with Mr. Bang-Knudsen during his investigation in the spring of 2008, rather than her specific interactions with Mr. Len. VR 287:4-11. Otherwise it is hard to imagine that this male adult teacher's presence in her son's room late at night was not

something that she would take affirmative steps to avoid, or inquire what he was doing there, if she had a legitimate objection.

Second, the Evans' failure to take such action was confirmed by Steve Evans, who testified that he went into his stepson's (Student K), room at 11 p.m. that same evening, saw Mr. Len there and did not take any steps to ask him to leave or challenge his presence. VR. 188:3-12. Though Mr. Evans testified that he had not asked Mr. Len to spend the night, and had not been asked by Mr. Len to stay around, Mr. Evans' failure to inquire of Mr. Len's intentions, suggest or demand that he leave, check back on him later, or take any further action is tacit approval. VR 188. And if Mr. Len's presence was disturbing, inappropriate, or otherwise unwelcome, it is hard to imagine that Mr. Evans would have lacked the ability to ask Mr. Len to leave, or to set other boundaries. He did not do so, and thereby implied that Mr. Len was welcome and his presence accepted. VR 195:5-12.

Mr. Evans' OPP statement in 2010 adds some detail to what he couldn't remember at hearing in 2012. Within that sworn document, Mr. Evans stated that he 'found Mr. Len to be a very straightforward guy. Those boys never voiced any concerns about Mr. Len making them feel the least bit uncomfortable. . . .' CP 685:3-

5. Mr. Evans further stated 'the boys spoke very highly of him and there was nothing uncomfortable about their time with him.' *Id.*:12-13. Contrasting his statement with that of his testimony, Mr. Evans clearly had a greater awareness of the International School's teacher-student role. To OPP's investigator he stated:

Yes. One student had a senior project and invited his instructor over to his house for Sushi. She came over and had dinner. His parents and friends were there, but is the type of circumstances would come up as an example. . . . Each person can have a different perspective on what is appropriate or inappropriate. One person may see nothing wrong with a situation and another may see something completely different going on'. . . .

CP 685:18-20; CP 68:1-2.

This was important evidence in the evaluation of unprofessional practices and ignored by the ALJ in her factual findings, and her assessment of Mr. Len's honesty.

When asked by the OPP investigator if he had any additional information, Mr. Evans concluded his sworn statement by suggesting minimal consequences would occur: 'Hopefully evaluation and guidance will be sufficient. Teens need adult friends as they bridge childhood to adulthood. May good things come from

this.' CP 686:10-12.¹⁶ The record shows that, like almost all of his students, Mr. Evans perspective of Mr. Len was only positive. The suggestion that he was critical of or unhappy with Mr. Len as the ALJ concluded is simply unsupported by any record evidence.

By contrast with her husband's, Ms. Evans' testimony reflected a degree of imprecision affected by the passage of time and revealed her own hostility toward this entire situation that seemed to emanate from a strained relationship with her son, Student K. See, e.g., VR 274:7-23. She stated at hearing she did not know that Mr. Len was in her son's bedroom in the evening hours before she went to bed. VR 278:23-25. But she also testified, contrary to her husband's testimony, that he did not go into her son's bedroom that same evening. VR 279:1-3. She further stated she saw Mr. Len the next morning when she awoke around 9:30. VR. 267:19-25; 279:13-16; 280:12-14. But other witnesses clearly contradicted this testimony.

Ms. Evans' son characterized Mr. Len as a 'mentor and a friend' (VR 295:1) and further testified that he had been with Mr. Len on maybe four occasions (VR 300:10) including the barbecue

¹⁶ This last part was hand-written. It does not bear the venom expressed by Ms. Evans during her testimony at hearing about Mr. Len.

at his home, stated that Mr. Len left early in the morning (between 1 – 4:00 a.m.) when he and his friends left with his step-father (Mr. Evans) for a trip to Canada. VR 305; 323. Student E was also present and testified that the group of student-friends left the next morning around 6:00 a.m. (VR 464:3-7), and Mr. Len did not sleep at the Evans' house (VR. 461-62), and that Ms. Evans did not come into the room before he, his friends and Mr. Evans left for Canada. VR 464:8-10. Furthermore, Mr. Evans who was up early to leave on the trip testified he did not see Mr. Len in his house the next morning. VR. 197:4-8.

In light of the foregoing, Ms. Evans could not have seen Mr. Len because he had departed before she arose for the day, and her attempts to create outrage and impropriety are not supported by the facts. The ALJ's conclusion that Mr. Len was being deceptive on this issue is clearly not supported by record evidence.

1. The Factual Distinctions on the Lost Wallet Episode Do not Suggest Dishonesty on Mr. Len's Part.

Mr. Len recalled that Mr. Evans asked him to come to his house because he had lost his wallet and wanted Mr. Len to supervise the boys. Mr. Evans denied that he lost his wallet. VR. 188:17-25; 189:1. At hearing, Mr. Evans was very vague about

many episodes from the past, VR 192:16-18; 22-24, and his certainty on this memory is puzzling. Student K, Mr. Evans' stepson, testified that Mr. Evans had *lost his passport* the night before they were to depart for Canada. VR. 325. Whether Mr. Evans lost his passport, or lost his passport which was also in his wallet, or told Mr. Len he had lost his wallet when in fact he had lost his passport, was never clarified in sufficient detail to suggest that under a 'clear and convincing' standard Jason Len was deceptive, or actually correct, but under the clear and convincing evidence standard he was not attempting to deceive OPP during its investigation about why he was at the Evans home overnight during the summer months. What Mr. Len did when he was interviewed in October of 2009 was attempted to recall to the best of his ability what happened in the summer of 2007 (or 2008 depending on whose testimony is taken into consideration on the event's happening). This reflects at worst inconsistent memory of witnesses; hardly enough to justify a finding that a violation of WAC 181-87-050(7) due to deception occurred.

2. Mr. Len's Recollection of Where He Slept During a Trip to Oregon in Summer 2007 was Also Not Deceptive.

The ALJ concluded that Mr. Len was deceptive about whether he occupied the same bed as one of his minor students during a summer trip to Oregon in 2007. Appx. A, at 5-6, ¶ 20. Mr. Len and the students, which included Student E who had graduated from International School and was an adult, took Student G and others who had prior parental permission for the trip. Consistent with such outings, the group slept in cabins, tents and motels. *Id.* No one testified that Mr. Len acted inappropriate in any manner.

D. The Administrative Law Judge erred as a matter of law in affirming that Jason Len Must Submit to a Psychological Evaluation and Assessment before his License may be Reinstated.

WAC 181-86-013(3) requires that a certified teacher not have a behavioral problem, and is among the considerations enumerated in 181-86-070(6). The ALJ concluded that the entire record supported a conclusion that Mr. Len had a behavioral problem that required his assessment by a psychological professional before his license should be reinstated. Appx. A at 26 ¶ 31. WAC 181-86-013(3) specifies that an individual lacks requisite fitness if s/he acts in a manner that 'endanger[s] the educational welfare or personal safety of students, teachers or other colleagues within the educational setting.'

No professional testified that Mr. Len's interactions with students reflect a behavioral deficiency. No one from OSPI established a sufficient foundation that s/he was qualified to assess Mr. Len's ability to interact with younger people in a pedagogical setting. The fact of Mr. Len's involvement with their students was known to the parents, and none objected until Mr. Bang-Knudsen contacted them and solicited their criticism of Mr. Len, any contention that Mr. Len possessed or possesses a behavioral problem is without record support. Had his behavior been alarming, one could assume that a responsible parent would have taken action sooner.

The District never demanded that Jason Len submit to a psychological evaluation and/or counseling after its investigation into his conduct and reassigning him to a different school. The District in fact continued to employ Mr. Len for the remainder of the 2007-08 School Year at the IS and then at another middle school during the 2008-09 School Year. Mr. Len completed these assignments without incident. OSPI did not seek an Emergency Suspension of Mr. Len's certificate under WAC 181-86-175, as they could have if they had concerns about his continued interaction with students in a school environment. The Complaint was filed

December 9, 2008; OPP's Proposed Order issued March 8, 2011. CP 816-22. The record before the OPP or the ALJ is devoid of any suggestion that Mr. Len was and remains a threat and unfit to teach requiring psychological evaluation.

The ALJ abbreviated conclusion that Mr. Len was not fit to teach is also contradicted by her earlier statement that Mr. Len should have received lesser discipline based upon his actual interactions with students (not including his alleged dishonesty). Mr. Len's behavior, though different from some other teachers, was not proven to be alarming or suggestive of imbalance, deviancy or defective development to the district's administrators.

OPP's directive that Mr. Len be psychologically assessed is not only unsupported by facts it is not authorized at law. See, e.g., *State v. Hooper*, 154 Wn.App. 428 (Div. 3, 2010). OPP was unqualified to make such an assessment in this area, and incapable through its staff in identifying psychological problems that are manifest in Mr. Len's behavior. OPP's Director testified she did not consider Mr. Len to be a threat to children outside schools. VR 913:21-25. The ALJ's conclusion that such a condition of certificate reinstatement was not supported by any clear and convincing evidence, and should be reversed.

E. The ALJ erred as a Matter of Law in Conducting *de novo* review of the Case against Mr. Len, which did Not require the OPP to Prove and Defend its Proposal for Discipline Based upon Its Investigative Record.

The ALJ stated repeatedly through the hearing that the proceeding was *de novo* on the facts, and thereby allowed OSPI to go beyond OPP's investigative record and introduce *any* evidence in support of the proposed One-Year Suspension of Mr. Len. See, e.g., VR 902; 903:16-18; 911:20-24; see also, VR 912-13 (re: Mr. Len misrepresenting the facts). This is error as a matter of law in that the appeal process confers the Judge with authority to act as a substitute for the OPP in reaching factual and legal conclusions and an outcome.

1. The APA Does not Authorize *De Novo* Review in Appeals to the Office of Administrative Hearings.

This deviates from the process of administrative appeals reserved under the APA, as it is inconsistent with the intent of the law. The process as outlined within applicable statutes and regulations proceeds as follows:

1. A Complaint is filed by a school district superintendent with the OPP;
2. OPP conducts an investigation;
3. If the facts support its determination, OPP may propose a suspension;

4. An informal appeal to APCAC is authorized by WAC 181-86-145, prevents OPP's Proposed Order from becoming final;
5. The Review Officer, after consultation with the members of the APCAC, 'may uphold, reverse or modify. . .the [OPP]. . .order to suspend. . .' by issuing a written decision which includes findings of fact and conclusions of law;¹⁷
6. The investigated individual may appeal an adverse Final Order authored by the Review Officer pursuant to 'Appeal Procedure-Formal SPI review process' WAC 181-86-150; and
7. The appeal of the Review Officer's findings of fact and conclusions of law are subject to the Administrative Procedures Act.¹⁸

Regardless that the appeal may proceed from APCAC to an ALJ of the OAH under the APA, the APA itself does not authorize *de novo* review of a subordinate agency's proceeding. The APA in fact does not provide for any standard of review of a lower level

¹⁷ WAC 181-86-145(3).

¹⁸ OSPI contracts with the Office of Administrative Hearings pursuant to 28A.300.120 RCW to hear appeals from Orders to suspend and to issue a Final Order. WAC 181-86-150. An ALJ is not present during the APCAC informal proceeding as happens in other agency proceedings. *Cf.*, RCW 42.52.430 & WAC 292-100-060 (Executive Ethics Board hearing conducted with Board present; ALJ conducts factual proceeding).

hearing. The APA does state that only judicial review of an administrative ruling may be conducted *de novo*. RCW 34.05.510(3). But the APA does not confer the ALJ with the authority to conduct a hearing in such manner.

The ALJ concluded *de novo* review was appropriate, contending that she was not limited to 'sitting in appellate review of OPP's proceedings.' Appx. A at p. 20 (COL 4-6). Yet throughout her Decision she refers to Mr. Len as 'the appellant.' Appx. A, *seriatim*. The structure of the process and the method of proceeding under APA do not require *de novo* review given to an expansive submission of evidence, but do authorize review of the reasons and facts OPP relied upon in proposing an outcome to its investigation. Thus, OPP must justify its recommended discipline, a decision that occurs based upon specific facts in its possession at the time it issues the Proposed Order.

RCW 34.05.094 also specifies that in such further proceedings the 'agency record' is that which 'consists of any documents regarding the matter that were considered or prepared by the presiding officer for the brief adjudicative proceeding *or for the reviewing officer for any review.. ..*' Before this appeal proceeded to ALJ, the record was that acquired and prepared by

the director of the OPP, and submitted by OPP to the APCAC for its review of the OPP's recommended discipline. That record is provided to Mr. Len through his attorney. The APCAC, through its 'reviewing officer,' evaluates all facts and materials submitted by OPP in reaching his conclusions and issuing a Final Order on behalf of OSPI. See, RCW 34.05.464(4).

De novo proceedings must be authorized by law. In *Hoagland v. Mt. Vernon Schl. Dist.*, *supra.*, the Supreme Court observed that under the predecessor teacher tenure law, disciplinary cases were formerly heard *de novo* in superior court, limited to proof of the accusation(s) cited by the school superintendent's letter of probable cause. 95 Wn.2d at 427. The Supreme Court then concluded *de novo* review by the courts was no longer authorized once the statutory procedure had been amended to subject the courts to the APA. *Id.* at n. 2. This change in the statutory scheme clearly suggests that *de novo* review is not appropriate under the APA process where it is not expressly provided for at law.

If the *de novo* review method conducted by the OAH is allowed to survive, difficulties in the application of the 'clearly erroneous' test to an agency's fact finding will arise. In *Lenca v.*

Employment Sec. Dep't, 148 Wn.App. 565, 575 (Div. 2, 2009), this Court acknowledged that it did not review the administrative judge's 'initial decision' but that of the final agency decision-maker, i.e., the Commissioner. *Id.* Though that appeal concerned unemployment benefits, and not loss of a professional license, *de novo* review places the ALJ in the position as Agency decision-maker, rather than as judicial evaluator of the decision by the Agency under the APA. This also undermines RCW 34.12.010, which confers the OAH is to remain 'independent of state agencies. . .' in its review function.

2. OPP's Investigative Record Was Not Submitted to the ALJ in Its Entirety & Therefore OSPI was Able to Re-Create its Rationale for the Proposed Suspension.

In this case, the record relied upon by OPP in proposing a one-year suspension was not submitted to the ALJ. Instead, OPP was allowed to create a new record, introduce new evidence, and secure new witnesses who were not part of the process conducted by OPP during its investigation. The ALJ was confirming OPP's proposed 1-year suspension as an appropriate reflection of its assessment of the evidence it acquired as well as the application of laws and regulations it is charged with administering.

RCW 34.12.010 provides that 'Hearings shall be conducted with the greatest degree of informality consistent with fairness and the nature of the proceeding. . . .' A casual approach to litigation of such an important issue as that of stripping someone of their professional license, and employability in their field, creates a disadvantage of such one-sidedness to the accused that it renders his/her ability to properly defend in this environment of administrative process a sham.¹⁹ See FOF 49, Appx. A at 13.

Nor is this a process similar to that at issue in *N.Kitsap Schl. Dist. v. K.W.*, 130 Wn.App. 347, 370 (Div. 2, 2005), whereby this court recognized that the ALJ held 'the expertise to make educational policy judgments' in matters of student placement based upon enabling law. The APA is not susceptible of such an application of legal consequence, and should not be allowed to become a vehicle for such outcomes.

VI. CONCLUSION

In this appeal, the record overwhelmingly indicates that Jason Len threatened no one, suggested nothing improper, and

¹⁹ Under the APA there is no meaningful pre-hearing discovery, e.g., the disclosure of party witnesses to be called to hearing and the identification and exchange of exhibits precedes the actual hearing a week before (CP 192-98 & 242-46 – Witness Lists exchanged one week before hearing commenced), advances the informalities of the APA without an opportunity for useful recourse.

acted slightly outside the realm of expected interrelationships with students from Bellevue's International School. In this respect, the record provides a profile of his positive, encouraging presence to male students in the middle through high school grades. He did this with the initial knowledge and approval of the students' parents, whether express or implied; the record contains no proof that he targeted any particular person for focused treatment. In his interrelationship with these students, he acted in a manner that was merely a continuation of his pedagogical function.

It is undisputed that each and every student who had such an interrelationship with Mr. Len outside regular school activities viewed Mr. Len as professional and appropriate. Not one person cited any departure from expected adult behaviors. It is also noteworthy from the record that no parent, teacher, or student came forward with any accusations that the events that occurred during the summers of 2006 and 2007 that became the basis for Principal Bang-Knudsen's investigation in March 2008 raised any concerns. And despite the many episodes Mr. Bang-Knudsen included in his Letter of Reprimand to Mr. Len, the fact that he received minimal discipline speaks volumes to the comparative effort of the OPP, which relied so heavily upon Principal Bang-

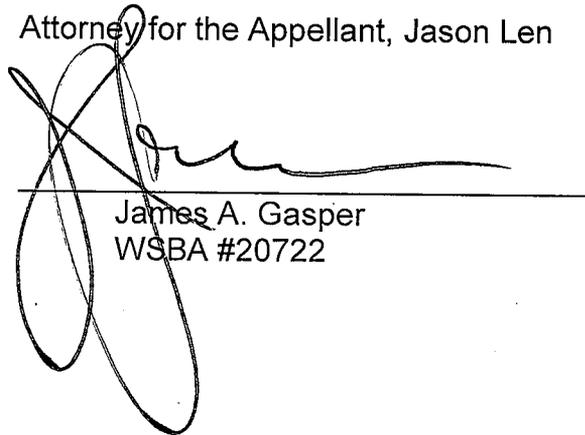
Knutsen's investigation. OPP's conclusion that Mr. Len should not be allowed to teach for one year is not merely inexplicable, it is unjustified.

This appeal respectfully urges the court to find the ALJ's Findings and Conclusions unsupported by the appropriate quantum of proof and interpretation of applicable law and vacate the rulings. Mr. Len requests that the court grant him appropriate relief and that his license be restored without qualification.

Dated this 1st day of May 2014 in Federal Way, Washington.

Attorney for the Appellant, Jason Len

By:



James A. Gasper
WSBA #20722

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DIVISION II

2014 MAY -2 PM 3:25

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II

JASON LEN,

Appellant,

vs.

OFFICE OF THE
SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Respondent.

Pierce County No.
13-2-05481-2

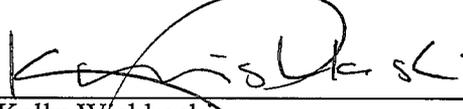
Case No. 45534-0-II

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Errata Brief of
the Appellant (Second Submission) was served by Certified United States
Mail upon the following:

Aileen Miller, Assistant Attorney General
Attorney General's Office
1125 Washington Street SE
Olympia, WA 98504-0100

DATED this 1st day of May 2014 in Federal Way, Washington.



Kelly Wishkoski
Paralegal to James A. Gasper

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STATE OF WASHINGTON

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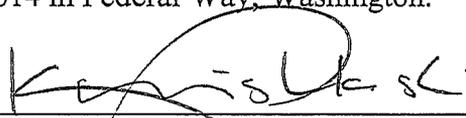
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No. 45534-0-II
IN THE COURT OF APPEALS
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JASON LEN,

Appellant,

v.

OFFICE of the SUPERINTENDENT of PUBLIC INSTRUCTION,

Respondent.

APPELLANT'S APPENDIX DOCUMENTS

James A. Gasper, WSBA #20722
32032 Weyerhaeuser Way South
P.O. Box 9100
Federal Way, Washington 98063-9100
(253) 941-6700

Attorney for Jason Len, Appellant

MAILED

DEC 18 2012

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

SEATTLE - OAH

IN THE MATTER OF:

JASON LEN

CERT. NO. 363652H

TEACHER CERTIFICATION
CAUSE NO. 2011-TCD-0002

**AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Seattle, Washington, on August 6, 7, 8, 9, and 13, 2012. The Appellant, Jason Len, appeared and was represented by James Gasper, attorney at law. The Office of Superintendent of Public Instruction (OSPI) was represented by Dierk Meierbachtol and Aileen Miller, assistant attorneys general. The following is hereby entered.

STATEMENT OF THE CASE

On November 14, 2011, OSPI issued a Final Order of Suspension concerning the Appellant's Washington State teaching certificate. On December 9, 2011, the Appellant filed an appeal of that suspension order pursuant to Washington Administrative Code (WAC) 180-86-150.

Prehearing conferences were held on January 3 and April 9, 2012. Prehearing Orders were issued on January 3, March 12, April 11, May 31, and June 7, 2012.

Under the Administrative Procedure Act, Revised Code of Washington (RCW) 34.05.461(8)(a), the written decision in this matter is due within 90 days after the close of the record. The record closed on October 12, 2012, with the filing of OSPI's post-hearing reply brief.¹ The written decision is therefore due 90 days thereafter, on January 10, 2013.

EVIDENCE RELIED UPON

Testimony was taken under oath from the following witnesses, in order of appearance:²

The Appellant
Student F

¹ On the final day of hearing, the due date of September 14, 2012 was established for both parties to simultaneously file post-hearing briefs. The parties subsequently requested a staggered briefing schedule. Pursuant to the agreed schedule, the last brief to be filed was OSPI's reply brief on October 12, 2012. See Order Amending Closing Brief Schedule of September 12, 2012.

² To maintain personal privacy, the names of students and former students are not used herein. They are referred to as Student A, Student B, etc.

Stepfather of Student K
Student N
Student L
Mother of Student L
Mother of Student K
Student K
Student C
Student A
Michael King, Bellevue School District teacher
Student E
Student O
Peter Bang-Knudsen, former Bellevue School District principal
Student D
Mother of Students E and G
Student H
Student I
Lee Holt, Bellevue School District teacher
Student OO
Debra Knickerbocker, Bellevue School District teacher
Catherine Slagle, director, OSPI Office of Professional Practices
Lindsay Brown

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-10;
Appellant Exhibits: A-1, A-3, A-4 (pages 1 and 4 only), A-6, A-7, A-10;
OSPI Exhibits: S-1, S-2, S-4 through S-10, and S-12 through S-27.

ISSUES

1. Whether OSPI's decision to suspend the Appellant's teaching certification for 12 months should be upheld; and
2. Whether the conditions imposed by OSPI on reinstatement of that teaching certification are proper.

First Prehearing Order of January 3, 2012.

FINDINGS OF FACT

Background

1. The Appellant earned a bachelor's degree from the University of Washington in approximately 1995. He earned a master's degree in education from Seattle Pacific University in 1998. The Appellant obtained his initial teaching certification in Washington State in September 1998. He is endorsed to teach science, physics and math. His current certificate will expire in June 2013. Testimony of Appellant; J-6.

2. The Appellant began his teaching career at the International School (I.S.) in the Bellevue School District (District or School District). He taught at I.S. for 10 years, from September 1998 through June 2008. The Appellant worked under three principals at I.S., the last of whom was Peter Bang-Knudsen. The Appellant does not recall any of his classes or trainings in college or graduate school addressing appropriate teacher-student relationships. No such training was given to him by the District. Testimony of Appellant.

3. I.S. is a combined middle and high school, spanning grades six through twelve. The Appellant generally taught math and science at the middle school level, though in his earlier years at I.S. he taught high school classes as well. In addition to math and science, he has occasionally taught physical education and health classes. The Appellant served as advisor to the I.S. math/science team for a number of years, and as advisor to the Robotics team and the Associated Student Body for approximately one year. He served as chaperone on school Focus Weeks and other school field trips. He also served as advisor to some high school seniors on their senior projects.

4. In February 2008, the Appellant received a letter of reprimand for negative, sarcastic comments about students in class, and for inappropriate physical contact. The physical contact incidents were tapping students on the head, flicking them with his finger, and inserting his index finger into a student's ear while questioning whether the student liked his class. All of these incidents occurred during class. The letter counseled the Appellant to use good professional judgment in his interactions with students, and to ensure that he is treating all students fairly and equitably. It stated that further similar conduct would subject the Appellant to further discipline, up to and including termination. S-2.

Findings Regarding Appellant's Interactions with Students

5. Most of the events at issue took place from 2006 to 2008. The Appellant was in his mid-thirties during those years. By 2006, he had been teaching for eight years. The Appellant taught middle school classes at I.S. and advised the math/science team during those years. All students referred to herein were I.S. students during those years, except that Student E graduated from I.S. in June 2007.

6. This section sets forth the ultimate findings of fact regarding the Appellant's conduct with students, after considering all of the evidence and weighing credibility. The sections that follow this one examine the contradictory contentions of the parties and discuss why some were found more credible than others.

7. The Appellant spent large amounts of time socializing with several I.S. high school boys outside of school: Students D, E, F, G, H, I and K. Occasionally other students were involved. The boys had classes with the Appellant in middle school (with the exception of Student K, who never had a class with the Appellant), but only started socializing with him in high school. Most of them were sophomores in the 2007-08 school year.

8. The Appellant took these boys out for dozens of meals, sometimes in groups and sometimes one-on-one. He gave them rides in his personal vehicle dozens of times. He took

them on outings to local parks (including Alki Beach in Seattle) and malls, either in groups or one-on-one. He spent extended periods of time at some of the boys' homes, usually socializing and watching as groups of the boys played video games. He often stayed at their homes doing this until the small hours of the morning.

9. The Appellant paid for the students' meals most of the time when he took them out, often to a local sushi restaurant where the bill for the group would come to approximately \$50.00. Testimony of Bang-Knudsen; S-5, p. 2. There is no mention in the record of them eating at fast-food establishments, but rather at restaurants like Red Robin, Applebees, Spazzos, Ruby's, and Sushi Land. Testimony of Appellant; Testimony of Student E; S-10, p. 7; S-12, p. 2. Student G E went out to meals with the Appellant once a week. Two-thirds of the time the meals were one-on-one, and the Appellant paid the bill 75% of the time. Testimony of Student G E. Student H usually offered to pay for his own meals, but the Appellant paid for them instead. Testimony of Student H.

10. The Appellant also bought students small, incidental gifts such as bandanas, T-shirts, small souvenirs from travel, and a toy helicopter costing approximately \$15.00. He lent Student I \$20.00 to buy a pair of shoes that the student saw on an outing, and Student I paid him back. Testimony of Student I.

11. The invitations were mutual. The boys frequently asked the Appellant to take them places and join in their activities, and the Appellant extended invitations to them as well, often by text or cell phone. No student ever reported any inappropriate touching or sexual conduct by the Appellant. The Parents of these students were aware that the Appellant spent a lot of time with the boys and gave them rides. The Appellant did not inform the parents or seek their approval before taking the boys out. He did not volunteer to the parents where they were going, but would tell the parents when asked.

12. The Appellant had no social relationship with the parents of Students D, E, F, G, I or K. He did have such a relationship with the parents of Student H. They were from Hawaii, as the Appellant was, and they sometimes socialized together.

13. The Appellant spent the most one-on-one time with Student E, who graduated from high school in 2007. Student E is the older brother of Student G. While Student E was in high school, the Appellant and Student E would spend one to four hours at a time one-on-one, driving around, hanging out at parks, having meals together, and talking. The Appellant visited Student E once at college after Student E graduated from I.S. They agreed it would not be advisable to continue their friendship once the investigation into the Appellant's conduct began.

14. While Student E was still in high school, he asked his mother whether he could spend Thanksgiving at the Appellant's home. Student E told his mother that the Appellant was alone, with no family around, and had invited Student E to join him. The mother said no. Testimony of Mother of Students E and G. After Student E graduated from high school, he went on a vacation to Hawaii with the family of Student F. The Appellant was in Hawaii at the same time, visiting his parents. He spent some time with Students E and F while they were in Hawaii. Student E telephoned his mother and asked if he could stay on in Hawaii with the Appellant

after Student F and his family had left. The Appellant had invited him to do this. Student E's mother said no.

15. In Spring 2006, during a Focus Week school field trip to Orcas Island, Washington, the Appellant served as chaperone in a boys' cabin. He had his own room in the cabin, but stayed in the boys' room until 1:00 a.m. During some of that time, the lights were off in the boys' room. During some of that time, the Appellant lay on the floor of the boys' room wrapped in his sleeping bag. There is conflicting evidence from the students as to whether the Appellant was sleeping.

16. In Spring 2007, during a middle school Science Bowl trip to Portland, Oregon, the Appellant again had his own sleeping quarters. They were in an open loft, while the boys slept on a lower floor. There was one high school boy on the trip, Student D, who was president of the math/science club. He wanted to sleep in the Appellant's loft area rather than with the middle school boys. The Appellant let Student D sleep on the floor in the Appellant's loft area.

17. In Spring 2007, the high school math team participated in a competition at nearby Bellevue High School. The night before the competition, the Appellant held a party and sleep-over at his home in Renton, Washington, for the math team. Girls participated in the party, but only boys slept over, approximately eight or nine of them.

18. The Appellant did not comply with the School District's policy on field trips in holding this math team party. That policy requires, among other things: (1) advance approval by school administration; (2) the absence of potential legal liabilities against which the District is not adequately protected; and (3) signed permission slips from parents that are sent home at least three school days prior to the event, describing the nature and purpose of the event. S-24; S-25. School administrators knew nothing about the math team sleep-over at the Appellant's house. The absence of signed parental permission exposed the District to potential legal liability if an accident or injury were to occur during the event. The absence of any other adult at the sleep-over exposed the District to potential legal liability if a student were to claim the Appellant engaged in inappropriate sexual conduct during the event.

19. In July 2007, Student K invited the Appellant to a barbeque at his home. Student K's mother and step-father were there. Several school friends of Student K, with whom the Appellant was also friends, were there. Several of these friends were going to spend the night because they were all leaving on a trip to Canada with Student K and his step-father the next morning. The Appellant spent the night in Student K's bedroom with this group of students. The students stayed up all night playing video games, with the Appellant watching them play. Student K's mother was extremely shocked when she found the Appellant in her son's bedroom, with the door closed, the next morning. Neither she nor her husband had been asked whether the Appellant could stay there all night.

20. Also in July 2007, the Appellant took four boys from I.S. on a week-long road trip to Oregon. Three of the boys were in high school: Students G, H and I. The fourth, Student E, had just graduated from high school in June 2007. The parents of the boys gave permission for the trip. During the trip, the Appellant shared hotel rooms, cabins, and tents with the boys. One

cabin had four fold-out sleeping platforms. The Appellant shared a sleeping platform with Student H. He and Student H each had their own sleeping bags on the platform.

21. In Summer 2007, some of the socializing the Appellant did with students was at local parks at night, after the parks were posted as closed pursuant to local ordinances. On one such occasion, at Wilburton Park in Bellevue, Student K's mother saw the Appellant's van at the park. She knew her son was in the van because she had been talking to him on his cell phone regarding where he was. Student K's mother saw the Appellant's van speed away, driving above the speed limit and failing to slow down when rounding curves. The Appellant was taking Student K back to his (Student K's) house. Student K's mother attempted to follow the van but was unable to.

22. In Fall 2007, there was a Tolo Dance at I.S. The Appellant came to the dance, though he was not one of the official chaperones. Students G, H and I attended the dance together with their respective dates, Students N, M and L. When the boys' after-party plans fell through, they became frustrated and left the dance without telling the girls. The girls became upset with the boys. The Appellant approached them and tried to get them to reconcile with the boys. He offered to drive the girls to a local restaurant to meet the boys. The girls did not appreciate the Appellant interjecting himself into the matter, and had already arranged for one of their parents to pick them up. They declined the Appellant's offer of a ride. During the ensuing week, the Appellant approached the girls again and encouraged them to reconcile with the boys for the sake of class unity. The girls believed it was the boys' obligation to apologize to them first. The girls again did not appreciate the Appellant interjecting himself into their personal affairs. One of the girls, Student M, spoke angrily and used profanity toward the Appellant for interjecting himself in this way.

23. During mid-winter break in February 2008, the Appellant served as chaperone on a field trip to a jazz festival in Idaho. The Appellant had expressed interest to jazz choir teacher Michael King in serving as a chaperone, and Mr. King agreed. On the last night of the festival, the group got back to their hotel after midnight. Mr. King told the students that curfew was 1:00 a.m., and they were to go straight to their own rooms. They had an early-morning departure the next day. However, the Appellant had other plans. Several of the students planned to stay up all night playing video games, and the Appellant helped them with this plan. The Appellant had brought his X-Box on the trip at their request. He would not let them use his X-Box in their rooms, so the boys spent all night playing video games in the Appellant's room. As usual, the Appellant watched them play. He was in his pajamas for some of the night, and slept on his bed for part of the night. Some of the boys napped on a chair or on the other bed in the room. They planned to sleep on the bus ride home the next morning. Mr. King was surprised and disappointed to learn that this had occurred on his trip. He learned about it from the mother of Student O, who was a school employee, upon their return to school after the break.

24. In March 2008, the Appellant drove Students E, G, H, I, K and Z to purchase a new video game that was being released after midnight at a local mall. They then returned to the home of Students E and G. The Appellant stayed with the boys at the home until approximately 3:00 a.m. The mother of Students E and G stayed awake until the Appellant had left the house.

25. In March 2008, the I.S. principal, Peter Bang-Knudsen, initiated an investigation concerning the Appellant's relationships with students. On the date of his first interview of the Appellant, March 13, 2008, he gave the Appellant directives about his future interactions with students. S-4; S-5. Those directives included the following:

1. You are NOT to discuss this matter with current or former IS parents or students. If someone mentions this to you, you will need to be ready to say that you have been asked not to discuss this matter.

6. You are not to hang out with students as if he [sic] is a peer at any location after school hours. During school hours, you should be acting in you [sic] professional teaching role with students only.

7. You should limit your interactions with students to those of any normal professional teacher/ student relationship.

S-4.

26. A final set of directives was issued to the Appellant in early November 2008. This was after the Appellant had left I.S. and was teaching at Tillicum Middle School pursuant to an involuntary transfer to that school. The District decided on an involuntary transfer because it believed the Appellant could correct his conduct if removed from the students with whom he had developed close personal relationships. (The Appellant taught for two years at Tillicum Middle School, 2008-09 and 2009-10, before moving to Europe to teach.) Mr. Bang-Knudsen's final directives to the Appellant included the following:

2. You are directed to refrain from visiting the homes of students at any time, except with an explicit invitation of students' parents and only then with prior confirmation and authorization by your building principal. Even with such prior authorization, you are directed to terminate any such visits no later than what is reasonably necessary to finish the purpose of the invitation and in no event later than midnight except in cases of emergency for which reason you are given explicit parental permission, and as to which emergency you provide prompt and full disclosure to your principal of the incident.

4. You are directed to refrain from any social or other contact with District students away from school, except as noted in item 2 above. If you unexpectedly encounter students away from school, you are directed to promptly separate yourself from the situation in a polite and professional manner.

5. You are to maintain a professional demeanor and distance with students at all times in every setting. You are not to engage in activities such as students typically engage in with their peers, i.e. your [sic] are not to act like you are an age peer of students such as playing video games with students, and you are not to meet students outside school for social activities of any type, or otherwise "hang out" with students.

6. You are directed to refrain from having any telephone, email, or other communication with District students outside the normal requirements of teacher-student communication regarding academic matters or approved District activities.

7. You are directed to limit your interactions with students at all times to the normal scope of the professional teacher-student relationship, except as specifically limited more stringently above.

...

S-22, pp. 5 - 6.

27. In the spring of 2008, I.S. teacher Debra Knickerbocker attended a professional development class with the Appellant. She heard the Appellant making plans with students to pick them up in the school's back parking lot after school. Ms. Knickerbocker asked the Appellant why he was picking up the students. He responded that he was going to help them on their school talent show performance. S-8, p. 4; S-15, p. 4; Testimony of Knickerbocker. According to the principal, Ms. Knickerbocker was the first person to report a concern to him about the Appellant's relationships with students, and he then initiated the investigation. S-8, p. 4; Testimony of Bang-Knudsen. Ms. Knickerbocker, on the other hand, believes she made this report *after* Mr. Bang-Knudsen had already put restrictions on the Appellant, in other words, after the investigation began on March 13, 2008. S-15, p. 4; Testimony of Knickerbocker. Both of them refer to the same concern reported by her: She heard the Appellant on his cell phone with students arranging to pick them up in the school's back parking lot. Mr. Bang-Knudsen's contemporaneous notes of April 4, 2008 are closer in time to the events than Ms. Knickerbocker's June 2010 statement to OPP. S-8, p. 4; S-15, p. 4. It is therefore found more likely that Mr. Bang-Knudsen is correct. Ms. Knickerbocker witnessed this event *before* restrictions were placed on the Appellant's conduct. Therefore, the incident was not in violation of the principal's directives of March 13, 2008.

28. In approximately May 2008, Ms. Knickerbocker heard some I.S. students conversing with the Appellant at the Relay for Life event about Mr. Bang-Knudsen's investigation of the Appellant. The students were telling the Appellant that they thought Mr. Bang-Knudsen was being unfair to him. Testimony of Knickerbocker. This conversation was in violation of the principal's directives.

29. The following school year (2008-09), the Appellant spoke by cell phone with Student H approximately 10 times, when Student H was in the 11th grade. The next year (2009-10), when Student H was a senior, they continued to communicate, though they may have had slightly fewer telephone calls that year. Testimony of Student H. This communication was in violation of the principal's directives.

30. Student I testified he spent time in-person with the Appellant during the two years following the Appellant's departure from I.S., e.g., having meals together. These two years were 2008-09 and 2009-10, during Student I's junior and senior years of high school. He saw the Appellant less frequently the second year. This continued relationship was in violation of the principal's directives.

31. I.S. teachers Brad Moore and Michael King told OPP they saw no behavior by the Appellant that would raise concern. Mr. Moore said the Appellant had high moral values and was efficient and nurturing with students. S-14, p. 5. Mr. King said he was a good teacher and created a comfortable environment for students. S-19, pp. 5, 11.

32. OPP's Proposed Order of Suspension (March 8, 2011) and its Final Order of Suspension (November 14, 2011) suspended the Appellant's teaching certificate for 12 months, and attached the following conditions to reinstatement of that certificate:

Reinstatement will require: (1) successful completion [sic] a psychological examination, from psychologist mutually agreed upon by OPP and Jason Len, which validates Jason Len's ability to have unsupervised access to children; (2) successful completion of any and all treatment recommended as a result of said psychological evaluation; (3) Jason Len will provide OPP with evidence of his successful completion of or continued compliance in his treatment program; (4) successful completion of a mutually agreed upon course, or training, for issues of appropriate/inappropriate relationships with students and; (5) if requested, Jason Len will sign consent forms authorizing OPP to have access to all records pertaining to his treatment and to discuss any and all treatment undertaken with the providers administering treatment. The cost of conformance to all reinstatement requirements will be the responsibility of Jason Len.

AND/OR Reinstatement shall (also) require submission of a new application, including Character and Fitness Supplement, provided by OPP and having Jason Len's fingerprints be checked by both the Federal Bureau of Investigation (FBI) and the Washington State Patrol (WSP). Reinstatement shall be also contingent upon Jason Len's fingerprint background check returning with no criminal convictions that are listed in WAC 181-86-013, RCW 28A.410.090, and/or any felony convictions[.]

J-2, p. 7; J-4, p. 7 (bold in originals).

Credibility Findings on Specific Incidents

33. Regarding the Thanksgiving invitation to Student E, the Appellant testified he has no recollection of making this invitation. This is not an explicit denial, and the testimony of the Mother of Student E was specific and credible. It is therefore found that the Thanksgiving invitation did occur.³

34. Regarding the math team party and overnight at the Appellant's home in Spring 2007, the Appellant stated during the investigation and testified as follows: The event was originally planned to take place at the home of Student A, but that plan fell through, so the Appellant

³ Regarding the invitation for Student E to extend his Hawaii vacation with the Appellant, the Appellant acknowledged the invitation but testified the idea originated with Student E. (Student E did not testify about the Hawaii invitation; only his mother did.) The Hawaii invitation occurred after Student E had graduated from high school, so it has only marginal relevance. It does, however, shed light on the nature of the relationship, which included extensive time spent one-on-one both before and after Student E graduated.

offered his home. The event was not pre-planned as a sleep-over; the idea for sleeping over came up after the party began. The eight to nine boys who slept over telephoned their parents for permission. The Appellant has a lot of camping equipment and provided sleeping bags for them. While the Appellant characterized the gathering as a preparation for the math competition the next morning, he acknowledged that only 30 minutes were spent on that preparation. Testimony of Appellant; S-13, pp. 3 – 5.

35. This testimony conflicts with that of Students A, C and OO. Student A testified that the event was not previously planned to occur at his house, and that it was pre-planned as a sleep-over at the Appellant's home rather than that idea occurring spontaneously. He assumes he brought his own sleeping bag, but cannot remember. Student C testified it was pre-planned as a sleep-over, and the students who slept over arrived with their own sleeping bags. Student OO recalls that the Appellant invited him in-person to the event, said it would be a sleep-over, and told him they would play video games and watch movies as well as sleeping over.

36. The Appellant's testimony that the event was not pre-planned by him as a sleep-over is not credible in light of the testimony of these three students. Being invited to sleep over at a teacher's house is a memorable occurrence, and it is likely the students would remember this. It is found that the Appellant did not testify truthfully when he stated he did not invite the students for a sleep-over at his house, and that the idea of sleeping-over occurred spontaneously during the party.

37. Regarding the Appellant spending the night in the bedroom of Student K with several boys in July 2007, the Appellant testified that the stepfather of Student K asked him (the Appellant) to stay and supervise the boys. The Appellant testified the stepfather of Student K did this because he (the stepfather) had lost his wallet and was busy dealing with that and packing for the trip the next morning. The stepfather of Student K denies having lost his wallet for several decades. He wrote in a statement to OPP that he would not have asked a man he did not know very well to supervise his son like this. He testified the boys did not need supervision in his own home, especially since his wife was there. There was some evidence from other witnesses that the stepfather of Student K misplaced his passport the night before the trip. Even if this occurred, his testimony is both logical and credible that he would never have asked the Appellant, who he did not know well, to stay the night and supervise his son and friends, given the boys' age, their being safe at home (not out on the town), and the fact that one or both parents were at home.

38. It is found that the Appellant did not testify truthfully that the stepfather of Student K asked him to stay at Student K's home to supervise the boys on the occasion when the Appellant spent the night in Student K's bedroom. This is found to be a later invention by the Appellant in an attempt to justify his conduct. The principal, Mr. Bang-Knudsen, interviewed the Appellant three times in Spring 2008. In none of these interviews did the Appellant mention a lost wallet or passport, or the stepfather asking him to stay to supervise the boys, in connection with this event. See S-5, p. 1; S-7; S-8; see also S-10, pp. 4 – 5. The Appellant mentioned it only after receiving a formal reprimand for his conduct. See J-10, p. 1.

39. Regarding sharing a bed with Student H on the Oregon road trip in July 2007, the principal wrote the following contemporaneous notes following his first interview of the Appellant

on March 13, 2008: "When asked if he ever shared a bed with a student, he said that sometimes he shared a bed with [Student H], but that they both had separate sleeping bags." S-5, p. 2; see also S-10, p. 5; S-22, p. 2.

40. In November 2008, the Appellant wrote a rebuttal to Mr. Bang-Knudsen's letter of reprimand. Regarding this incident, he wrote: "The sharing of the bed happened when we were watching a movie." J-10, p. 1. The Appellant testified to the same effect at the hearing, that he had sometimes sat on a bed with other students while watching television, but never slept in a bed (or a sleeping platform) with a student.

41. It is found that the Appellant testified untruthfully about sharing a bed with Student H on the Oregon road trip. The Appellant's earliest statement in the investigation matches with Student H's testimony several years later: the two of them slept on the same bed overnight, in separate sleeping bags. There was no television in the cabin, according to Student H, so they could not have been sitting on the bed to watch television.

42. The Appellant's cross-examination of Mr. Bang-Knudsen implied that the words "share a bed" can mean either sleep in a bed, or sit on a bed for another purpose such as watching television. Mr. Bang-Knudsen testified the Appellant never mentioned sitting on the bed for another purpose, and that he understood the Appellant to mean he shared the bed with Student H for sleep. The implication that the Appellant meant he sat on a bed to watch television when he stated he shared a bed with Student H is not credible. If the Appellant intended this by the phrase "share a bed," he had every incentive to clarify this meaning to the principal. He did not do so. The Appellant had no incentive to use an ambiguous phrase (to the small extent it is ambiguous, given that "share a bed" generally signifies sleeping in the same bed) without clarifying his intent.

43. The fact that the Appellant's earliest statement about the incident matches with Student H's testimony about the incident makes Student H's testimony credible. Student H is a supporter of the Appellant and does not want the Appellant's teaching certificate to be suspended. He has no incentive to be untruthful, and the specificity of his testimony made it credible as well. The fact that in his first interview with the principal, the Appellant specified that when they shared a bed they used separate sleeping bags also undermines his later allegation as to what he meant. If he meant they were sitting on the bed to watch television, it would be very strange to add that they did so in separate sleeping bags. It is concluded that the Appellant testified untruthfully about this incident.

44. Regarding the Tolo dance in Fall 2007, the Appellant testified that when he offered to drive the girls to a local restaurant, he told them they would first need to get permission from their parents. Student N contradicted this, testifying the Appellant said nothing about obtaining parental permission. Student N's testimony is credited over the Appellant's on this matter for several reasons. The Appellant was not in the habit of obtaining parental permission each time he offered a ride to students. Also, the Appellant has been found untruthful on other matters in this case, so his credibility is damaged.

45. The Appellant attempted to justify his uninvited involvement with the girls on several bases: First, he had been a teacher of theirs in middle school, so it was his obligation to help

them with social skills. Second, one of the girls swore and used a vulgar finger gesture toward the boys as the girls were leaving campus, so he was forced to intervene as a teacher. J-10, p. 2. However, the swearing and vulgarity occurred after the girls had left school and were in a vehicle, which passed the boys walking on the street. Testimony of Student I. It did not occur on school grounds. Finally, the Appellant testified he offered the girls a ride because the dance was ending and it would be unsafe for them to wait outside the school. However, Student L testified the dance was not even near its end at the time, and that is why she and the other two girls were so frustrated. Student L's testimony is found more credible than the Appellant's regarding the timing. Even if the dance had been ending, the Appellant had no reason to believe the girls were stranded at school and in need of his protection. They all had parents they could call. The Appellant's justifications for his conduct are weak and unpersuasive.

46. Regarding the jazz choir field trip to Idaho in February 2008, the Appellant testified that Mr. King told him that he (Mr. King) was not going to enforce curfew on the night in question. The Appellant also testified he affirmatively informed Mr. King that some boys would be staying up all night playing video games in the Appellant's hotel room.⁴ Mr. King denied that he told the Appellant curfew would not be enforced, and denied the Appellant informed him of the all-nighter plans. Mr. King testified he first learned what had happened from the mother of one of the students. Mr. King is found to be a more credible witness than the Appellant. Based on the testimony of all three teachers who testified in this case about appropriate student-teacher interactions, it strains credulity to imagine that the teacher responsible for this school event would have allowed the Appellant to have boys spend the night in his hotel room. Mr. King testified he expects chaperones to follow the rules, not break them. He explained that he has a perfect safety record on field trips, and that only happens when rules are followed. Mr. King's testimony that the Appellant did not tell him of the plan for an all-nighter in the Appellant's room is found truthful. The Appellant's testimony to the contrary is found untruthful.

47. The Appellant is also found to have been untruthful with his principal, Mr. Bang-Knudsen, about the jazz choir trip. Mr. Bang-Knudsen asked the Appellant about the trip only one month after it occurred. The Appellant at first told Mr. Bang-Knudsen that he did not recall whether students were in his hotel room on the trip to Idaho. He later admitted that they were. S-7, p. 1. It is not credible that the Appellant forgot the all-night event only a month after it occurred.

48. Regarding whether the Appellant violated the directives given to him by Mr. Bang-Knudsen, the Appellant is also not found to have testified credibly. The Appellant denied violating the directives. Yet Students H and I testified to extensive contacts they had with the Appellant outside of school after the directives were issued. These students support the Appellant and oppose suspension of his teaching certificate. They do not have a motivation to testify falsely against him. Teacher Debra Knickerbocker also observed the Appellant violating the principal's directives in May 2008. The Appellant did not refute Ms. Knickerbocker's testimony in this regard.

⁴ The Appellant's testimony in this regard is contradicted by his earlier statement to OPP: "Q: Did you tell Mr. King that you were having students in your room?" "A: I didn't tell him, but he saw the students go into my room, because he was right across from my room." S-13, p. 17. Based on Mr. King's testimony, it is found he did *not* know that students went into the Appellant's room.

49. The Appellant testified that Student I telephoned him about his (Student I's) senior project, because the project concerned photography and the Appellant is knowledgeable about photography. However, Student I testified that after the Appellant left I.S., when Student I was a *junior*, they went out for meals and met at other students' homes. This is before his senior year, when a senior project would typically be done. Student I said these meetings continued during his senior year, but to a lesser degree. Student I mentioned nothing about telephone calls with the Appellant, or about seeking advice on his senior project. The Appellant's testimony that his post-directives contact with Student I was limited to telephone calls about his senior project is found to be untruthful. The Appellant is found to have testified untruthfully about his compliance with the directives.

Findings on Appropriateness of Appellant's Conduct in Context of I.S. Culture

50. The Appellant testified his conduct with students was appropriate in the context of the I.S. culture at the time. He presented no testimony from any I.S. teacher to support this assertion.

51. The three I.S. teachers and the one I.S. administrator called to testify by OSPI did not support the Appellant's assertion. They all agreed that I.S. students and teachers often had closer bonds than at other schools because the school is small, and because students spent a full seven years at the same school. Teachers can choose to have students call them by their first names at I.S., and many teachers do. They also agreed that I.S. culture had changed over time, with a requirement for more adherence to the standard District curriculum and the elimination of some programs that I.S. teachers had created. Mr. King also felt that over time, the type of student attracted to I.S. had changed. However, according to these witnesses, the conduct that the Appellant engaged in with students was not within the bounds of the I.S. culture at any time.

52. Regarding giving students rides, in 13 years of teaching Mr. King has only had a student in his personal vehicle under the following circumstances: Once, some students were on a jog for a P.E. class. They were lost and called out to him as he drove by, asking him to help them return to school. On another occasion, students needed a cable for a school show. Student O knew the type of cable that was needed. Mr. King obtained permission from Student O's father to drive him to a store to obtain the cable. Finally, a student once had a solo in a music performance and did not have a ride to the performance. Mr. King (who is the music teacher) obtained permission from the student's parent to transport him to and from the performance. Testimony of King; S-19, p. 9.

53. Regarding going to a student's home late at night, going to a student's home without a parent's knowledge or permission, taking students out to meals, having students overnight at his home, ~~hanging out at a student's home, texting or calling students to hang out, and shuttling students around in his vehicle~~, Mr. King testified none of these were ever part of the I.S. culture. The only non-I.S. functions that he and other teachers attended for students were student athletic games at other schools. I.S. does not have its own sports teams. Students therefore join sports teams at other District schools. Mr. King and other teachers (including the Appellant)

would sometimes attend athletic events at other District schools when I.S. students were playing for those schools.

54. Lee Holt has taught at I.S. for eight years. She allows students to call her by her first name. She testified as follows. It has never been part of the I.S. culture to act as a personal mentor to students. Mentoring by teachers is about academics or career paths, and occurs at school, such as during the after-school tutorial period. If a student came to her with personal problems, she would direct them to the school counselors. It has never been part of the I.S. culture for teachers to give rides to students, except for school-related activities and only with school approval. The only exception is when a teacher is also a parent of an I.S. student, and gives rides to their child's friends in their role as a parent. It is not part of the I.S. culture for teachers to have students stay overnight at their home, again with the exception of teachers who are also parents of I.S. students who invite their own friends for a sleep-over. It is not part of the I.S. culture for teachers to have students in their hotel rooms, share a bed with a student, go to a student's home without an invitation from a parent, take students out for meals, vacation with students, share a tent with them, buy them gifts, or hang out socially at their homes. Ms. Holt expects all teachers to know that such activities are inappropriate. She explained that since 2006 or 2007, the School District has not allowed money to change hands between a teacher and student, even for a field trip. All financial transactions with students are to be handled by office staff, not by teachers. Teachers are not peers of students, but persons in authority. The same personal boundaries apply between teachers and students during the summer as during the school year. Testimony of Holt.

55. Debra Knickerbocker taught at I.S. for four years, from 2006 to 2010. She testified as follows. It was not part of I.S. culture for teachers to hang out socially with students, spend time at students' homes, have students sleep over at the teacher's home without school approval for a school-sponsored event, give rides to students, or give gifts to students. It is unfair to give some students gifts but not give those gifts to other students. This shows impermissible favoritism. She expects all teachers to know that the above-referenced conduct is inappropriate. Student-teacher boundaries apply during the summer as well as the school year, so taking a road trip and sharing a tent with students during the summer is inappropriate. Ms. Knickerbocker stated she could imagine teachers Brad Moore and T.J. Hanisy taking students out to eat. However, she never actually heard of them doing it, and she does not believe it would be appropriate. Ms. Knickerbocker could imagine them having a meal with students because they had interactions with students that were not strictly school-related. Testimony of Knickerbocker.

56. Teacher Bob Ellis did not testify at the hearing, but there was testimony from Ms. Knickerbocker and others that Mr. Ellis hosted I.S. school events at his vacation cabin. Student C also testified that he and others slept over at Mr. Ellis' cabin on non-school events during the summer. The Appellant relies on this to show such teacher-student socializing was part of the I.S. culture. However, Mr. Ellis had a son at I.S. who was a junior in 2006-07. S-26, p. 10; Testimony of Knickerbocker. Student C was also a junior in 2006-07. The summer overnights at Mr. Ellis' cabin may have been in his role as a parent, i.e., Mr. Ellis's son inviting his own friends over to the cabin, rather than Mr. Ellis inviting them to socialize with him (Mr. Ellis). Student C is the only witness who testified to any non-school function for students at Mr. Ellis's

cabin. Because Student C was a classmate of Mr. Ellis's son, it will not be assumed that Mr. Ellis invited Student C to the cabin to socialize with him (Mr. Ellis) rather than with his son.

57. Teacher Brad Moore was not called as a witness at the hearing. However, OPP transcribed an interview it took with him. S-14. Mr. Moore taught at I.S. for 13 years, beginning 1997. He agreed with all witnesses that I.S. had a unique, communal culture. However, the teacher-student interactions outside of school activities that he cited were much more limited than the Appellant's: Teachers would attend student sports events at other high schools (as discussed above); students would stop at his home to pick up equipment for use in school fundraisers; and he and others would gather at a student's home to go to a school fundraiser. The two interactions he had with students that came closest to some of the Appellant's conduct were the following: First, when there were freshman having trouble adjusting to high school, he would sometimes tell them when he would be at a local mall, and if they came he would play games with them there (cards, dominos, chess, etc.) Mr. Moore stated he deliberately met them in a public place for these activities, rather than at anyone's home. Second, Mr. Moore answered "yes" to the question whether it was acceptable for teachers to buy meals and gifts for students. There were no follow-up questions to this, and no context was given for the question. Mr. Moore was not available for clarification because he was not called as a witness. Teachers who did testify at the hearing distinguished between teachers coordinating meals on a field trip versus buying meals to socialize with students outside of school. They also distinguished between purchasing small gifts for an entire class versus singling out one student. Regarding "hanging out" with students one-on-one, Mr. Moore stated: "I don't know about hanging out. There was never overt one on one." S-14.

58. Principal Peter Bang-Knudsen testified as follows. It is not acceptable for teachers to be at students' homes without explicit parental permission. Interactions outside of school events are unusual, except for teachers attending student sports competitions at other schools. It is not acceptable for teachers to take students out to dinner, spend the night at a student's house, stay up late into the night with students on a field trip, sleep with a student on the floor next to the teacher's bed, or give students rides without a parent's knowledge (except in an emergency if parents cannot be contacted, and the principal is informed). It is also unacceptable for students to sleep over at a teacher's home, unless the teacher is also a parent of an I.S. student who is having a sleep-over with friends. It is common knowledge in the teaching profession that in relationships with students, you do not put yourself in a position where someone could perceive something negative. Appropriate personal conduct with students is a professional responsibility even on non-school days and during school breaks. Testimony of Bang-Knudsen. During his investigation, the Appellant did not raise the defense that his conduct was appropriate given the culture of I.S., a culture with which the principal was acquainted. See J-10; S-5; S-7. Only to OPP did the Appellant first raise this defense. See S-13.

59. The former students who testified at the hearing did not support the Appellant's assertion that his conduct was part of the I.S. culture. The following testimony, given by students who were closest to the Appellant, is found credible: Student F testified that no other I.S. teacher gave him rides, hung out with him, took him on a road trip, give him gifts, took him out for meals, met him on a vacation, or stayed overnight with him. He heard of students going to the home of one other teacher once or twice, but he does not know the purpose of their visit. Student K testified he had no other relationship with a teacher outside of school. Student E testified he

had no meals out with other teachers, spent no personal time with other teachers, never went to another teacher's home (except the Ellis cabin during Focus Week), and did not have any other teacher's cell phone number (except during Focus Weeks). Student E further testified that no other teacher came to his home, slept in a student's room, or bought him gifts. Student E told OPP that teachers spending time with their students was not seen as odd at the I.S. S-18, p. 5. However, he did not specify to OPP whether he meant spending time together *at school* or outside of school. In fact, he testified he spent time with no teacher other than the Appellant outside of school. Testimony of Student E. On the other hand, Student D testified that one other teacher, Jessica Scott, met small groups of students for coffee during the summer after her first year of teaching. Testimony of Student D.

60. Other students, who were more tangentially involved with the Appellant, testified as follows. All of their testimony is found to be credible. Student C testified he never invited an I.S. teacher to his home, never called or texted with a teacher, had no meals with a teacher outside of field trips, never got a ride from a teacher for a non-school activity, and never went on a road trip with a teacher. Student A testified he never shared a room with a teacher, a teacher never visited his home, he never had cell phone calls with a teacher, and that mentoring by I.S. teachers of I.S. students did not take place outside of school. Student N testified that no I.S. teacher invited her to their house or came to her house, had overnights with her, had text messages or phone calls with her, went out to meals with her or gave her rides. Student L testified that no I.S. teacher ever came to her house, nor did she go to one of their houses. She never called a teacher to see if they could hang out, never went out to a meal with a teacher, never got a ride from a teacher for a non-school activity, and never slept in the same room as a teacher. She believes teachers at I.S. would not do these things.

61. The Mother of Student L has two children who attended I.S. and was very involved with the school. She was vice president of the Parent Teacher Student Association, served on the Program Delivery Council, planned the drama program's annual gala for five years, and did other volunteer activities at I.S. She testified about the culture of I.S., that it was a close community with whole families participating. However, she testified that neither of her children socialized with any I.S. teacher outside of school, went out to meals with them, spent the night at a teacher's house, got rides to non-school activities from a teacher, called or texted with a teacher, or had a teacher at the house late at night. She testified that none of these activities were part of the I.S. culture. Testimony of Mother of Student L.

62. In light of all of this credible evidence, and in light of the Appellant's failure to present testimony from a single I.S. teacher in support of his allegations, the contention that the Appellant's conduct was part of I.S. culture is found to be unsupported. The close community of the I.S. did not include the kind of conduct for which OSPI suspended the Appellant's teaching certificate. The changes in I.S. culture over time involved curriculum and programs, and possibly the type of students the school attracted. These changes had nothing to do with the kind of conduct for which the Appellant's certificate was suspended.

Student and Parent Reactions to the Appellant's Conduct

63. Six students testified that the Appellant's conduct did not make them uncomfortable and/or that his teaching certificate should not be suspended. Testimony of Students C, E, F, H,

I and K. Students E, H and K went further, stating the Appellant had a beneficial effect on them as people. S-16, p. 16; Testimony of Students E and K.

64. However, even among the students who spent the most time socializing with the Appellant, five of them acknowledged his conduct was odd, or appeared to be so. Student G told the principal he thought the Appellant's relationship with him and other boys was "weird" at first, and he later felt uncomfortable with it again: "I was weirded out by the time he spent the night" at Student K's house with him and others. S-6, p. 3. Student K told the principal "It seems weird that my friends [Students G, H and I] always want to hang out with Mr. Len. No matter where we are or what we're doing, they always want to call Mr. Len and invite him along." S-10, p. 7. Student H had the following exchange with the OPP investigator: "Q: Did you ever think it was odd that Mr. Len would hang out with you and your friends like that?" "A: No, well, kinda of [sic]. I thought he would have his own friends by now. We always had a good time so why wouldn't someone what [sic] to hang out with us?" S-16, p. 10. Student H acknowledged that the Appellant's conduct made the mothers of Students E and K uncomfortable. S-16, p. 16. Student F told OPP that at first he thought it was "odd" that the Appellant hung out with them, but as time went by he did not think so. S-17, p. 5. Student E, who was the closest to the Appellant, told OPP the following: "I can see how people who do not know the circumstances could see it as inappropriate. When you think about it that way, this investigation actually makes sense." S-18, p. 5. "I know that this must look bad on paper, but it was not like that." S-18, p. 6. "Most people would consider it 'odd' since socializing with a professor outside of school would be out of the norm. If people could hear the types of conversations we had I do not believe they would consider it to be unusual." S-18, p. 8.

65. Four students had distinctly negative reactions to the Appellant's conduct. Student OO felt the Appellant's invitation for a math team party and sleep-over was odd. He saw the Appellant's mention of movies and video games as loading the event with incentives for them to attend. He refused the party invitation on his own, due to these feelings, without consulting his parents. Testimony of Student OO. Students L, M and N -- the girls involved in the Tolo dance incident -- reacted negatively to what they viewed as the Appellant's uninvited insertion of himself into their personal lives. They rejected his invitation for a ride to a restaurant on their own, not because of a parental directive. Testimony of Students L and N. Students L and M told the principal that the Appellant's conduct was "weird". S-8, p. 6.⁵

66. All of the parents who testified at the hearing or were interviewed by the principal had negative reactions to the Appellant's conduct, with the exception of Student H's father. Student H's parents had a social relationship with the Appellant, based on all of them being from Hawaii.⁶ The Father of Student H told the principal he was aware of his son's interactions with the Appellant. He said the Appellant was a family friend and that he and his wife trusted the Appellant. S-10, p. 7. The negative reactions by the other parents were as follows.

⁵ Another girl complained to an I.S. teacher, and then to the principal, about the Appellant's relationships with students, particularly about his intervening between herself and her boyfriend. S-6, pp. 1 - 2. This girl did not testify at the hearing.

⁶ The Appellant testified that he also knew the parents of Students A and B from his church. However, Student A stated that his family had not attended that church since he was 10 years old. Student A spoke of no relationship between his parents and the Appellant. Student B did not testify.

67. The Stepfather of Student K was concerned by the Appellant's level of involvement with Student K outside of school. He discussed with his stepson that this level of involvement was unusual and may raise concerns over time. Testimony of Stepfather of Student K.

68. The Mother of Student K was extremely shocked when she found the Appellant had spent the night in her son's bedroom without her knowledge. She interpreted his behavior as "grooming". S-10, p. 5; Testimony of Mother of Student K. Both she and her husband testified they never gave the Appellant permission to give rides to their son, yet the Appellant did so. She asked her son not to spend time with the Appellant but he did not obey. He kept meeting with the Appellant because his friends did. In the incident at Wilburton Park, she attempted to follow the Appellant's van but lost him. After the Wilburton Park incident and the incident where the Appellant spent the night in her home (both in Summer 2007), she no longer asked her son to stop seeing the Appellant, but actually forbade him from seeing the Appellant. Nevertheless, Student K disobeyed her. Testimony of Mother of Student K.

69. The mother of Student I does not speak English well. The principal interviewed her and wrote that she was confused by the Appellant spending a lot of time with her son and his friends. She said it was strange, but thought she should be able to trust a teacher. S-10, p. 7.

70. The mother of Student L thought it was odd and very strange that the Appellant offered to drive her daughter from the Tolo dance to a restaurant. She stated that if the Appellant was concerned about the girls, he should have contacted their parents first and asked what the parents wanted before inviting them to ride with him to a restaurant. Testimony of Mother of Student L. She contacted the principal and told him she was very concerned about the incident. At his request, she put her concerns in writing. S-9.

71. The father of Student M, another girl involved in the Tolo incident, also told the principal he was upset about the Appellant's interactions with the girls. S-10, p. 3. He did not testify at the hearing.

72. The mother of Students E and G felt very conflicted over the situation with the Appellant. She wanted to curtail her sons' involvement with him, but she felt unable to do so because they so strongly wanted to continue that involvement. She would stay up until the Appellant left her home, sometimes in the small hours of the morning. Her normal bedtime was 10:30 or 11:00 p.m., but she stayed up until 2:30 a.m. approximately five times when this occurred. The Appellant did not ask her permission before starting to invite her sons out. He would tell her where he was taking the boys only if she asked him. She was unaware that they sometimes went as far as Alki Beach in Seattle. The Appellant spent time at her house often, never asking her permission to do so. He used the separate entrance to the basement, as her son's friends did.

73. The Mother of Students E and G always felt badly for not establishing ground rules with her sons from the beginning about the situation. She discussed her concerns with them, saying the Appellant might be a great guy but could have bad intentions. She asked them to tell her if anything of that nature occurred. However, she was not sure they would. So she looked for signs of stress in them, but did not see such signs. She also faulted herself for not telling the

Appellant early on that he must communicate with her, rather than the boys, about his activities with them. She did say no to Student G about two invitations the Appellant extended to him: to spend Thanksgiving at the Appellant's house alone with him, and to stay on in Hawaii and vacation with him.

74. The Stepfather of Students E and G was very uncomfortable with the Appellant's conduct, according to the Mother. Soon after they married in July 2007, right after Student G graduated from high school, she wrote an email to the Appellant asking him to confine his interactions with Student E to school activities. The impetus to do this was because Student G would no longer be with Student E during the Appellant's outings, and also because her new husband was uncomfortable with the Appellant's conduct. The Appellant never replied to her email. He did, however, comply with it. Testimony of Mother of Students E and G.

Lindsay Brown's Testimony

75. The Appellant presented testimony from Lindsay Brown (formerly Lindsay Griffin), a teacher from Central Washington who received a reprimand from OSPI in 2010. The reprimand was occasioned by a short period during which she exchanged many text messages with a student outside of school hours and not related to education. A-3. Ms. Brown testified that the reprimand has made it very difficult for her to obtain consistent employment as a teacher. After part-time substitute teaching for a few years, she accepted a full-time classified position with a school district. Testimony of Brown; A-3; A-4.

76. OSPI moved to exclude Ms. Brown's testimony and related exhibits from the hearing as irrelevant. The ALJ admitted the testimony and some of the exhibits, but stated that a ruling on their relevance would be deferred until after the ALJ had received closing briefs from the parties on this matter. This issue is addressed in the Conclusions of Law, below.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in a suspension or revocation hearing lies with OSPI. WAC 181-86-170(2). 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).

Hearing De Novo

4. The Appellant argues that this tribunal is limited to reviewing the evidence relied upon by OPP in reaching its Final Order, or only hearing from witnesses interviewed by OPP. See Appellant's Motion in Limine, Appellant's Closing Brief, at pp. 23 – 25, and arguments made orally during the hearing. This conflicts with the Administrative Procedure Act (APA), RCW 34.05.449, 34.05.452 and 34.05.461. Those statutes provide that the ALJ shall hear testimony from witnesses, including cross-examination and rebuttal testimony, shall decide on objections and the admission of evidence, and shall issue findings of fact and conclusions of law. "Findings of fact shall be based exclusively on *the evidence of record in the adjudicative proceeding* and on matters officially noticed in that proceeding." RCW 34.05.461(4) (italics added). This means a *de novo* hearing, with findings of fact based on the record of evidence taken in the *adjudicative proceeding*, not the OPP proceeding. The evidence before OPP may be offered as exhibits in the adjudicative proceeding before the ALJ, but that hearing is by no means limited to such exhibits.

5. If the ALJ were limited to reviewing OPP's decision and the evidence facts relied upon by OPP, in other words sitting in appellate review of OPP's proceedings, there would be no need for testimony from witnesses, or at most witnesses could be questioned only about their statements to OPP. The ALJ would review the written records received by and created by OPP this material, and would then determine whether an erroneous decision had been reached. That is not the nature of the hearing provided for in the APA. Instead, the ALJ must base his or her findings of fact on the testimony heard at the adjudicative proceeding and the exhibits admitted therein. The APA contains no limitation that the ALJ may only review evidence relied upon by the underlying administrative agency, or only hear from witnesses interviewed by that agency.

6. Like the APA, the regulations on teacher discipline require a full adjudicative hearing when teachers appeal an OPP order. See WAC 181-86-150(2). Under the Appellant's argument, teachers would be afforded a *lesser* degree of due process than they are entitled to under the APA or OSPI regulations. A full adjudicative hearing constitutes a higher level of due process than a simple review of the record compiled by OPP proceedings. For these reasons, the Appellant's argument against a hearing *de novo* is rejected.⁷

⁷ As the ALJ stated during the hearing, taking evidence on distinctly new matters would be an unfair surprise to the Appellant and would violate his due process rights. For instance, if OSPI had attempted to introduce evidence at the hearing that the Appellant furnished alcohol to students during the meals he had with them at restaurants, or engaged in sexual touching of them during the overnights at issue, this would be distinctly different conduct than the conduct the Appellant knew he was accused of. If such evidence was presented for the first time at the hearing with no prior notice to the Appellant, he would be deprived of the opportunity to seek discovery about those allegations and prepare to meet them with effective cross-examination and the presentation of witnesses and exhibits to counter them. The requirements of due process are a different matter than whether this tribunal sits in appellate review of

Hearsay Evidence and the Clear and Convincing Standard of Proof

7. The Appellant argues that hearsay evidence should not be admitted in a case where the standard of proof is clear and convincing evidence. Appellant's Closing Brief at pp. 26 – 27. The APA provides:

Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *Findings may be based on such evidence even if it would be inadmissible in a civil trial.* However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

RCW 34.05.461(4) (italic added). At several points in this decision, findings of fact are based exclusively on hearsay evidence from persons who were interviewed by the principal or OPP, but not called to testify at the hearing, e.g., teacher Brad Moore and the Mother of Student I. This does not unduly abridge the parties' opportunities to confront witnesses or rebut evidence because both parties had advance knowledge of this hearsay evidence (it is set forth in documents that were in their possession prior to the hearing), and they could have called the declarants to testify as witnesses.

8. RCW 34.05.461(4) allows for the admission in APA proceedings of hearsay evidence that would be inadmissible in a civil trial. It contains restrictions on the circumstances under which such hearsay evidence may be admitted, but no restriction based on the standard of proof applicable to the case. There are numerous types of adjudicative proceedings where the standard of proof is clear and convincing evidence. Yet RCW 34.05.461(4) contains no exception for those cases. The Appellant cites no legal authority – in statute or case law – for such an exception. His argument is rejected.

Standards for Suspending a Teaching Certificate

9. RCW 28A.410.090(1)(a) authorizes OSPI to suspend a professional educator certificate "based 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."

10. OSPI may suspend a professional educator certificate in situations including the following:

The certificate holder has committed an act of unprofessional conduct or lacks good moral character but the superintendent of public instruction has determined that a suspension as applied to the particular certificate holder will probably deter subsequent

OPP's proceedings, or is instead required to assemble a new record of evidence and base its findings of fact on that record.

unprofessional or other conduct which evidences lack of good moral character or personal fitness by such certificate holder, and believes the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension. Such order may contain a requirement that the certificate holder fulfill certain conditions precedent to resuming professional practice and certain conditions subsequent to resuming practice.

WAC 181-86-070(2).

11. 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.

12. Regarding private conduct versus professional conduct, the regulations state the following:

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.

WAC 181-87-020.

13. "Student" is defined in the regulations 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.

WAC 181-87-040.

14. OSPI has carried its burden of proof and established by clear and convincing evidence that the Appellant committed acts of unprofessional conduct. His conduct was unprofessional for five reasons.⁸

15. First, the Appellant engaged in unprofessional conduct by violating rules: a School District rule, a school rule, and a local ordinance. He held a party and sleep-over for the math team at his home in violation of the District's published rule on field trips. He did not obtain advance approval from the principal for the event, and did not obtain signed, written permission from the parents for their children to participate in the event. He exposed the District to potential legal liabilities in violation of the rule on field trips. See S-24; S-25. The Appellant violated a school rule by disobeying the explicit curfew established by the staff member in charge of the jazz choir field trip. Finally, he violated a local ordinance by being in parks after their posted closing times. He not only committed the latter two violations himself, but drew students into committing them with him. This the opposite of the professional conduct expected of an educator with students.

16. Second, the Appellant engaged in unprofessional conduct by selecting some students for vastly differential treatment as favorites. Testimony from other educators established that it is unprofessional for teachers to engage in favoritism. In addition to vastly different amounts of attention he gave to certain students, the Appellant intervened on behalf of three of them when they got in a conflict with three girls at the Tolo dance. The Appellant's favorites acted rudely, but he opined that the recipients of this rudeness (the girls) should take the initiative to reconcile with the boys. The girls felt it was the boys' obligation to apologize to them first. The girls were dismayed at the Appellant's intervention on the behalf of the boys.

17. The Appellant attempted to justify his differential treatment of some students by stating that all students had the same opportunity to have a closer relationship with him, but only some chose to do so. Testimony of Appellant. This is not true. The female students at I.S. did not have this opportunity; the evidence shows the Appellant chose only boys as close companions. Even if girls had been included, the Appellant's attempted justification fails. Many students may find it odd to have such a close personal relationship with a teacher, and may have no desire for such a relationship. Because of this, the majority of students did not receive the attention provided to the few.

18. It may be argued that favoritism is not a problem because the students with whom the Appellant socialized were former students from his middle school classes, and were not currently in his classes. However, the Appellant also served as faculty advisor to several student groups that included high school students, such as the math/science team, Robotics

⁸ Many of the incidents discussed in the Findings of Fact are found unprofessional for several of the five reasons discussed here. This not intended to double or triple-count the incidents. Rather, it is to analyze the multiple reasons why the same acts are unprofessional.

club, and Associated Student Body. He also served as chaperone on Focus Weeks, field trips (such as the jazz choir trip), and attended school activities (such as the Tolo dance), all of which included high school students. He served as an advisor on high school senior projects. In all of these activities he supervised students, and students had a right to be free of the perception that some participants were the Appellant's favorites while others were not. Moreover, the Appellant might have had some of his favorites in classes again in the future had he not been required to leave I.S. after the sophomore year of most of them. Mr. Bang-Knudsen did not assign the Appellant to high school classes, but a different principal might do so in the future, as a past principal had. (There was a high turnover in principals at I.S.; the school had three principals during the Appellant's years there.)

19. The third type of unprofessional conduct by the Appellant was financial. The Appellant made numerous purchases for students, and on one occasion lent money to a student. The meals he purchased for students came to a large expense over time. The bills at Sushi Land, where they often ate, came to approximately \$50.00 a visit. They also ate at Red Robin, Applebees, Ruby's and Spazzos, with the Appellant paying the bill most of the time.

20. The testimony of all of the educators who testified (except for the Appellant) established that it is professionally inappropriate for a teacher to lavish meals and gifts on students. The School District does not allow money to change hands at all between a teacher and a student. It is easy to understand why the Appellant's conduct was professionally inappropriate. Meals and gifts can create a sense of obligation, especially if they are repeated over time. Money is a form of power, and changes relationships. Spending money on certain students but not others is also a form of favoritism.

21. The fourth reason the Appellant's conduct was unprofessional was that it interfered with relationships between parents and students, and usurped the parental decision-making role. He took students on outings without informing parents and without seeking their permission. He simply assumed he had general permission because the parents were aware of some of the outings, and did not tell him to desist. He created strife between students and their parents by injecting himself so much into their lives. The mothers of Students E, G and H agonized over their sense that the Appellant's conduct was inappropriate and potentially unhealthy for their sons, and their sons' insistence to the point of disobedience on persisting with the relationship. All of the parents who testified at the hearing or were interviewed by the principal were uncomfortable with the Appellant's relationship with their children, except for the Father of Student H, who had a social relationship with the Appellant.

22. The Appellant also usurped the parental decision-making role in his activities with the students. Parents may have limits on the amount of video game time they allow their children. There is no evidence the Appellant inquired of parents whether they had such limits that he should observe. Some parents may not want their children engaging in all-nighters, whether for health reasons or simply as a conduct rule. There is no evidence the Appellant inquired of parents whether they approved their children engaging in all-nighters before he engaged in them with students. Parents may even have dietary restrictions for their children, whether for religious or health reasons. There is no evidence the Appellant inquired of parents about such matters before buying many meals for their children.

23. The fifth reason the Appellant's conduct was unprofessional concerns student-teacher boundaries and potential liability for the School District. Sleeping in the same tent or bed with students, chauffeuring them around town, spending hundreds of dollars on their meals, and spending late nights in their bedrooms is in flagrant disregard of generally recognized professional standards. It resembles grooming behavior for sexual abuse, regardless of the Appellant's intent. Teachers are responsible in their conduct with students to the school districts by whom they are employed, not just to their own consciences. Several parents in this case were concerned about sexual impropriety and repeatedly questioned their sons about it. It was the Appellant's unprofessional conduct that caused this unhappy situation to occur. The Appellant may know in his heart that his intentions were pure, but parents and school administrators were not present in the tents and bedrooms to verify this. They should not have to be, because teachers should not be there.

24. The Appellant argues that his outings with students during the summer were private conduct, not subject to discipline, based on WAC 181-87-020. That regulation distinguishes between private conduct and professional conduct. However, it has an exception where those types of conduct are "not clearly distinguishable." The regulation appears mostly aimed at conduct by teachers in their private lives that has nothing to do with school or students. There, the two types of conduct are clearly distinguishable. The conduct in question in the present case was entirely *with* students. "Student" is defined broadly in the regulations, as quoted above. WAC 181-87-040. There is no exclusion in this definition for students while they are on summer break. The Appellant's defense based on some of his conduct occurring while students were on summer break is rejected.

Appropriate Level of Discipline

25. The imposition of a disciplinary order requires consideration of at least eleven factors:

Prior to issuing any disciplinary order under this chapter the superintendent of public instruction or designee shall consider, at a minimum, the following factors to determine the appropriate level and range of discipline:

- (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.

26. *Factor (1) – Seriousness of the acts, and actual or potential harm to persons or property.* The Appellant's acts were serious. He modeled for students violation of rules, and drew them into violating rules along with him. He showed extreme favoritism to certain students. He gave significant financial favors to some students. He interfered with relationships between parents and students and usurped the parental decision-making role. He flagrantly violated personal boundaries between teachers and students. He caused actual harm by creating anxiety and guilt on the part of parents, and conflicts between parents and children. He created potential harm to the School District by exposing the District to the risk of litigation for his conduct. This factor weighs against the Appellant.
27. *Factor (2) – Criminal history.* The Appellant has no criminal history. This factor weighs in favor of the Appellant.
28. *Factor (3) – Age and maturity level of participants.* The Appellant was in his mid-30s at the time in question. The students he was involved with were sophomores to seniors in high school. This is an age difference of two decades. The Appellant was an experienced teacher, not a novice, having taught full-time for eight years at the time the events in question began in 2006. This factor weighs against the Appellant.
29. *Factor (4) – Proximity or remoteness of time of the events.* The events in question occurred between 2006 and 2008, which is four to six years ago. This is not remote in time. This factor weighs slightly against the Appellant.
30. *Factor (5) – Whether conduct demonstrates a disregard for health, safety or welfare.* The Appellant's conduct demonstrates a disregard for the welfare of students, parents, and the parent-child relationship, for the reasons discussed under factor (1), above. His fast driving with students in his vehicle in the Wilburton Park incident demonstrates a disregard for their safety. This factor weighs against the Appellant.
31. *Factor (6) – Whether conduct demonstrates a behavioral problem.* The Appellant's repeated violation of the principal's directives regarding conduct with students demonstrates a behavioral problem. Even when warned and directed not to engage in certain interactions with students, the Appellant was unable to conform his conduct to those requirements. The Appellant's repeated untruthfulness to this tribunal about his interactions with students also demonstrates a behavioral problem. This factor weighs against the Appellant.
32. *Factor (7) – Whether conduct demonstrates a lack of fitness.* The Appellant's conduct demonstrates a lack of fitness to teach children, for the reasons discussed under factors (1), (5) and (6), above. This factor weighs against the Appellant.
33. *Factor (8) – Discipline imposed by any governmental or private entity.* The Appellant had one prior instance of discipline: a letter of reprimand in February 2008. However, the conduct for which he was reprimanded in February 2008 is dissimilar from the conduct at issue here. The District chose not to discipline the Appellant for the conduct at issue here. It believed

he was capable of correcting his conduct once removed from the students with whom he had developed close relationships. The District therefore transferred him to another school rather than disciplining him. This factor weighs in the Appellant's favor.

34. *Factor (9) – Aggravating or mitigating circumstances.* The Appellant's violation of the principal's directives concerning his future interactions with students is an aggravating factor. The Appellant's untruthfulness to this tribunal on several matters is also an aggravating factor. As discussed under factor (6), these weigh against the Appellant.

35. The support for the Appellant reflected in the testimony of six former students who knew him well is a mitigating factor. They testified to no inappropriate conduct of a sexual nature by him, and they do not believe the Appellant's teaching certificate should be suspended. This weighs in favor of the Appellant.

36. *Factor (10) – Information to support character and fitness.* There is no additional information to support the Appellant's character and fitness not already discussed above.

37. *Factor (11) – Any other relevant information submitted.* The potential effect on a teacher's employment prospects from OPP discipline is not one of the factors listed in WAC 181-86-080. The Appellant argues it should come within the provision of WAC 181-86-080(11) for "[a]ny other relevant information submitted." This provision is not for any and all information submitted; it is restricted to "relevant" information. The factors in WAC 181-86-080 all focus on the teacher's conduct and background. There is no mention in any of the statutes or regulations on teacher discipline of a teacher's career prospects as a relevant consideration. Nor is this factor considered in any of the 15 OPP orders submitted by the Appellant (see A-7) or the additional OPP order cited in the Appellant's Closing Brief at p. 20. Without some basis in statute, regulation, OPP orders, or case law for finding this to be "relevant information" (WAC 181-86-080(11)), there is no basis for expanding the type of matters to be considered in determining teacher discipline. If it were a relevant factor, it would have been considered in *all* OPP cases, not just this one. For these reasons, the testimony of Lindsay Brown, and the related exhibits A-3 and A-4, are found not relevant to this proceeding. They are not considered in deciding on the Appellant's discipline.

38. After considering the Appellant's conduct, the factors discussed above, and OPP orders in the cases of other teachers, it is determined that the 12-month suspension of teaching certificate imposed by OPP is appropriate. If only the Appellant's original conduct were considered, then the length of the suspension would have been somewhat reduced. This is because he did not attempt to conceal his relationships with students at the time they were happening, and because the students testified to no sexual or exploitative behavior by the Appellant. However, the Appellant's violation of the District's directives in order to continue his personal relationships with students shows that he has a behavioral problem. His untruthfulness to this tribunal on several factual matters, and his overall minimization and justification of his conduct during the hearing, are additional reasons why the 12-month suspension is warranted. A school district must be able to rely on a teacher to be truthful about his relationships with students and to adhere to its directives about such relationships, especially if the teacher has a history similar to the Appellant's history.

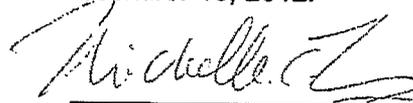
Conditions for Reinstatement of Certificate

39. The conditions required by OSPI for reinstatement of the Appellant's teaching certificate are reasonable. Essentially, he will be required to undergo an examination by a psychologist mutually agreed upon by himself and OPP, comply with any treatment recommendations made by the psychologist, and allow OPP access to the psychologist's and treatment records if requested. These are reasonable requirements given how far outside the personal boundaries for appropriate student-teacher relationships the Appellant's conduct went, and the behavioral problem discussed herein. These are similar to the conditions for reinstatement imposed in several of the orders of suspension placed in evidence by the Appellant. See A-7.

ORDER

1. The Appellant's Washington State teaching certificate no. 363652H is suspended for twelve (12) months, as ordered in OSPI's Final Order of Suspension of November 14, 2011.
2. In order to obtain reinstatement of his Washington State teaching certificate, the Appellant must comply with the conditions for reinstatement set forth the in OSPI's Final Order of Suspension of November 14, 2011.

Dated at Seattle, Washington on December 18, 2012.



Michelle C. Mentzer
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 30-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 and that no stay of reprimand, suspension, or revocation shall exist until the Appellant files an appeal in a timely manner pursuant to WAC 181-86-155.

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.

Jason Len
c/o James A. Gasper, Attorney at Law
PO Box 9100
Federal Way, WA 98063-9100
via US Mail, Certified Mail, and fax

Catherine Slagle, Director, OPP, OSPI
PO Box 47200
Olympia, WA 98504-7200
via US Mail and fax

Dierk Meierbachtol, Assistant Attorney General
Aileen Miller, Assistant Attorney General
PO Box 40100
Olympia, WA 98504-0100
via US Mail and fax

cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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

IN THE MATTER OF
MICHELE TAYLOR
CERTIFICATION NO. 378311E

TEACHER CERTIFICATION
CAUSE NO. 2011-TCD-0001

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing was held on this matter before Administrative Law Judge (ALJ) Johnette Sullivan on May 21 to 24, May 29 to 31, and June 7, 2012, at Yakima, Washington. The Appellant, Michele Taylor, appeared and was represented by Joseph W. Evans, attorney at law. The Office of Superintendent of Public Instruction (OSPI) appeared through Catherine Slagle, director of the Office of Professional Practices (OPP), and was represented by Anne Shaw, assistant attorney general (AAG).

Testimony was taken under oath or affirmation from twenty five witnesses: eleven current or former high school students¹ of East Valley School District (EVSD), John Schieche (EVSD Superintendent), Mike Messenger (EVSD Assistant Superintendent), Mark Hummel (former Principal EVSD high school), Dorthea Seay (current Principal EVSD high school), Mark Mochel (EVSD high school teacher and coach), Dawn Young (EVSD high school counselor), Dwaine Morrison (EVSD high school teacher and coach), Erin Pitzel Uren (EVSD high school teacher), Victoria Lamar (EVSD high school main office manager and mother of Appellant), Catherine Slagle (Director, OPP), Michele Taylor (Appellant), Kevin Taylor (Appellant's husband), Meranda Smith (Appellant's sister), and Koreena Sedge (Appellant's cousin).

The following documentary evidence was admitted: Joint Exhibits JT1 - JT37; Appellant's Exhibits A-C, D (excluding withdrawn pages 17, 21-37, 44-54), H, L-M, O-S, Y, AE-AG, and AJ; OSPI's Exhibits 2-6, 8-10, 12-13, and 20; admitted for identification purposes only OSPI's Exhibits 14A, 15-19, and 20-22. Appellant withdrew Exhibits E-G, J-K, N, T-X, Z, AA-AD, and AI. OSPI withdrew Exhibits 7, 11 (replaced with redacted version 11A), and 14B.

After considering the objections and legal arguments of the parties, the following documentary evidence was excluded pursuant to RCW 34.05.451 and .461 and in furtherance of the principles of due process: Appellant's Exhibit AH (witness questioned about excerpted version; full 81-page report offered after witness excused); OSPI's Exhibit 1 (not compliant

¹ To protect identity and confidentiality, students who testified, and students who were mentioned by name by witnesses, are identified by letter designation.

with RCW 5.44.040; no witness was referred to Exhibit 1 and asked to confirm statements attributed to the witness during testimony; and for the reasons outlined in letter to counsel dated June 1, 2012); OSPI's Exhibit 11A (to which OSPI did not refer Appellant during questioning when she testified as OSPI's direct witness or upon cross examination when she testified in her own defense).

The record closed June 22, 2012. The due date for the written decision in this matter is 90 days after the close of the record, pursuant to the Administrative Procedure Act, Revised Code of Washington (RCW) 34.05.461(8)(a), on September 20, 2012.

PROCEDURAL BACKGROUND

On February 11, 2010, the EVSD Superintendent sent a letter to OPP, alleging acts of unprofessional conduct on the part of the Appellant. Exhibit JT 1. On June 16, 2011, OSPI issued a Proposed Order of Revocation against the Appellant's teaching certificate, from which the Appellant appealed on July 13, 2011. Exhibit JT 4. On September 14, 2011, OSPI issued an Amended Proposed Order of Revocation. Exhibit JT 3.

On November 18, 2011, a review officer issued a Final Order of Suspension, after reviewing the files and having considered the arguments of each party and the recommendations of the Admissions and Professional Conduct Advisory Committee (APCAC). Exhibit JT 5. Appellant filed a notice of appeal on December 7, 2011. Exhibit JT 6. The matter was assigned to the Office of Administrative Hearings (OAH) to assign an ALJ to conduct an administrative hearing and issue a decision.

OAH mailed the parties a Scheduling Notice on December 9, 2011, which set a prehearing conference for January 3, 2012, and a hearing for January 19, 2012. The parties agreed to reschedule the hearing for a two week period beginning on May 21, 2012.

ISSUES

On January 13, 2012, the parties submitted an agreed Joint Issue Statement:

1. Has OSPI shown by clear and convincing evidence that Appellant violated WAC 181-86-013(3) and WAC 181-86-014 by exhibiting a behavior problem which endangered the educational welfare or personal safety of students, teachers, or colleagues within the education setting through her interactions with and treatment of Students A, B and C?
2. Has OSPI shown by clear and convincing evidence that Appellant violated WAC 181-87-060 through her flagrant disregard or clear abandonment of generally recognized professional standards in the course of her assessment, treatment, instruction, or supervision of Students A and B?

3. Has OSPI shown by clear and convincing evidence that Appellant violated WAC 181-86-013(3), WAC 181-86-014, and/or WAC 181-87-060 as set out in issues 1 and/or 2 above and that a one-year suspension as set out in the Review Officer's Decision of November 18, 2011, is the appropriate discipline in this matter?

FINDINGS WITHDRAWN

The Final Order of Suspension issued by OSPI on November 18, 2011, was timely appealed by Appellant on December 7, 2011. During this administrative hearing, OSPI withdrew three allegations. Finding No. 15, that Appellant invited Student B over to her house while indicating that her husband was not going to be at home, is withdrawn. Finding No. 23, that Appellant's mother told the high school principal that she told Appellant that Appellant should not be texting male students like Appellant was doing, is withdrawn. The last sentence of Finding No. 29, that Appellant refused to be interviewed for the school district investigation, is withdrawn. OPP continues to recommend a one-year suspension as an appropriate sanction based on the remaining findings.

FINDINGS OF FACT

1. The Appellant holds Bachelors and Masters Degrees in Education, and Washington Education Certificate No. 378311E, which was issued on June 27, 2000. Her endorsements are in grades K-12 physical education and grades 4-12 in health. She is not a school psychologist or counselor.
2. Appellant was educated in EVSD schools, where she was a student athlete. On her 16th birthday, she met another EVSD athlete, Kevin Taylor. They continued to date after he graduated and moved to Spokane to attend college on a baseball scholarship. Appellant graduated the next year, and moved to Centralia to attend a community college on a softball scholarship. She moved again to complete her education at Eastern Washington University. She continued to date Mr. Taylor through her college years. Appellant completed her Masters degree at Central Washington University.
3. In 1999, when Mr. Taylor was playing semi-pro baseball in California, he arranged an elaborate public marriage proposal to Appellant during a game on the Fourth of July. They were married July 1, 2000.
4. Appellant and her husband each began their teacher careers with the Yakima School District. Appellant also coached middle and high school girls' fast-pitch softball, volleyball, basketball, and soccer. Her performance reviews were satisfactory.
5. Appellant's husband found employment with the EVSD, and they bought a home in the district in March 2001. Mr. Taylor teaches at EVSD elementary school.

6. Appellant and her husband were heartbroken on the death of their first child in 2003. The East Valley community in which they had grown up and to which they had returned offered comfort and support.

7. In February 2004, after a medically difficult pregnancy, Appellant and her husband became the parents of triplets. The infants required extended medical care after birth. The East Valley community again offered comfort and support, including a fundraiser of \$7,000.

8. EVSD offered Appellant part-time work as a physical education teacher for the 2004-2005 school year. The contract was for a 0.50 full-time equivalent (FTE) position.

9. Appellant's mother also works for the EVSD, as secretary to the principal and manager of the high school's main office.

10. For the 2008-2009 school year, EVSD increased Appellant's contract from 0.50 to 0.82 FTE. She was assigned four classes (3rd through 6th Period) plus a Connections class of sophomores. She was paid under the contract from 8:52 a.m. to 3:00 p.m. She was assigned to second lunch.

11. Appellant, her husband, and especially their triplets, were well known in the East Valley community. She was a popular teacher with satisfactory performance reviews, and well liked among EVSD teachers, students, and administrators. Appellant was anticipating teaching full time for the 2009-2010 school year, until EVSD placed her on paid administrative leave on June 9, 2009.

12. Appellant seeks reversal of the suspension order, asserting that she would not be facing the current allegations were it not for earlier high profile sensational allegations which resulted in criminal charges. The state failed to prove the criminal charges beyond a reasonable doubt and Appellant was found not guilty. Described by the parties as the "statutory hearing," a civil matter followed in which EVSD sought to end the employment relationship. The hearing officer determined EVSD failed to prove many allegations by a preponderance of the evidence. As to the allegations which were proven, the hearing officer concluded termination was not appropriate because the behaviors were remediable. EVSD appealed. This third-legal proceeding followed. The more sensational and serious allegations rejected by the jury and the statutory hearing officer are not at issue here.

Credibility Considerations

13. Appellant describes this as a "she said-he said" case, pitting a solid member of the community, a teacher of good character, a Christian wife and mother, against a troubled boy from a dysfunctional family who was emotionally and mentally unstable (Student A). OSPI contends Appellant inexplicably behaved in a manner contrary to the tenets of her profession,

her employer's policies, and her Christian values, and holds her responsible because she was the teacher and the adult in the matter.

14. Appellant argues that Student A's failure to preserve the contents of text messages or the fact that he deleted them, particularly the last 200 texts exchanged June 7-9, 2009, should cause the administrative law judge to infer that they would have been relevant and favorable to Appellant or, conversely, unfavorable to the position taken by OSPI.

15. The evidence is not simply "Appellant said-Student A said." Other students who read the text messages supported Student A. Students described texts about events which actually did occur. Student A knew personal details about Appellant's life, described to him by Appellant. If Student A said and did the things reported by Appellant, then she did not behave in a manner consistent with a reasonable teacher. Appellant's testimony conflicted with that of many students, and with the testimony of Principal Hummel and Coach Morrison.

16. Student A shared with Appellant about his life. In 8th grade, Student A was suspended for initiating a fight, but the evidence establishes it was an isolated incident. He resisted referral to a counselor. Student A witnessed a violent crime some years prior in Mexico. A brother had drowned in a canal. One older brother was preparing for military service, another for college. His sister had married and left home in 2008. Student A lived with younger sisters and his mother, who spoke only Spanish. For several years, his father was seriously ill and required hospitalization and nursing home care. His father died in January 2009, after life support was removed.

17. Appellant described Student A as a deeply troubled boy who was emotionally and mentally unstable. However, Student A earned A's and B's his freshman year in courses including Agricultural Science, Microcomputers, Freshman English, German, Core Math, Intro to Fitness, and World History. His choice of German as a freshman elective was indicative of a student on a college career path. He was described by several coaches and teachers as a quiet leader. Other witnesses described him as quiet and respectful. His freshman football coach described him as a group leader, and while "boys will be boys" with bad language or telling stories, not so with Student A, who did not swear and displayed good morals. Sometime after June 2009, a friend asked the coach about Student A dating his daughter, and the coach approved and assured the friend of Student A's character. Student A had no absenteeism or disciplinary problems at EVSD high school. No other teacher or coach expressed a concern about Student A's behavior or reported observing signs of mental or emotional instability. Appellant's description of Student A was not shared by any other teacher or witness who regularly interacted with him.

18. Appellant asserts she did not hide text exchanges with Student A which occurred while she was in the presence of her mother, sister, friend, and hairdresser (her cousin). By mid-May 2009, her husband learned she exchanged text messages with Student A. However,

Appellant did hide that she was sharing secrets and personal confidences about herself with Student A. None of her supporting witnesses knew that Appellant exchanged text messages with Student A during the school day at times he was scheduled in other teachers' classrooms.

19. Appellant admits she behaved in a manner contrary to her marital vows and Christian values at a bachelorette party in Seattle on May 16-17, 2009. The indiscretion should have remained private, but Appellant told Student A and he told other students. To justify why she told Student A about the indiscretion, Appellant told the jury in the criminal matter that Student A was being hard on himself about mistakes he had made. She said she mentioned the indiscretion as an example of mistakes she regretted, to explain how everybody makes mistakes, that she apologized to her husband, and moved on from there. Exhibit 17, page 27. During the statutory hearing, Appellant had to concede she had not apologized to her husband in 2009. She asserts she did not mislead the jury; rather, she lied to Student A. Exhibit 18, pages 32-33. In this third legal proceeding, Appellant admits the details about the May 2009 indiscretion were revealed to her husband in spring 2010 when she knew the information would be made public at the criminal trial. OSPI contends Student A knew that Appellant had not told her husband about the indiscretion, a fact he would not otherwise have known but for Appellant's confessing to him. Appellant explains she lied to Student A in 2009 in order to encourage him to do the right thing.

20. Most witnesses were asked to recall events which occurred three years ago in the 2008-2009 school year. Most witnesses had previously testified about these matters twice before in earlier criminal and civil proceedings, and some had also been deposed.

21. To make findings supported by clear and convincing evidence, it was necessary to assess and weigh witness testimony and documentary evidence, and make credibility determinations. In resolving conflicting testimony, the administrative law judge considered the demeanor and motivation of the witnesses, the logical persuasiveness of the parties' positions, consistency with prior testimony, and the totality of circumstances.

22. Based on the foregoing factors, the administrative law judge finds that OSPI's witness testimony and other evidence is clear, convincing, and more logically persuasive than the Appellant's, and has formed the basis of the Findings of Fact related to these issues.

EVSD Daily Schedules

23. During the 2008-2009 school year, EVSD high school students attended six class periods daily plus a Connections class. The assignment to first or second lunch period determined the students' and teachers' schedules for 4th period. EVSD allotted 5 minutes to pass from one class to the next. Mondays began with staff "Collaboration," and 42-minute class periods for students starting at 8:50 a.m. The "regular" Tuesday through Friday periods

were 52 minutes starting at 7:50 a.m. On occasion the periods were shortened by 10 minutes to allow a 30-minute period at day's end for a school-wide activity. Connections was scheduled daily for 25 minutes. The students' school day ended daily at 2:26 p.m.

24. Below is the "bell schedule" observed by students and teachers for the 2008-2009 school year:

| | Collaboration Monday | Regular Tues - Friday | Activity Day |
|------------------------|----------------------|-----------------------|---------------|
| Collaboration | 7:50 - 8:35 | | |
| 1 st Period | 8:50 - 9:32 | 7:50 - 8:42 | 7:50 - 8:37 |
| 2 nd Period | 9:37 - 10:19 | 8:47 - 9:39 | 8:42 - 9:29 |
| 3 rd Period | 10:24 - 11:06 | 9:44 - 10:36 | 9:34 - 10:21 |
| Connections | 11:11 - 11:35 | 10:41 - 11:05 | 10:26 - 10:47 |
| First Lunch | 11:35 - 12:05 | 11:05-11:35 | 10:47 - 11:17 |
| 4 th Period | 12:10 - 12:52 | 11:40-12:32 | 11:23 - 12:10 |
| 4 th Period | 11:40 - 12:22 | 11:10 - 12:02 | 10:52 - 11:40 |
| Second Lunch | 12:22 - 12:52 | 12:02 - 12:32 | 11:40 - 12:10 |
| 5 th Period | 12:57 - 1:39 | 12:37 - 1:29 | 12:15 - 1:03 |
| 6 th Period | 1:44 - 2:26 | 1:34 - 2:26 | 1:08 - 1:56 |
| Activity Period | | | 1:56 - 2:26 |

EVSD Policies and Procedures

25. EVSD Staff Handbook. In August 2008, Appellant received a Staff Handbook for the 2008-2009 school year. Exhibit JT 12.

26. The Staff Handbook described the Connections Program. Each staff member serves as a "coach" to a group of approximately twenty students. The coach is responsible to help supervise and guide the students to complete the requirements of the program. The group is of students all of one grade, and remains with the coach for the four years of high school. Each coach represents a caring staff member who encourages the students in their group to connect in a positive manner within the school, to build connections with staff, and to understand the connections between their efforts in school and their post secondary opportunities and success. Connections meets daily for approximately 25 minutes as a graded class that impacts cumulative grade point average.

27. To meet new state non-credit graduation requirements, EVSD chose to monitor and support the requirements through the Connections Program. EVSD designated Tuesdays as the day for coaches and students to focus on the senior culminating project, career pathway exploration/job shadow/presentations, and community service activities. EVSD remained committed to its original goal to have every student reading silently every day for 25 minutes, with the exception of Tuesday activity days as needed to comply with the non-credit graduation requirements. Connections is not a study hall, and reading from class room textbooks or for homework is not appropriate. The Staff Handbook described in detail the type of reading-related activities which might extend beyond Tuesdays at the coach's discretion, not at the student's discretion.

28. The Staff Handbook section on Electronics in the Classroom states:

It is important that all staff members consistently enforce the school expectations regarding electronic devices at school. The policy is written as follows in the student handbook—

East Valley High School strongly discourages students from bringing electronic devices to school as they are prime targets for theft. The school will assume no responsibility for lost, misplaced, damaged or stolen electronic devices, including no responsibility to attempt to recover stolen electronics. **Electronic devices are not permitted into any classroom or learning environment, including the library and auditorium, at any time.** If brought to school, the student is responsible to ensure that they are in a secured area, such as a locker, while the student is in class. Students observed to have electronics (i.e. cell phones, I-pods, MP3 Players, CD players, audio and/or video recorders, video games, etc.) in their possession in a learning environment will be disciplined. The possession of camera phones in private areas such as locker rooms and restrooms is strictly forbidden and will carry the consequence of a suspension for a first time offense.

As a way of modeling this expectation, teachers should also limit their own cell phone use to non-instructional times.

29. The Staff Handbook addresses Parent Communication, a target area from the 2007-2008 school improvement plan to improve communication with parents. At the end of each month, secretaries place EVSD post cards in each teacher's mail box for use to send home a positive note about a student. The Staff Handbook states additional cards may be obtained from Mrs. Lamar, the EVSD high school main office manager and Appellant's mother. A quick check-off form to communicate a concern about a student was also developed, available in the office in English and Spanish.

30. The Staff Handbook section on Supervision of Students reminds teachers that leaving students unsupervised places both the teacher and the district in a situation of increased liability. Leaving a classroom unattended should only occur in emergency situations. In the event a teacher finds it is necessary to leave a classroom, the expectation is to "please notify a neighbor and minimize the time out of the classroom."

31. EVSD Policies Nos. 5100 and 2022. The Electronic Information System and Interschool and Electronic Mail and Message Delivery policies do not describe any of the conduct at issue here. Exhibit JT 25.

32. EVSD Policy No. 5242. Entitled Maintaining Professional Staff/Student Boundaries, the purpose of the policy is to provide staff, students, volunteers, and community members with information to increase their awareness of their role in protecting children from inappropriate conduct by adults. Exhibit JT 26. The EVSD Board of Directors expects all staff members to maintain the highest professional, moral, and ethical standards in their interaction with students. Staff members are required to maintain an atmosphere conducive to learning, through consistently and fairly applied discipline and established and maintained professional boundaries. The interactions and relationships between staff members and students should be based upon mutual respect and trust, an understanding of the appropriate boundaries between adults and students in and outside of the educational setting, and consistent with the educational mission of the schools.

33. Policy No. 5242 further provides that staff members will not intrude on a student's physical and emotional boundaries unless the intrusion is necessary to serve an educational or physical, mental and/or emotional health purpose. An educational purpose is one that relates to the staff member's duties in the district.

34. Additionally, staff members are expected to be sensitive to the appearance of impropriety in their own conduct and the conduct of other staff when interacting with students. Staff members will discuss issues with their building administrator or supervisor whenever they suspect or are unsure whether conduct is inappropriate or constitutes a violation of the policy. The EVSD Board supports the use of technology to communicate for educational purposes. However, employees are prohibited from inappropriate online socializing or from engaging in any conduct on social networking Web sites that violates the law, district policies or other generally recognized professional standards. The policy does not mention text messaging.

35. Policy 5242 provides illustrative examples of inappropriate boundary intrusions by staff members which constitute unacceptable conduct. Examples included:

- a. Singling out a particular student or students for personal attention and friendship beyond the professional staff-student relationship;

b. For non-guidance/counseling staff, encouraging students to confide their personal or family problems and/or relationships. If a student initiates such discussions, staff members are expected to refer the student to appropriate guidance/counseling staff. In either case, staff involvement should be limited to a direct connection to the student's school performance;

c. Banter, allusions, jokes, or innuendoes of a sexual nature with students;

d. Disclosing personal, sexual, family, employment concerns, or other private matters to one or more students;

e. Maintaining personal contact with a student outside of school by phone, email, Instant Messenger or Internet chat rooms, social networking Web sites, or letters (beyond homework or other legitimate school business) without including the parent/guardian.

Exhibit JT 26, page 3.

36. Policy 5242 further provides that, whenever possible, staff should avoid situations which can create actual impropriety or the appearance of impropriety, including being alone with an individual student out of the view of others, inviting or allowing individual students to visit the staff member's home, or social networking with students for non-educational purposes. If unavoidable, the activities should be pre-approved by the appropriate administrator. Lacking pre-approval, the staff person must report the occurrence to the appropriate administrator as soon as possible.

37. EVSD Policy 3416. The policy regarding Medication at School anticipates that under normal circumstances medication will be dispensed before and/or after school hours under supervision of the student's parent or guardian. For school-day dispensing, each school principal may designate two staff members to administer prescribed or non-prescribed oral medication. The policy provides for adoption of procedures in each school, including written authorization from a parent and as needed, from a physician or dentist. Exhibit JT 37.

38. Appellant was not a staff member designated to administer oral medications to EVSD high school students.

EVSD Staff Training

39. In August 2009, Appellant participated in three staff training sessions. EVSD training for athletic department staff specifically defined proper and improper behavior between coaches and students, relationship boundaries, and avoiding behavior which is inappropriate or could be perceived as inappropriate. An all-staff training addressed sexual

harassment and reviewed EVSD policies and procedures. EVSD written policies did not specify newer telephone technology like text messaging. Each administrator provided training related to building-specific policies and procedures. The orientation at EVSD high school and subsequent periodic staff training included forms and procedures for its team approach to responding to teachers who reported a student-of-concern.

Student B

40. Appellant's telephone records detail the date and time of two telephone calls and over 350 text exchanges with Student B. Exhibit Jt 35.

41. On Saturday, October 4, 2008, at 2:25 p.m., Appellant sent a text message from her cellular phone to the cellular phone of Student B. She did not receive a reply text.

42. A month later, at 6:14 p.m., on Wednesday, November 11, 2008, Appellant sent a second text message to the same number. A reply text was received to which Appellant responded, and Student B sent her an incoming text one minute later. The four-text conversation was completed in about 38 minutes.

43. Appellant explains she initiated the texts after she saw the name "Hottie" in her list of contacts on her cellular phone. She was curious about who had accessed her cellular phone and added the contact and decided to text the number. She learned it belonged to Student B. Appellant did not delete Student B's telephone number from her contacts list.

44. Student B was a sophomore. Appellant was his Connections coach. After June 2009, Student B transferred to another school.

45. Appellant initiated a 9-text exchange with Student B starting at 2:15 p.m. on Friday, January 30, 2009.

46. Appellant sent one text to Student B on Wednesday, February 25, 2009, at 6:56 p.m., but received no reply.

47. Shortly after midnight on Saturday, February 28, 2009, Appellant sent one text to Student B, but received no reply.

48. Appellant sent a text to Student B on Tuesday evening, March 3, 2009. A total of 8 texts were exchanged between 5:28 p.m. and 7:33 p.m. Appellant and Student B did not exchange another text for eight weeks.

49. Appellant initiated a text exchange with Student B on Tuesday, April 28, 2009. Between 12:42 p.m. and 4:54 p.m., they exchanged over 45 text messages. Early the next

morning, starting at 5:38 a.m., Student B initiated a text exchange with Appellant, which continued until 11:33 a.m., when he placed a one minute telephone call to Appellant.

50. Appellant and Student B continued to text over the next two weeks, with some exchanges initiated by Appellant and some initiated by Student B. The texts were exchanged from very early morning to very late evening, weekdays and weekends.

51. Appellant asserts the content of the text conversations with Student B concerned the advantages and challenges of participating in the Running Start program for his junior and senior years. She recalls Student B was a twin, and near Mother's Day she reminded him that mothers of multiples are special and to treat his mother well. She also told him about her weekend plans to go to the Bloomsday run. Their final text conversation occurred on Friday afternoon, May 15, 2009.

52. Appellant admits she violated EVSD policy when, without a medical note or parental permission, she provided an over-the-counter medication to Student B. Other than her claim she knew Student B suffered migraine headaches, Appellant admits she acted without knowledge of Student B's allergies, the potential for interaction with other medications, and his medical history.

53. Appellant was alone with Student B when she dispensed the medication. Teachers are often alone with a student at school during the school day. Examples of common situations include testing, the student first to arrive for class or last to depart, and conversations after class. The evidence does not clearly and convincingly establish that in being alone with Student B, Appellant departed from EVSD's expectations.

54. On June 8, 2009, Appellant made an unusual request to the school counselors who monitored Running Start participants. She asked if it would be okay if Student B stayed assigned to her Connections class and that she be the one who would monitor his fulfillment of non-credit graduation requirements starting in the 2009-10 school year. Running Start students attend class at a community college campus rather than the high school. The counselors sought input from the principal, who replied it was Appellant's call provided she understood Student B would remain her responsibility. A counselor told Appellant it was easiest to get the kids' cell phone numbers to contact them about upcoming deadlines and the like, and Appellant asked the principal if it would be acceptable for her to do the same with Student B. The principal replied "the word of the day is document," and that Appellant was to keep a written log of every time and the manner in which she communicated with Student B as "you never know how or why it will get turned back on you." Appellant did not tell the principal she was already communicating about Running Start with Student B and had been doing so for months, or that she had not thought to keep a written log of the communications:

55. Rumors about an inappropriate relationship between Appellant and Student B

circulated amongst some EVSD high school students during the 2008-09 school term, but were not heard by Student A.

Student A

56. Student A was age 14 when he started his freshman year of high school at EVSD in the 2008-2009 school year. In second semester, Appellant became his 5th period Fitness teacher. Student A played freshman football, and in spring he played baseball.

57. All baseball players, freshmen to senior class, start the season with joint practice sessions the first week of March. During the 2009 joint sessions, Mr. Taylor directed the running and conditioning assignments. Mr. Taylor had taught and coached Student A in elementary school. On Thursday, March 5, 2009, Mr. Taylor was watching players run and talking to players as they were going by when he was deeply offended by Student A.

58. When he testified at Appellant's criminal trial in June 2010, Mr. Taylor stated that Student A passed by and asked, "Coach Taylor, how was your day today?" Mr. Taylor testified:

I said, Good. And he very sarcastically and with a smile that I'll never forget, a cocky smile, said, So was Ms. Taylor's. And I did not take that correctly at all. I was – I thought he was talking, obviously about my wife and in a very sexual manner. And so I stopped him from running at that point and brought him over to me, called him over to me, and told him specifically how that was very disrespectful for me as a coach/player relationship that you are talking about my wife. And he's just standing there listening to the conversation, staring at me and listening. And I continued to tell him how disrespectful that is. How that cannot be allowed. She is a teacher of yours. I'm your coach. There's a separation of this baseball field as my wife to be mentioned. But you need to know that I'm your coach, you're a player, and that she's your teacher and you are the student and that what you said was not taken very well. And so I told the rest of the team at that time, which I did have to shout, because we're running the perimeter of the baseball field. I had to shout that we had an extra two laps for that comment.

Exhibit 21, page 30.

59. At this administrative hearing in 2012, Mr. Taylor still considered Student A's remark to be sarcastic and intentionally sexual in nature, but his testimony differed about the remark itself. Instead of "So was Ms. Taylor's," which Student A has consistently said was intended as a reference to Ms. Taylor's day also being a good day, Mr. Taylor now claims the remark was "So was Ms. Taylor."

60. Mr. Taylor's description of Student A as just standing, staring, and listening, while Mr. Taylor continued to repeat how Student A was disrespectful, is consistent with Student A's description of being in shock because he did not know what he had said to upset Mr. Taylor.

61. Mr. Taylor later told Appellant that Student A had remarked about her in a sexual way. He told her he punished all the players by requiring them to run extra laps. Mr. Taylor knew the reaction of the other ball players, while Appellant observed Student A was being teased by other students at school. They talked about these observations extensively. Appellant observed a noticeable change in Student A's behavior at school. He had been an eager, communicative student, but avoided and barely spoke to Appellant during 5th period Fitness. Appellant spoke to Student A to ease the situation, and his embarrassment ended within a week or so.

62. Text exchanges. Seven weeks later, beginning April 24, 2009, Appellant exchanged the first of over 1,100 text messages with Student A. A few days after the text exchanges began, Student A turned 15 years of age.

63. On Friday, April 24, 2009, it happened that Student A was one of several students who did not have parental permission to go on a freshman field trip to visit Heritage University. Appellant was one of the teachers assigned to supervise the freshmen who remained behind. She decided to use the time to clean up the gym and fitness areas. Appellant allowed students to openly use electronic devices in the gym's wrestling area during at least the last 45 minutes of the school day.

64. Student A was using a new touch screen cellular telephone which could play music. Appellant sat down next to Student A and asked how to use the new style phone. Appellant provided her personal cellular telephone number, and at 1:49 p.m., a text message was sent from Student A's cellular telephone to her personal cellular telephone. She replied from her personal telephone with a text back to Student A at 1:51 p.m. Exhibit JT 34, page 1.

65. Appellant did not tell anyone about the exchange. Student A immediately told Student F, who had been seated nearby, that the Appellant had given her cellular telephone number to him, and showed Student F the text she had sent to him. Student A also told Student I about how he and the Appellant had each others' numbers.

66. On Monday, April 27, 2009, at 12:51 p.m., Appellant sent Student A one text message just before the end of her lunch period and Student A's 4th period class. Student A did not reply on April 27, 2009.

67. Appellant's behavior on April 27, 2009, and the days following, was not consistent with her description of the text she sent to Student A on April 27, 2009. Appellant claims a student's remark that Monday morning caused her to be concerned Student A was telling other

students he had her cellular number. She wondered what he might be saying about her, and whether he might be sharing her cellular number with other students. Appellant did not speak privately with Student A to discuss her concerns before or after class, after school that day, or at any time. Appellant did not delete Student A's telephone number from her contacts list. Appellant did not reprimand or discourage Student A the next day when he sent her a text at 9:13 a.m. Exhibit JT 34, page 1. Instead, she replied to Student A with a text sent at 9:19 a.m., ten minutes prior to the end of Student A's 2nd period class with another teacher. Appellant gives no explanation for how her concerns were allayed or resolved.

68. It is more credible and logically persuasive, considering the totality of the circumstances, that a 14-year old boy would recall a text sent by a teacher just before he enters her class. Student A's description is consistent with descriptions by other students of the flirtatious nature of later text messages. Student A's description is not inconsistent with the events which followed, including extensive text exchanges before, during, and after class on school days, on weekends, and all hours of the day and night. His description is not inconsistent with Appellant's subsequent disclosures about intimate details of her personal life. It is found that the substance of Appellant's text message to Student A on April 27, 2009, was to not text anything too bad because her husband was the jealous type.

69. Appellant and Student A exchanged text messages from April 28, 2009, until on or about May 12, 2009, the contents of which were general in nature, asking about each other's day, or Student A asking for advice about girls. Appellant and Student A disagree regarding the content of text messages exchanged thereafter through June 8, 2009.

70. Regarding the text messages between his wife and Student A, Mr. Taylor testified at the June 2010 criminal trial, and at this administrative hearing in 2012, that he was "completely fine with it." Exhibit 21, page 30. He credibly explained the positive influence of teachers and coaches in his own life. He was willing to guide and help students, and believed his wife had the same attitude. However, he is barely able to concede even the possibility of other meanings of the March 2009 remark, and does not believe that Student A's words could be interpreted as non-sexual. Mr. Taylor expressed strong emotion as he recounted his still-vivid memory of the remark. He remains convinced three years later, as he was convinced on March 5, 2009, that Student A intended the sexual nature of the remark, and intended to show disrespect toward Mr. Taylor right to his face. The evidence is clear and convincing that Mr. Taylor was not aware, day-to-day, of the volume of text exchanges, frequency of text exchanges, or time of day of text messages exchanged between Appellant and Student A.

71. Mr. Taylor clearly understood the standards for acceptable boundaries with students, and in that context he was fine with some conversation and limited text messaging strictly to mentor Student A. When Mr. Taylor learned from Appellant some of Student A's confidences about his family, Mr. Taylor suggested Appellant invite Student A to a family dinner. The suggestion was consistent with his upbringing, his supportive attitude, and his

understanding of acceptable boundaries to encourage students to broaden rather than isolate their community connections. He trusted his wife and her representations.

72. No party or witness to this administrative hearing preserved any of the text messages exchanged between Appellant and Student A. Appellant's relatives and friends did not read the incoming or outgoing texts on her cellular telephone. Student A's cellular telephone could store only 200 texts, and beyond that the chronologically oldest texts would be deleted one-by-one. Some days Student A exchanged 100-200 texts and found the automatic delete function to be a hassle. Sometimes he selected "delete all" to start over. There were no texts stored when he submitted his cellular phone memory card for examination by school authorities on the afternoon of June 9, 2009.

Other Students

73. Other students read texts from Appellant in Student A's cellular telephone in-box, or were with Student A when an incoming text arrived from Appellant. Student A also forwarded some of Appellant's texts to other students.

74. Student F was not a close friend of Student A, but also missed the freshmen field trip on April 24, 2009. Student F was seated on the wrestling mat next to Student A. Some students were sending texts or making calls on cellular telephones. Appellant did not stop any students from using cellular telephones. Student F saw out of the corner of his eye that Appellant sat down and talked to Student A for about 10 minutes. Student A told him that Appellant had asked how to send a text, and displayed his telephone to show Student F he had a text from Appellant. Student F read a text from Appellant that said "Hi" or something similar. Student A later told Student F that he and Appellant were exchanging text messages, but Student A did not show or describe any additional texts to Student F. Exhibit 8.

75. Student A told freshman Student I about how he and Appellant came to have each others' numbers. He showed Student I text messages from Appellant, and also forwarded text messages from Appellant. Student I was with Student A as he received an incoming message from Appellant. Student I read about 20-30 text messages from Appellant. Student I described Appellant's texts as initially casual and fairly benign. Over time, the content of the Appellant's texts to Student A became more personal and flirtatious, like friend to friend rather than teacher to student. Student I recalls reading texts like "5th period is my favorite because I get to see you," or "see your smile," and "if I was in high school you would be my type," and really wishing she could talk to Student A about a book in a text with a sad face icon. Student I recalled a text about Appellant getting married too young or too soon, and a text to the effect that Mr. Taylor found out about the texting, but believed Appellant when she said she was mentoring Student A. Student A indicated to Student I that he had asked Appellant to stop texting. Student I recalls Student A was upset, shocked, and confused while recounting a late-night telephone conversation with Appellant. After reading texts from Appellant like "I feel like

"I've been broken up with," and "I am sorry I made you feel uncomfortable," Student I urged Student A to tell a teacher or coach about it. Student I was a model student with excellent grades, and an articulate, thoughtful witness. Exhibit 2.

76. Student D was a junior. He read a text message on Student A's phone from Appellant. The text message was something about Appellant being in Seattle at a bachelorette party, and that she had been drinking. Student A told Student D that Appellant kissed someone at the bachelorette party. Student D saw a few texts and cannot recall the exact wording, but the content left him with the definite impression Appellant thought Student A was "hot." The texts were not like a self-esteem style cheer up, but more flirty. Student A did not appear to be bragging. Student D was not in any of Appellant's classes. He and Student A played football and volleyball together, but they were not close friends. Student D graduated with an overall 3.24 GPA. Exhibit 3.

77. Student G was one of Student A's best friends. Student G's overall GPA for high school is about 3.3, which was maintained while playing sports and having an outside job through most of high school. Student G's initial impression was that Student A was comfortable exchanging texts with Appellant. Student G thought the texts he saw seemed kind of personal, not like what he would expect a teacher to send to a student. Student G recalls being in the school gym with Student A and the topic of discussion was a text from Appellant regarding a bachelorette party in Seattle where Appellant did something she wasn't supposed to do. Student G can no longer recall if he actually read texts about the party, or if Student A just talked about them. Student G's impression was that Appellant had cheated on her husband. Student G observed Student A was sometimes comfortable and sometimes uncomfortable about exchanging texts with Appellant. Student G understood Student A wanted Appellant to stop texting, but he didn't know how to get Appellant to stop. Exhibit 4.

78. Student E was a good friend, but not a best friend, of Student A during their freshman year. Student E thought it was weird Student A and Appellant were exchanging texts and did not know what to think about it. Student E saw only one text message from Appellant on Student A's phone, something about if Appellant was in high school Student A would be her type of guy. Student E teased Student A and Student A stopped sharing texts with Student E. Student A did not talk much about Appellant. Student E was not interested in talking about the text exchange because Student E did not think it would turn out good for anyone. Student E maintained an overall high school GPA of 3.0. Exhibit 5.

79. Student J was a junior and was not close to Student A, but they knew each from athletics and were related by the marriage of their older siblings. On Saturday, June 6, 2009, they attended a tournament in Ellensburg. Student J recalls he was approached by Student A at lunch, and Student A began to talk about text messaging with Appellant. Student J was initially skeptical until Student A opened his cellular telephone and scrolled through a "bunch" of texts from Appellant. Student J can only remember the content of a few texts. Student J

recalls one text, something about "why can't two people be together in the same house, one with hormones and one who hasn't done anything in a while." Student J cannot recall the exact wording, but "hormone" was memorable because it seemed very odd that a teacher would send a message about hormones to a student. Student J recalled another text, something like "I'm worried you're not texting me," or "you haven't been texting me back." Student A told Student J about a late-night phone call where Appellant was purportedly in the garage so her husband would not find out they were talking. Student J understood Student A wanted to stop exchanging texts with Appellant. Student J told Student A to talk to Coach Morrison about the situation. Exhibit 6.

80. Student L was a sophomore and related to Appellant by marriage. Student L could not believe the rumors he heard about text exchanges between Appellant and Student A. He did not like that a member of his family was the subject of rumors. Student L did not go to Appellant or to Mr. Taylor. Student L talked directly to Student A, whom he knew from the March 2009 football conditioning. They were not on the same team and were not friends. Student L asked if Student A was texting Appellant. Student A took out his cellular telephone and showed a text from Appellant. Student L does not recall the content, only that it did not cause him concern. Student L asked if Student A had sent any pictures, and Student A replied he had not. Student L and Student A differ slightly in their recollection of whether Student L asked if any texts were inappropriate or asked if they were sexual, but agree that Student A replied, "No."

Other Objective Evidence

81. The testimony of student witnesses was consistent with other objective evidence. Appellant attended a bachelorette party in Seattle, on May 16, 2009, where she consumed alcoholic beverages. Appellant send text messages to Student A from Seattle on May 16 and 17, 2009, the last sent at 3:53 a.m. Exhibit JT 34, page 6. Appellant disclosed to Student A that she had kissed a man not her husband while at the Seattle bachelorette party. Appellant hosted a bachelorette party at her home on June 6, 2009, after which the party moved to a Yakima bar. She exchanged text messages with Student A through the afternoon and early evening of June 6, 2009, and from 9:23 p.m. until her final two messages at 10:33 and 11:08 p.m., Appellant continued to text Student A past midnight, sending him a text at 12:12 a.m. on June 7, 2009. Appellant sent a text to Student A on June 6, 2009, at 10:59 a.m., and she sent enough texts to constitute a "bunch" on June 4th (31 texts) and June 5th (14 texts). On June 4 and 5, 2009, Appellant talked for 73 minutes by telephone with Student A starting at 11:45 p.m., and continuing past midnight, while in her garage. Exhibit JT 34, pages 13-14.

82. In an effort to explain her decision to leave the house on June 4, 2009, a school night, for a late-night telephone call with Student A, Appellant and her husband described their home routine, his early bed time, that he was a light sleeper, and the layout of their home including the heated office/exercise area in the adjacent garage. It is not necessary to

determine Appellant's motive for going to the garage to speak to Student A. It is sufficient to find that, on June 4, 2009, Appellant exchanged numerous text messages with Student A starting at 7:14 a.m. and continuing throughout the day and into the evening. Appellant initiated the final text exchange at 9:48 p.m., which continued every few minutes through her last text at 11:31 p.m. Appellant invited Student A to telephone her, she accepted his call at 11:45 p.m., and they talked for 73 minutes. Exhibit JT 34, page 13.

83. Appellant admits to the quantity, dates, and time of day of the telephone calls and text messages she exchanged with Student A, who was a boy half her age. She admits that she shared with Student A many details about her personal life, including details of her high school years, dating her husband, the death of her first child, a difficult pregnancy, a family outing to the Bloomsday run, and the indiscretion at the Seattle bachelorette party.

84. Then and now, a text exchange between an EVSD teacher and student is rare except for the occasion a coach might text the team that practice was delayed. Students agreed it was weird or strange or odd for a teacher to be sending any text messages to a student. Between January 2009 and June 2009, Appellant exchanged less than 140 text messages with all other persons, compared to over 350 with Student B and over 1,100 with Student A.

85. Appellant did not think it was inappropriate to exchange texts during the 5-minute passing time between class periods, or during the first and last five minutes of Fitness classes. She explained gym class did not start and end like academic classes; rather, her students spent the first and last five minutes of the class period suiting up or down in the locker room. Appellant noted the Staff Handbook section on Electronics in the Classroom urged teachers to limit their own cellular phone use to non-instructional times. Exhibit JT 12. Appellant contends passing time and the suit-up, suit-down times are such "non-instructional" times.

86. Appellant offered no explanation for exchanging multiple texts with Student A at times he was attending other teachers' classes. Appellant offered no explanation for exchanging multiple texts with Student A at times he was scheduled in another teacher's Connections class and supposed to be engaged in 25 minutes of silent reading. Appellant's contention is contrary to the EVSD policy regarding student use of electronic devices. She asserts, without any objective support, that each teacher had discretion regarding enforcement of the Electronic Devices policy during class or instructional periods.

87. Excluding the first exchange on April 24, 2009, on 17 school days Appellant and Student A exchanged texts during the times he was scheduled to be in a class. The number of text conversations during class time cannot be determined from the evidence because of the possibility that, on a few days, EVSD departed from the published schedule due to conferences, late starts, or other activities. However, the evidence is clear and convincing that

on at least a dozen school days, at times when Student A was in another teacher's class room, he and Appellant were exchanging texts.

88. Appellant's claim that policy enforcement was at the discretion of the classroom teacher during Fitness class is not credible. She admits to an absolute ban or prohibition on using cellular telephones in the locker rooms, and students do not carry electronic devices while in gym suits. She confirms the Physical Education Department teachers were aware of risks associated with cellular telephone cameras in the locker rooms. Nevertheless, her telephone records show text exchanges during the first five or last five minutes of 5th period Fitness, time Student A could be in the locker room suiting up or down.

89. Appellant admits she exchanged texts with Student A while in Seattle at a bachelorette party where she consumed alcoholic beverages. She does not deny her telephone records show a text to Student A in the early hours of Sunday after the party. She admits she has no memory of the 3:53 a.m. text.

90. Appellant admits her telephone records show nine telephone calls exchanged with Student A. She claims she missed the call from Student A the evening of the second bachelorette party, June 6, 2009. She does not deny the time of day of other calls, including during the school day and two late-night telephone calls on June 4 and June 8, 2009. She admits she never informed Student A's parent about the personal contact by telephone communication after school hours.

91. Appellant's stated purpose. Appellant's stated purpose for exchanging texts and telephone calls with Student A is inconsistent with EVSD policy and reasonable standards for teachers' behavior. She contends the text exchanges had an educational value to the extent that her assistance enabled Student A to function at school following the death of his father, and amidst other family struggles. Appellant claims she initially engaged in the text conversations in an attempt to be a caring, accessible teacher, because students often find it easier to communicate about personal matters with younger teachers like herself. After Student A raised more serious subjects, she continued text exchanges and telephone calls because she believed she was the only adult that Student A trusted. She claims he repeatedly declined her encouragement that he discuss matters with a counselor. She claims she realizes now it was a mistake to believe she could counsel and mentor Student A, and admits her attempts to counsel failed.

92. EVSD policy defines an educational purpose as one that relates to the staff member's duties in the district. Exhibit JT 26. During the 2006-2007 school year, Appellant taught health class while the regular teacher was on maternity leave. It may have been proper, in a class focused on child development and family relationships, for Appellant to discuss with a student her own experiences as a wife and mother, or details regarding her youth, or pregnancy. Appellant's text exchanges and telephone communication with Student A did not

relate to the fulfillment of her duties as Student A's Fitness teacher.

93. Appellant's actions encouraged Student A to confide in her about his personal or family problems and/or relationships in violation of EVSD Policy 5242. Exhibit JT 26, page 3. When a student initiates such discussions, a teacher is expected to refer the student to the appropriate guidance/counseling staff.

94. During the 2008-2009 school year, the duties of EVSD's high school counselors were focused on testing and test administration. However, Appellant knew the counselors. She spoke to a counselor about the Running Start program, and sent an electronic mail to a counselor about Student B. She could have spoken to a counselor about Student A. The counselors maintained an open door and remained available to teachers and students during both first and second lunch periods. The counselors met weekly with high school administration and other colleagues to address or follow-up on reports of a student-of-concern. The reports of a student-of-concern were made orally and in writing by teachers, students, administrators, and the counselors. Appellant talked to Student A about whether he should talk to a school counselor. Appellant's behavior in continuing to attempt to counsel Student A regarding his home and family circumstances was not consistent with the behavior of a reasonable teacher or EVSD policy.

95. Appellant's stated purpose of counseling or mentoring was not limited to a direct connection to Student A's school performance, or to his performance in her 5th period Fitness class, in violation of EVSD Policy 5242. Exhibit JT 26, page 3.

96. EVSD policy prohibits teachers from maintaining personal contact with a student outside of school by telephone without including the parent. Exhibit JT 26. Appellant maintained personal contact with Student A by telephone through oral conversations and typed text messages without knowledge or permission of his parent, in violation of EVSD policy.

97. Failure to refer for counseling. Appellant described Student A as emotionally and mentally unstable by late May and early June 2009. To the jury in the criminal trial, Appellant described Student A as "raging mad," "tanking," and "just falling apart" during text and telephone communication. Exhibit 17, pages 13-14, 21, and 52. Other teachers, administrators, and students described Student A as confused. Students I and J knew that Student A was upset about a late-night telephone call which occurred on June 4, 2009.

98. Appellant knew or should have known by late May or early June 2009, that Student A was upset and wanted to stop communicating by telephone with her. Her claim that she decided to stop the text exchanges and that she told Student A that he would need to be the one to reopen communication, is not consistent with her behavior between June 4 and 9, 2009. Appellant did not alert Student A's mother, his other classroom teachers, the school's

counselors or administrators, to his unstable condition, or even attempt to do so. Appellant departed from EVSD policy when she did not seek advice from her professional colleagues about how best to respond to concerns she allegedly had for Student A.

99. Multiple teachers and/or administrators gave clear and unambiguous testimony regarding the role and responsibility of a teacher when responding to a student in troubling circumstances as described by Appellant. A teacher is the adult and the person responsible to make difficult decisions in the best interests of a student, including the decision to make referrals to counselors or administrators with the professional credentials and expertise to actually counsel a student.

100. When Student A spoke to Coach Morrison, the coach immediately recognized his responsibility to seek advice and counsel from the high school principal. Teachers and administrators all easily identified "red flags" regarding the kind of behavior which Appellant attributed to Student A. They described Appellant's behavior toward Student A as inconceivable and unfathomable. Appellant departed from accepted teaching standards and EVSD policy when she failed to make referrals to counselors or administrators. Her behavior singled out Student A for friendship or personal attention in violation of EVSD Policy 5242. Exhibit JT 26, page 3.

101. Appellant violated Student A's trust when she shared the stories he had confided to her with her mother, her sister, her hairdresser, and a friend she knew was Student's A's neighbor. None were teachers or counselors. Their perception of Appellant as a caring teacher does not excuse Appellant's failure to comply with accepted teaching standards and EVSD policy when she failed to inform the appropriate EVSD professionals of her beliefs concerning the Student's fragile state of mind.

102. Appellant's decision to share extensively with Student A personal information about herself was inconsistent with EVSD policy for appropriate teacher/student boundaries, relationships, and avoiding actual or the appearance of inappropriate conduct.

103. Appellant knew or should have known by late May or early June 2009 that Student A was upset and expressing a desire to stop communicating with her. Her claims that it was she who decided to stop the text exchanges and that she told Student A that he would need to be the one to reopen communication is not consistent with her behavior between June 4 and 9, 2009.

Student A's "Threat."

104. Appellant sent a text to Student A on Monday, June 8, 2009, at 7:53 p.m., to which he replied with a one-minute telephone call. They exchanged texts throughout the evening, seven between 10:20 p.m. and 10:29 p.m., followed by a 15-minute telephone call initiated

by Appellant. She testified in the criminal matter that during this telephone call Student A threatened to go to school the next day and ruin her life. Exhibit 17, page 23.

105. Appellant saw Student A at school on Tuesday, June 9, 2009, but he was absent for 5th period Fitness class. Appellant left the high school building, went to the main office building, spoke to her mother, and learned Student A was in the office talking with Principal Hummel and Coach Morrison. She returned to the high school and taught 6th period Fitness class. She denies any urgency, but she did not tell a neighboring teacher she needed to leave the building and ask that students be supervised for any part of the 5th period suiting-down time, for passing time, or for 6th period suiting-up time.

106. Appellant did not immediately tell her husband that Student A had threatened her, even though she claimed the source of Student A's anger was the betrayal he felt after learning that Appellant had shared his personal confidences with her husband. Exhibit 17, page 21.

107. On June 9, upon arrival at school, Appellant did not tell Principal Hummel she had been threatened by Student A. Even if Appellant initially did not believe Student A would carry through with the threat, she still did not tell Principal Hummel about his threat after she saw Student A in the office with Coach Morrison and Principal Hummel. Appellant did not tell Principal Hummel about the threat when, at day's end, he informed her that she was being placed on administrative leave pending investigation into serious allegations made against her. The next day, at a meeting on June 10, 2009, Appellant did not mention the threat to Principal Hummel or the EVSD Superintendent.

108. There is no evidence that Appellant immediately told her union representative about receiving a threat. There is no evidence that Appellant or her union representative reported the threat to EVSD or any other authority.

109. At passing time before 5th period on June 9, 2009, Coach Morrison was standing in his classroom doorway monitoring students in the hallway. His classroom was the last doorway before the gym where Appellant taught Fitness class. Student A asked if he could come into his room. Student A did not want to go to Fitness class. Coach Morrison sought more information, and Student A began to describe text and telephone communication with an unnamed teacher. After about ten minutes, he told Coach Morrison the teacher was Appellant. Coach Morrison understood Student A wanted to hide and not attend Fitness class for the next few days until school ended on June 11, 2009. Coach Morrison told Student A he thought this information was the kind that needed to be reported. Coach Morrison understood Student A did not want to get Appellant in trouble, but did want the communication to stop.

110. Coach Morrison explained to Student A that as a teacher it was his duty to do what was best for Student A. He told Student A to wait while he sought the advice of the principal. After speaking to Principal Hummel, Coach Morrison told Student A he needed to tell the

principal. He offered to accompany Student A. If Student A refused to tell the principal, Coach Morrison stated he would tell because it was his duty. Student A accompanied Coach Morrison to the principal's office and told Principal Hummel about text exchanges and late-night telephone calls with Appellant, and he details about Appellant's personal life. Shortly after informing EVSD authorities, Principal Hummel was told to inform the building union representative a meeting was needed with Appellant, and to verbally inform Appellant she was being placed on paid administrative leave pending investigation.

111. Appellant's reaction to Principal Hummel. Appellant claims she remained silent during the June 9, 2009, meeting and made no mention of Student A or his threat because Principal Hummel would not permit her to talk, and because before the meeting began her union representative told her to remain silent. Appellant did not offer the testimony of the third person who attended the meeting, her union representative, who reportedly witnessed that she remained silent before Principal Hummel.

112. Principal Hummel has informed teachers about pending investigations and has observed the reaction of many teachers. Student A had just disclosed details about Appellant's personal life reportedly learned during text and telephone conversations with Appellant, and Principal Hummel anticipated Appellant's reaction would be something like, "Gosh, I need to tell you about Student A." He was surprised when she made no mention of Student A. Appellant repeatedly said she had no idea what the allegations could be about. She continued to ask for details to learn what these allegations might be. Principal Hummel repeatedly stated he could not discuss the details with her. Appellant did not mention she had been concerned enough about Student A's absence from her 5th period class that she found it necessary to leave the gym, or that she had recently observed Student A meeting with Principal Hummel.

113. EVSD Policy 5242 expects teachers will discuss issues with their building administrator or supervisor whenever they suspect or are unsure whether conduct is inappropriate or constitutes a violation of the policies regarding teacher/student boundaries. Exhibit JT 26, page 1. The policy expects teachers to be sensitive to the appearance of impropriety in their own conduct when interacting with students. At no time during the 2008-2009 school year did Appellant discuss with Principal Hummel or other EVSD authority her interactions with Student A.

114. Appellant's testimony at this administrative hearing and the prior criminal trial that "a million things" came to mind about what Principal Hummel was talking about is not logical. Exhibit 17, page 52. It is inconsistent with her other claims that Student A had recently been raging mad, tanking, falling apart, and had threatened her. A reasonable teacher in Appellant's situation would have immediately regretted sharing personal information with a freshman boy, and such regret would likely have immediately come to mind. A reasonable teacher with Appellant's actual knowledge of the full extent of the text exchanges would have

immediately thought about having to explain herself. Appellant's testimony on this point is not credible.

115. Appellant's failure to inform Principal Hummel of a threat made by Student A was inconsistent with EVSD policy, common practice, and the expectations of Principal Hummel that teachers keep him informed of potential problems, risks, challenges, or claims. EVSD policy required Appellant to tell her supervisor whenever she suspected or was unsure whether conduct was inappropriate, or constituted a violation of EVSD Policy No 5242, the boundaries policy. Communication between teachers and the principal allows the principal to not be blind-sided, be prepared before speaking to a parent or student, and to provide support to the teacher. A health, nutrition and child development teacher described how teachers are always at risk, and it is necessary and important for teachers to protect themselves and their students.

116. Coach Morrison and Principal Hummel were immediately concerned with at least the appearance of improper behavior by the Appellant, based on Student A's descriptions of Appellant's communications. Student A's report caused Principal Hummel to reconsider with skepticism the timing of Appellant's June 8, 2009, request to get the cellular telephone number of Student B.

117. Principal Hummel would have been one of the first people Appellant told if there had been a threat. When he learned in June 2010, the Appellant told the jury in the criminal matter that on the evening of June 8, 2009, Student A had threatened to go to school the next day and ruin her life, he was convinced she had been dishonest with him in June 2009. He is convinced Appellant feigned ignorance about the entire matter involving Student A, and he no longer trusts her judgment to teach.

118. Principal Hummel's description of Appellant's response to the news that serious allegations had been brought against her is consistent with his encounters the next day with her mother and husband. On June 10, 2009, Appellant's mother told Principal Hummel, who was her immediate supervisor, that she did not understand why no one would tell Appellant what this was about, and how unfair it was to Appellant to not have any idea what the allegations might be about. Principal Hummel saw Mr. Taylor shortly before the meeting scheduled for Appellant to meet with the EVSD Superintendent. He was surprised Mr. Taylor was not planning to attend, as he knew Mr. Taylor to be a very supportive guy. Principal Hummel was impressed that Mr. Taylor's demeanor and actions demonstrated he was unaware of the extent of the Appellant's relationship with Student A. Principal Hummel's impression was accurate, given the evidence that Mr. Taylor was not aware of the extent of the communication between Appellant and Student A, the Appellant's behavior at the Seattle bachelorette party, that Appellant had told Student A about what she had done at the party, or that Appellant had claimed to have recently been threatened by Student A.

119. The testimony of Principal Hummel and Coach Morrison was more clear,

convincing, and logically persuasive than the Appellant's testimony. Appellant did not remain silent when Principal Hummel informed her of the pending investigation, but instead she acted as the innocent victim, pretending to be ignorant of any source of concern or problem.

120. Student A, and the student witnesses with whom he shared Appellant's text messages, gave credible testimony about the contents of the texts. It is found that Appellant departed significantly from expected norms for teacher-student communication and boundaries when she exchanged texts and telephone calls with Student A. The exchange of cellular telephone numbers began at the initiative of Appellant, and continued with her encouragement. The claim she was counseling or mentoring Student A is inconsistent with exchanging texts while he was in other teachers' classrooms. She knew or should have known that her remarks to Student A about his appearance, hormones, and drinking and kissing another man in a bar were inconsistent with EVSD expectations for communication with students. When Student A wanted to stop, Appellant continued to text and inquire as to why he had not replied. Appellant knew or should have known Student A was not mature enough to cope with disclosures about her personal indiscretions or private life. It is found that on June 8, 2009, Student A did not threaten to go to school the next day and ruin Appellant's life.

121. A reasonable teacher does not respond to a student's need for help or guidance by exchanging text messages during the school day, while the student is in classrooms with other teachers. A reasonable teacher does not respond to a student's need for help or guidance with before and after midnight text message and telephone calls. When the totality of the circumstances are considered, the evidence is clear and convincing that the Appellant's statements about mentoring Student A were intended as a ruse.

122. Student A continued at EVSD during his sophomore year. EVSD offered \$5,000 to seek treatment from a private counselor, but Student A declined and instead sought counsel from EVSD personnel. Student A admits he does not like it when others tell him he needs a counselor. He is not opposed to counselors themselves, just to people thinking he needs a counselor. Student A transferred to a private school after rumors, media interest, and teasing made attendance at EVSD high school difficult. His grades dropped his sophomore year, but have since rebounded. He recently graduated high school and has won a college scholarship.

Administrative Leave Directive

123. On June 10, 2009, Appellant was given a written directive by EVSD Superintendent Schieche, which stated in part:

You have been placed on paid administrative leave until further notice. The reason for this action is that certain matters have been alleged concerning your inappropriate conduct with male students which must be looked into. An investigation will therefore be conducted.

The letter included a list of seven "Directives". Directive 1 stated:

You are hereby directed to not talk with anyone concerning this matter other than your union representative, your attorney, mental health counselor or doctor, law enforcement conducting an investigation, your clergyperson, and district representative conducting any school district investigation. Talking includes any form of communication, including telephonic, electronic, blogging, and texting communication. Should you need to discuss this matter with anyone other than those listed in this paragraph, you must obtain prior written consent for me to do so.

Directive 3 stated the Appellant was not to communicate with or cause communication about this matter with any student or member of any student's family or suggest to or cause anyone else to do the same. Directive 6 provided that she was to refrain from action which could be construed as retaliation against any person who has complained about her or who has offered any information about her. Exhibit JT 8.

124. On December 10, 2009, Appellant sent an electronic mail to nine EVSD staff asking for "help in gathering information on the two boys" who made allegations against her. She was seeking people who could talk about the "negative character" of the boys, even if the information was second- or third-hand. If the email recipients knew any other staff members that might have helpful information, Appellant asked to have those persons email or call her. Appellant admits her action violated Superintendent Schieche's administrative leave directive. Exhibit JT 9.

125. Appellant was fearful of the possibility of going to jail, and felt she had to do all within her power to defend herself. Also, she felt the accusations had been aired publicly in the media, and did not feel she was disclosing information not already known.

126. Superintendent Schieche learned of the Appellant's email and responded on December 22, 2009. He reminded her of his earlier directives, told her that he considered her email to the nine EVSD staff to have been a violation of the directives, and said that she was "not to have any contact with [EVSD] staff" regarding this matter. Exhibit JT 10.

127. Appellant sent a second electronic mail on September 9, 2010, to "groups," one of which included members of her bible study group. Exhibit JT 11. One of the individuals in the bible study group was an EVSD staff member. The husband of another bible study group member was an EVSD staff member. Although Appellant referenced the "crazy story told by the two boys" at the criminal trial, the content of the email is primarily informative regarding the status of her employment hearing with EVSD, the burden of proof, and the timing of entry of a decision. Appellant considers her September 9, 2010, email, at most, a technical violation of Superintendent Schieche's directive.

Factors OPP Considered in Determining Disciplinary Sanction

128. OPP considered the eleven factors listed in Washington Administrative Code (WAC) 181-86-080 to determine the appropriate level and range of discipline.

129. Factor 1. Seriousness of the acts and actual or potential harm. OPP acknowledges that the most serious of the allegations raised in 2009 are not at issue here. It asserts the behavior and rule violations which remain at issue are of a serious nature. The large number of texts exchanged between Appellant and Student A, over 1,100, primarily during a six-week period, at all hours of the day and night, before, during, and after school and on weekends, were considered serious acts. The disclosure of personal and intimate information to a student, attempts to counsel a student outside her scope of expertise, and a pattern of fostering personal relationships with her students were considered to be serious in nature. Actual harm to Student A was evident in falling grades, harassment and teasing, and media focus which necessitated Student A transferring to a different school. OPP considered the fact that all the student witnesses had to deal with this matter and endure questioning related to three legal proceedings throughout their high school years to be harmful. OPP considered that potential harm includes unknown long-term effects related to violation of trust by a teacher.

130. OPP considered that there were over 350 texts exchanged between Appellant and Student B, and that Student B also transferred to another school after June 2009. OPP considered there was potential for harm to the school and community, but did not explain how harm might potentially occur.

131. Factor 2. Appellant's criminal history. Factor not applicable; no record of convictions.

132. Factor 3. Age and maturity level of participants. Appellant is a mature, married adult in her 30's with nine years of teaching experience. Students A, B, and C were 14-16 years of age, as were other high school students with whom Student A shared text messages, or shared his confusion and desire to stop communicating with Appellant. OPP considered Student A and other student witnesses to be to be impressionable boys and girls during the 2008-2009 school year.

133. Factor 4. Proximity or remoteness of time. OPP considered the proximity in time of text exchanges and telephone conversations exchanged almost daily within a six-week period in spring 2009. OPP considered that Appellant had known Student A for only a few months before she decided to confide personal and intimate information to him. OPP considered the proximity in time between Appellant's awareness by late May 2009 that her disclosures and communication were upsetting to Student A, and her failure to seek counsel or help for Student A before June 9, 2009.

134. Factor 5. Disregard for health, safety or welfare. OPP considered that Appellant gave an over-the-counter medication to Student B without knowledge of his allergies, interaction with other medications, and his medical history. This demonstrated a disregard for Student B's health, safety and welfare. OPP considered that Appellant treated Student A as her friend rather than her student, disclosing intimate details of her life which exceeded his maturity level and coping skills. Even if Appellant's version of events was accepted, such inappropriate disclosures and her failure to seek qualified counseling and help for Student A showed disregard for his health, safety and welfare.

135. Factor 6. Behavioral problem. OPP considered Appellant's behavior to be a problem because it demonstrated a pattern of excessive sharing of personal information, and excessive communication with a student without educational purpose during all hours of the day and night and all days of the week. OPP also considered the pattern of not following policies and directives to be a behavioral problem. Examples of the Appellant failing to follow policies and directives included: deciding to use her own discretion whether to enforce student compliance with the electronic device policy; deciding to accept/send texts during class time; using her own interpretation of 'non-instructional' time; ignoring EVSD's expectation to supervise students during passing time; using her own discretion to dispense over-the-counter medication without complying with the medication policy; and not following the administrative leave directives.

136. Factor 7. Fitness. OPP considered the fostering or developing of personal relationships with students without telling anyone, even if only just the perception, to be activities which demonstrated Appellant's lack of fitness. OPP considered the act of sharing information about a teacher's personal life to demonstrate lack of fitness. OPP considered the text contents described by the students to demonstrate a lack of fitness. A teacher not willing to follow rules and procedures is not fit. A teacher who does not demonstrate honesty and integrity in dealings with students and administrators is not fit.

137. Factor 8. Discipline. Factor not applicable; no record of other discipline imposed against Appellant.

138. Factor 9. Aggravating or mitigating circumstances. OPP considered as an aggravating factor the excessive number and the very personal content of the texts exchanged with the Student A. It considered the request for permission to contact Student B by cellular telephone to be dishonest. OPP considered Appellant's frequent attempts to counsel a student without the education, training, or expertise to do so, and her failure to seek help from her appropriate professional colleagues, to be aggravating factors. OPP considered that Appellant initiated the disclosure of her own personal information, kept secret the confidential nature of her relationship with Student A, and persisted when Student A wanted to stop.

Mitigating information considered was that Appellant was a good teacher, with satisfactory evaluations, but for this six-week period.

139. Factor 10. Information to support character and fitness. No other information was considered, beyond the mitigating statements that support Appellant in Factor 9 above.

140. Factor 11. Other relevant information. No other relevant information was considered.

141. OPP recommended reinstatement of Appellant's teaching certificate will require:

Reinstatement will require: (1) Successful completion of a mutually agreed upon course, or training, for issues of appropriate/inappropriate relationships with students; (2) successful completion of a course or training for issues of appropriate/inappropriate interaction with students as a school teacher and (3) Michele Taylor will provide OPP with evidence of her successful completion of the coursework or training completed. The cost of conformance to all reinstatement requirements will be the responsibility of Michele Taylor.

AND/OR Reinstatement shall (also) require submission of a new application, including Character and Fitness Supplement, provided by OPP and having Michele Taylor's fingerprints be checked by both the Federal Bureau of Investigation (FBI) and the Washington State Patrol (WSP). Reinstatement shall also be contingent upon Michele Taylor's fingerprint background check returning with no criminal convictions that are listed in WAC 181-86-013, RCW 28A.410.090, and/or any felony convictions.

CONCLUSIONS OF LAW

Jurisdiction

1. The Washington Professional Education Standards Board has the authority to develop regulations determining eligibility for, and certification of, personnel employed in the common schools of Washington pursuant to Revised Code of Washington (RCW) 28A.410.010. OSPI administers these regulations, with the power to issue, suspend, and revoke education certificates. RCW 28A.410.010. OSPI has granted jurisdiction to OAH to hear appeals of actions to suspend education certificates. Washington Administrative Code (WAC) 180-86-170.

2. Pursuant to RCW 28A.410.090, OSPI may revoke or suspend any professional educator certificate it grants "based upon a . . . complaint of any school district superintendent . . . for immorality, violation of written contract, unprofessional conduct, intemperance, or crime against the law of the State."

Burden of Proof

3. The burden of proof in a suspension or revocation hearing lies with OSPI. WAC 181-86-170 and -075. OSPI "must prove through 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.*

4. Clear and convincing evidence requires more than a mere preponderance of the evidence. *Nguyen v. Dep't of Health Med. Qual. Assurance Comm'n*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001), *cert denied*, 535 U.S. 904, 122 S.Ct 1203 (2002).

Unprofessional Conduct

5. Pursuant to WAC 181-87-060:

Any performance of professional practice in flagrant disregard or clear abandonment of generally recognized professional standards in the course of certain specified 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.

6. The terms "flagrant disregard" and "clear abandonment" are not defined by the regulations. According to *Hunter v. UW*, 101 Wn. App. 283, 290-291 (2000), "[i]f a term is not statutorily defined, the term is given its ordinary or common law meaning." In determining the ordinary meaning of a word or a term, a court may use a dictionary. *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994).

7. Flagrant is defined as "extremely or purposefully conspicuous; glaring; notorious; shocking. Webster's Seventh New Collegiate Dictionary 316 (1972) "Disregard" is defined as "to pay no attention to; to treat as unworthy of regard or notice." Webster's Seventh New Collegiate Dictionary 241 (1972) "Abandon" means "to forsake, desert", and "to cease intending or attempting to perform." Webster's Seventh New Collegiate Dictionary 1 (1972)

Good Moral Character and Personal Fitness

8. The definition of good moral character and personal fitness is in WAC 181-86-013:

As used in this chapter, the terms "good moral character and personal fitness" means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal

fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:

- (1) No conviction of any felony crime . . .
- (2) No conviction of any crime within the last ten years . . .
- (3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

9. WAC 181-86-014 provides that the requirement of good moral character and personal fitness is an ongoing one:

The good moral character and personal fitness requirement of applicants for certification under the laws of the state of Washington is a continuing requirement for holding a professional educational certificate under regulations of the professional educator standards board.

10. The term "behavioral problem" is not defined by the regulations. The definition of "behavior" is "the manner of conducting oneself, to behave with manners." Webster's Seventh New Collegiate Dictionary 77 (1972) "Problem" is defined as "a question raised for inquiry, consideration, or solution," and "dealing with human conduct or social relationships, difficult to deal with." Webster's Seventh New Collegiate Dictionary 678 (1972).

11. It is concluded that EVSD policies did prohibit communication between a teacher and a student by telephone depending on timing, frequency, and content. It is not relevant whether the mode of telephonic communication between a teacher and a student was oral or written. A teacher's conduct which singles out a student for friendship or personal attention is contrary to EVSD policy. A reasonable teacher does not encourage a student to confide in her over a period of several weeks about the student's personal and family matters and/or relationships. It is concluded that OSPI has shown by evidence which is clear and convincing that the timing, frequency, and content of Appellant's communication with Student A was inconsistent with EVSD policies and the manner in which a reasonable teacher conducts herself. As to Student B, the evidence which is clear and convincing related only to the timing and frequency of communication by Appellant, which were inconsistent with EVSD policies and the manner in which a reasonable teacher conducts herself. Therefore, it is concluded the evidence is clear and convincing that Appellant's assessment, treatment, instruction, or supervision of Students A and B was in flagrant disregard or clear abandonment of generally recognized professional standards and constituted acts of unprofessional conduct. WAC 181-87-060. The evidence is not clear and convincing regarding the allegations related to Student C, and Appellant did not violate WAC 181-87-060 related to Student C.

12. It is concluded that EVSD policies did prohibit Appellant's behavior regarding the manner in which she dispensed medication to Student B. It is concluded that EVSD policies

did prohibit Appellant's behavior regarding the timing, frequency, and content of oral and written communication with Student A, and the timing and frequency of the written communication with Student B. OSPI has shown by clear and convincing evidence that Appellant had a pattern of conducting herself in a questionable manner. Appellant has repeatedly decided on her own interpretation of policies or directives without seeking clarification from the proper authority. She has repeatedly decided to use her own discretion in deciding whether and when and which policies or directives to follow or enforce. OPP has shown by clear and convincing evidence that Appellant's pattern of problematic behavior interacting with Students A and B endangered their educational welfare, and that she lacks good moral character and personal fitness. WAC 181-86-013

13. The evidence is not clear and convincing regarding endangerment of the safety of Student B. Appellant violated the medication policy, but there is no showing of harm or consequence to Student B related to the over-the-counter medication. Appellant's use of poor judgment does not demonstrate a lack of good moral character or personal fitness. WAC 181-86-013

Grounds for Suspension

14. The grounds for issuance of a suspension order by OSPI relevant to these facts are set forth in WAC 181-86-070(2) and (3):

(2) The certificate holder has committed an act of unprofessional conduct or lacks good moral character but the superintendent of public instruction has determined that a suspension as applied to the particular certificate holder will probably deter subsequent unprofessional or other conduct which evidences lack of good moral character or personal fitness by such certificate holder, and believes the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension. Such order may contain a requirement that the certificate holder fulfill certain conditions precedent to resuming professional practice and certain conditions subsequent to resuming practice.

(3) The certificate holder lacks personal fitness but the superintendent of public instruction has determined the deficiency is correctable through remedial action and believes the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension which states condition precedent to resuming professional practice and which also may state certain conditions subsequent to resuming practice.

15. To impose a sanction/disciplinary order, WAC 181-86-080 requires consideration

of eleven factors in order to determine the appropriate level and range of discipline prior to issuance of the discipline:

Prior to issuing any disciplinary order under this chapter the superintendent of public instruction or designee shall consider, at a minimum, the following factors to determine the appropriate level and range of discipline:

- (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.

Factors Considered in Determining Disciplinary Sanction of Appellant

16. Factor 1. Seriousness of the acts and actual or potential harm. The exchange of over 1,100 text messages with Student A over a six-week period at all hours of the day and night, before, during, and after school and on weekends, constitutes serious acts. More serious were the text exchanges during Student A's scheduled class times in another teacher's class, or when he was supposed to be reading in silence in the Connections program. More serious were the text exchanges on school nights after 10:00 p.m., and communication on any day in any manner after midnight. The exchange of texts with Student A while Appellant was consuming alcoholic beverages at a party and at a bar are serious acts, made more serious by Appellant's decision to disclose her circumstances to him. The disclosure to Student A by Appellant of personal and intimate information about herself or her marriage is a serious matter, made more serious by the unwarranted disclosure of misbehavior or indiscretion. The attempts to counsel outside the scope of Appellant's duties and expertise is a serious matter, made more serious by the failure to consult with colleagues who possessed the education, training and expertise to help.

17. Actual harm to Student A was evident in falling grades, harassment and teasing, and media focus which necessitated a school transfer. The EVSD class of 2012 was harmed

when their freshman year ended in scandal, confusion, and unflattering public spotlight. The remainder of their high school experience was tainted with discord, suspicion, confusion, investigations, and multiple legal proceedings. Potential future harm includes long-term negative impacts on students' ability to trust.

18. Student B transferred to another school, but the reason which motivated the transfer is not clearly and convincingly known, and that factor was not considered. OPP did not provide evidence to support consideration of potential future harm to the school and community.

19. Factor 2. Appellant's criminal history. Factor not applicable; no record of convictions.

20. Factor 3. Age and maturity level of participants. Appellant is a mature, married adult in her 30's with nine years of teaching experience. Student A was 14-15 years of age in his first year of high school. The other high school students with whom Student A shared text messages, or shared his confusion and desire to stop communicating with Appellant, were ages 14-16. Student B was a sophomore in high school during the 2008-2009 school year.

21. Factor 4. Proximity or remoteness of time. The text exchanges and telephone conversations between Appellant and Student A, and Appellant and Student B, occurred almost daily within a six-week period. The communication with Student A escalated in frequency and intensity of content, and within a few weeks Appellant had decided to confide personal and intimate information with Student A, although she had only known Student A since the start of second semester. The proximity in time between Appellant's awareness by late May 2009 that her disclosures and communication were upsetting to Student A, is considered in context of her failure to seek counsel or help for Student A before June 9, 2009. The Appellant's pattern of behavior ignoring policies and directives involved a broader range of time, beginning with the 2008-09 school year and continuing to remote times in 2009 and 2010 with administrative leave violations.

22. The proximity of time of Appellant's final telephone call to Student A the night of June 8, 2009, is considered in context of her behavior in response to Student A's absence from her 5th period Fitness class, and in response to observing Student A in the principal's office, and in response to learning from Principal Hummel about the pending investigation.

23. Factor 5. Disregard for health, safety or welfare. Appellant treated Student A as her confidante rather than her student, disclosing intimate details of her life which exceeded his maturity level and coping skills. This demonstrated Appellant's disregard for Student A's health, safety and welfare. Appellant's failure to consult with colleagues who possessed the education, training and expertise to help her and to help Student A demonstrated disregard for Student A's health, safety and welfare.

24. Factor 6. Behavioral problem. Appellant's behavior was a problem because it demonstrated a pattern of maintaining inappropriate personal contact with a student outside of school without parental knowledge. This included sharing of her personal information, and excessive communication all hours of the day and night and all days of the week. Appellant demonstrated a pattern of behavior of deciding arbitrarily not to follow policies and directives. That the behavior constituted a pattern was evidenced by the breadth and scope of the violations: deferring to her own discretion whether to enforce student compliance with the electronic device policy; deferring to her own schedule and exchanging texts with Student A regardless of the bell schedule; deferring to her own interpretation of 'non-instructional' time; deferring to her own standards for best use of paid contract time rather than actively supervising students as expected during passing time; deferring to her own judgment to dispense over-the-counter medication without complying with the medication policy; and deferring to her own goals instead of following the administrative leave directives.

25. Factor 7. Fitness. The Appellant supported the ruse of mentoring Student A when she told her mother, a sister, her husband, her hairdresser and a friend the details of Student A's life, while Appellant fostered or developed a personal relationship by sharing with him her secrets, confidences and intimate details of her personal life. Both her actions, and the perceptions of her actions, demonstrated a lack of fitness. Appellant's pattern of behavior of not following rules and procedures demonstrates a lack of fitness. Appellant's interactions with Principal Hummel on June 8 and 9, 2009, were lacking in honesty and integrity, and demonstrated a lack of fitness.

26. Factor 8. Discipline. Factor not applicable; no record of other discipline imposed against Appellant.

27. Factor 9. Aggravating or mitigating circumstances. The aggravating information considered is: text exchanges with Student A on at least a dozen school days while Student A was scheduled to be in another teacher's classroom; text and telephone communication with Student A after 10:00 p.m. on school nights, and after midnight on any day; the steady maintenance of communication on a nearly daily basis for six weeks totaling over 1,100 messages in an educational environment when any text between teachers and students at all was a rarity; the ruse of mentoring Student A; attempting to counsel Student A without the education or expertise to do so; and failing to seek help from or make referrals to appropriate professional colleagues. Appellant initiated the disclosure of her own personal information, kept secret the confidential nature of the relationship with Student A, and persisted when Student A wanted to stop. Mitigating information considered was that Appellant was a good teacher, with satisfactory evaluations.

28. Factor 10. Information to support character and fitness. No other information was considered, beyond the mitigating statements that support Appellant in Factor 9 above.

29. Factor 11. Other relevant information. No other relevant information was considered.

30. OSPI has determined that suspension will probably deter subsequent unprofessional or other conduct by Appellant which evidences lack of good moral character or personal fitness. Second, it also determined that the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension. WAC 181-86-070(2).

31. OSPI recommended a one-year suspension as the proper sanction, but it has not proved all the factual allegations and has withdrawn three allegations listed in its Final Order. Two allegations withdrawn were the less egregious of its allegations, but the claim that Appellant invited Student B over to her house indicating her husband was not going to be home is an egregious allegation. OSPI has not proven that the text messages sent to Student B were without educational purpose, and speculation in light of the messages sent to Student A is insufficient. It also did not prove an encounter with Student B on June 9, 2009, involving a statement against interest by Appellant. OSPI did prove that Appellant used poor judgment and violated the medication policy, but there is no evidence of harm or consequence to Student B. Appellant's violation of the medication policy does not demonstrate a lack of good moral character or personal fitness. In the event evidence is not viewed favorably to Appellant, she argues that poor judgment on her part warrants only a letter of reprimand and other remediation conditions.

32. In *Patterson v. Public Instruction*, 76 Wn.App. 666, 887 P.2d 411, 416 (1994), the appellate court considered the appeal of an 18-month suspension, based on findings that a teacher failed to list prior employment on an application for professional employment, and removed his own job application file without authorization. *Patterson* held that falsification of an application for professional employment constituted unprofessional conduct. The falsification of the application, as well as the removal of the job application file without authorization, were both evidence of lack of personal fitness for teaching and the 18-month suspension was affirmed.

33. The Appellant's conduct and behavior had a direct negative impact on EVSD students, and in particular on Student A. The exchange of text messages with her student while he was in another teacher's classroom is a more serious act compared to the acts in *Patterson*. The disclosure of a personal indiscretion to a student half her age is a more serious act compared to the acts in *Patterson*. Appellant's pattern of behavior of not following rules and procedures is more serious behavior compared to *Patterson*. A letter of reprimand is not sufficient when these facts and conclusions are considered. The evidence clearly and convincingly supports a determination that the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a one-year suspension. WAC 181-86-070(2).

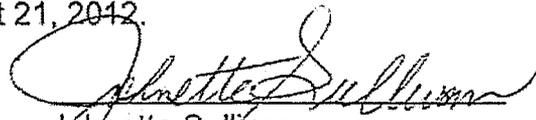
ORDER

Michele Taylor's Certification No. 378311E is SUSPENDED for twelve months. The conditions for reinstatement of the Review Officer are adopted, and are as follows:

Reinstatement will require: (1) Successful completion of a mutually agreed upon course, or training, for issues of appropriate/inappropriate relationships with students; (2) successful completion of a course or training for issues of appropriate/inappropriate interaction with students as a school teacher and (3) Michele Taylor will provide OPP with evidence of her successful completion of the coursework or training completed. The cost of conformance to all reinstatement requirements will be the responsibility of Michele Taylor.

AND/OR Reinstatement shall (also) require submission of a new application, including Character and Fitness Supplement, provided by OPP and having Michele Taylor's fingerprints be checked by both the Federal Bureau of Investigation (FBI) and the Washington State Patrol (WSP). Reinstatement shall also be contingent upon Michele Taylor's fingerprint background check returning with no criminal convictions that are listed in WAC 181-86-013, RCW 28A.410.090, and/or any felony convictions.

Dated at Yakima, Washington on August 21, 2012.


Johnette Sullivan
Administrative Law Judge
Office of Administrative Hearings

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 her 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 and OSPI. The filing of a petition for reconsideration is not required before seeking judicial review.

APPEAL RIGHTS

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 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

Please note: in the event this decision is to reprimand, suspend or revoke, pursuant to WAC 180-86-150, this order takes effect upon the signing of this final order. No stay of reprimand, suspension or revocation shall exist until such time as the Appellant files an appeal in a timely manner pursuant to WAC 180-86-155.

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. 

Via Certified Mail

Michele Taylor
606 Locust Ave
Yakima WA 98901

Catherine Slagle, Director, OPP, OSPI
PO Box 47200
Olympia, WA 98504-7200

Joseph W. Evans, Attorney
P O Box 519
Bremerton, WA 98337-0124

Anne Shaw, AAG
PO Box 40100
Olympia, WA 98504-0100

Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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

MAILED
JUL 31 2009
SEATTLE-OAH
RECEIVED
AUG 06 2009

IN THE MATTER OF:

LINDA CAPO

CERTIFICATE NO. 345373E

TEACHER CERTIFICATION
CAUSE NO. 2008-TCD-0007
SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SERVICES

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing was held before Administrative Law Judge (ALJ) Janice E. Shave in Port Angeles, Washington, on May 19, 20 and 21, 2009. The Appellant, Linda Capó, was represented by Jon Howard Rosen, attorney at law. Charles Schreck, director of the Office of Professional Practice (OPP) of the Office of Superintendent of Public Instruction (OSPI) participated. OPP/OSPI was represented by Anne Shaw, assistant attorney general. The ALJ, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

EVIDENCE RELIED UPON

Testimony was taken from the following witnesses under oath or affirmation: Linda Capó, Gary Cohn, Ph.D. (superintendent of Port Angeles School District (PASD)), Holli Hilt (relative of a student), Michelle Reid (PASD assistant superintendent), Mary Ann Unger (assistant principal, Port Angeles High School), Scott Harker (principal, Port Angeles High School), Cecilia Jacobs (school guidance counselor), Mark Jacobson (PASD executive director - business operations), Danetta Rutten (senior juvenile probation officer), Walter Seely (PASD intervention specialist), and Charles Schreck.

The following exhibits were admitted: Court Exhibit C1 (12.8.08 request for hearing), Joint Exhibits J1-J3, Tab 18 (the joint exhibits were the exhibits admitted in an earlier

employment termination hearing between the Appellant and the PASD), and OSPi's Exhibits S1 through S28. Although the parties agreed to the admission of Exhibit J-3, Tab 2 (Appellant's notes of her interviews with Student, admitted by stipulation under seal), and that exhibit was to be provided at the hearing, no copy of the exhibit was provided. It has not been reviewed, and is not admitted.

The record closed June 9, 2009, with the submission of post-hearing briefs. The written decision is due 90 days after the close of the record pursuant to Revised Code of Washington (RCW) 34.05.461(8)(a). The due date is September 7, 2009, which is a holiday. The decision due date is then the next business day, September 8, 2009.

ISSUES

Whether the Appellant is of good moral character and personal fitness (Washington Administrative Code (WAC) 181-86-013), or has disregarded or abandoned generally recognized professional standards (WAC 181-87-060(1)), such that her Washington Education Certificate No. 345373E should be suspended for twelve (12) months, and if so, whether the conditions for reinstatement imposed by OSPi are appropriate; and

Whether a harsher sanction may be imposed at the administrative hearing than was imposed by the informal hearing process?

FINDINGS OF FACT

Procedural History

1. The Appellant was issued Washington State elementary and secondary education certificates by OSPi under certificate number 345373E, issued June 5, 1996. Exhibit S-8.
2. OSPi received a written complaint from the Superintendent of the PASD's superintendent, Gary Cohn, on April 11, 2007. Exhibit S-1. The complaint alleged the Appellant had committed acts of unprofessional conduct. OSPi conducted an investigation of the Appellant, and issued a Proposed Order of Revocation on August 20, 2008. Exhibit S-3. The Proposed Order was appealed by the Appellant on September 23, 2008. Exhibit S-4. Prior to the next stage of the proceeding (an informal hearing), OSPi unilaterally and orally reduced the proposed discipline to a two-year suspension.

3. The informal hearing was held before the Admissions and Professional Conduct Advisory Committee (APCAC) on November 13, 2008. APCAC issued a Final Order of Suspension for twelve months on December 3, 2008. Exhibit S-6. On December 9, 2008, OSPI received the Appellant's appeal of the APCAC order. Exhibit S-7. Approximately two weeks prior to the due process hearing in this matter, OSPI notified the Appellant and her counsel that it sought imposition of the two year sanction it previously proposed. The Appellant objects to the imposition of a harsher sanction than that imposed by APCAC.

4. PASD issued a Notice of Pre-Determination Hearing (Loudermill hearing) on April 12, 2007. Exhibit J-3, Tab 12. The Loudermill hearing was held May 24, 2007. Exhibit J-3, Tab 13.

5. PASD sought to discharge the Appellant from employment. It issued a Probable Cause letter dated August 3, 2007. Exhibit J-3, Tab 15. The Appellant appealed and requested a probable cause hearing, which was held October 23 - 25, 2007. Exhibit J-1.

6. Following the probable cause hearing, an independent hearing officer issued Findings of Fact, Conclusions of Law and Order on November 6, 2007. Exhibit S-23. The discharge from employment was upheld on the sole basis of substantial insubordination. The two other bases alleged, unprofessional conduct - boundary invasion behaviors, and unprofessional conduct - extreme poor professional judgment, were dismissed.

7. The Appellant received her education and began her teaching career outside of Washington State. She began teaching 25 years ago, but interrupted her teaching career to raise her children. She is divorced. She is a recovering alcoholic who participates in Alcoholics Anonymous (hereinafter AA) meetings and has remained sober for several years as of the time of the hearing. At the time of the events at issue herein, the Appellant was in her early 60s.

8. The Appellant became employed by PASD as a high school special education teacher in or about 1995, and remained employed there into the 2006-2007 school year (SY).

9. Until the 2006-2007 SY events involving the Student¹ here which are the subject of this proceeding, the Appellant had never been disciplined in her employment. Exhibits J-2, Tab 4, J-3, Tab 10B.

Contact With Student

10. At the end of the 2005-2006 SY, the Appellant commenced research to write a book on the effects of methamphetamine use. She told students at the high school where she taught that she was interested in meeting students who were involved with methamphetamines, for research for her book. The Appellant met a 14 or 15 year old student (hereinafter the Student) at that time, but did not have significant contact with him then or over Summer break 2006.

11. The Student resided with his great-grandmother at all times material to this matter. His family members, including siblings, parents, aunts, uncles and grandparents, had significant involvement with drugs and alcohol.

12. The Student was in a rehab or behavior program during August and September 2006; he did not return to school at PASD until October 2006. He was a general education student, not a special education student, and was not assigned to any of the Appellant's classes.

13. The Appellant began to interview the Student as research for her methamphetamine book in October 2006. She quickly became fascinated by the Student's life story, which she felt was worthy of a book of its own. Audiotapes of some of the interviews she conducted with the Student document sad stories of his family members' involvement with drugs, alcohol and violence, some of the violence directed toward other family members, toward other people, and some directed at family pets. Exhibit J-3, Tab 1.

14. The interviews document in detail the Student's significant involvement with drugs and alcohol at a very young age. The Appellant's audible responses to the Student's autobiographical tales include her inappropriate laughing, giggling and chuckling. The Appellant made derogatory comments to the Student about Ms. Unger, one of the high school

¹ To ensure confidentiality, names of parents and students are not used.

assistant principals. The Appellant's responses sound like those of a teen peer, not like those of a professional educator to a deeply troubled student with significant substance abuse issues. Other witnesses who are certificated educators characterized the comments as unprofessional.

15. The Appellant felt sorry for the Student as she learned his life history. She believed he was an exceptional person. She became quite fond of him, and believed she could significantly and positively affect his life. She felt she was uniquely able to help him. She considered herself an extended family member, a mentor. She believed that her own personal history, including her alcoholism, gave her special insight into his life, his motivations, and problems. She did not think of herself in a teaching relationship with the Student. Instead, she came to see herself in a guardian or parental relationship with him. Over the first couple of months she worked with him, she quickly decided she wanted to become his legal guardian and to adopt him. She was generally aware he had a long history with juvenile justice authorities, but unaware of the specifics of his juvenile record, including the crimes he had been charged with, convicted of, and the terms of his probation.

OVERNIGHTS

16. The Appellant first slept in the same room or house with the Student sometime before Thanksgiving in November 2006. She was visiting with the Student, his 18 year old brother, and the brother's girlfriend, in the brother's small camping trailer, where the brother was living. The weather was snowy. The Appellant decided not to risk driving home when she learned the highway department was advising all non-emergency travel be avoided. There is no evidence to contradict her testimony that she slept on one bed in the tiny space of the camping trailer, and the Student, his brother and the brother's girlfriend all slept together on the other bed.

17. The roads were not actually closed by the highway department, but non-emergency travel was advised against for three nights and two days. The camping trailer did not have heat, and the toilet stopped working. The Appellant stayed with the Student, his brother and the brother's girlfriend three nights in a row in the trailer. When the weather cleared a bit, she

drove them all to her house, rather than the great-grandmother's house. The great-grandmother lived on a hill, and advised the group it was snowy and slippery on her driveway. The Appellant invited the Student, his brother and the brother's girlfriend to stay at her house, where they remained two or three more nights. No other adults were present in the house with them.

18. There is no allegation that the Student slept in the Appellant's bed or bedroom on those nights in November 2006, or on any of the approximately 10-11 overnights the Appellant admitted she and the Student slept in the same room/trailer/house. The overnights occurred from mid to late November 2006 through the end of December 2006.

19. During two nights in December 2006, the Appellant slept in the Student's own bed at his great-grandmother's house. At the same time, the Student slept on a lounge chair across from the Appellant in his open loft bedroom. The Appellant felt it was necessary to stay overnight because she was concerned about a wheel or tire of her car the first night, and the second night was due to poor weather. The Appellant did not ask the great-grandmother if she could sleep in the house - the Student asked his great-grandmother. The Appellant later explained she did not sleep on the main floor of the house, for instance, on the large sofa there, because it would have taken too long to move all the items off the living room sofa, and it might have upset the great-grandmother to have them moved.

20. During one of the nights the Appellant slept at the Student's great-grandmother's house, the Student played a recording as they lay in their beds, just before falling asleep. The recording contained explicit language about sex, rape, violence and misogyny. The Appellant asserts she did not pay attention to the message contained in the recording, and fell asleep.

21. The Appellant was aware at the time of the overnights that it was generally not considered appropriate for an unrelated teacher and student to sleep in the same room. She told him at the time that people would not understand.

22. The Student slept at the Appellant's house on Christmas Eve 2006. One of the Appellant's adult children stayed in the house that night.

Privileges Granted by Appellant to Student

23. The Appellant obtained written authorization from the Student's great-grandmother to drive him in her personal vehicle. Exhibits S-9, J-3, Tab 10-E. She frequently drove him to school, to her house, his house, and his other family members' houses, AA and other meetings, and to the Dream Center, a place for homeless youth. She drove him to the hospice where his step-great-grandfather was dying of cancer. The permission also allowed her to obtain emergency medical treatment for him, and to record him for her book research.

24. The Student was not a homeless youth from October 2006 through January 2007. Because of this, it was a probation violation for him to be at the Dream Center, where the Appellant frequently drove him. She was unaware of probation conditions which restricted his ability to drive a car. She was certain she knew more about what was good for the Student than did other professional educators at PASD, and was certain she knew more about what was good for him than his juvenile probation officer, Danetta Rutten, did. The Appellant believed she knew about the Student's childhood, and knew why he thought and acted the way he did.

25. The Appellant encouraged the Student to complete a Christmas gift wish-list online, which was what she did with her own adult children. Exhibit J-3, Tab 10-F. She felt so sorry for the Student as she learned about his history that she bought him every item on his list without considering the appropriateness of any of the items. She gave the Student the CDs he listed, with graphic and offensive lyrics which promoted substance abuse, misogyny, suicide, and violence against women and others. Exhibit J-3, Tabs 10-G and H. She bought him a T-shirt with an inappropriate photo of a performer who extolled violence and substance abuse. Exhibit J-3, Tab 10-I. The Appellant thought the T-shirt showed a man masturbating, but it showed a man reclining with a bottle of alcohol. The man depicted on the T-shirt was the same performer on the explicit recording the Appellant and the Student had listened to in the Student's bedroom in early December. The music and clothing would not have been allowed at PASD schools, and were inappropriate gifts to give to this substance-abusing Student by a teacher or tutor. She also gave the Student a \$200 snowboard.

26. The Appellant concedes the CDs and T-shirt were not appropriate gifts for her to give to the Student, given his history of violence and substance abuse, and concedes they were not appropriate to give to any teenage boy. She concedes that a teacher giving multiple gifts to a student, some of them costing \$200, is not generally accepted as appropriate.

27. On several occasions the Appellant allowed the Student to drive her car on his great-grandmother's property, and to drive it a short distance across a public roadway to turn around and re-enter the great-grandmother's property. The Appellant concedes that a teacher allowing an unlicensed student to drive her car is not generally accepted as appropriate.

28. The Appellant promised the Student she would give him her car as a gift when the book she was writing about him was published.

29. At the time of the events at issue (October 2006 through August 2007), the Student was 15 years old. He did not have a learner's permit or driver's license. Because he had four prior convictions for Minor in Possession (of alcohol, or MIP), he is not legally permitted to drive a car or obtain a permit or license until he turns 21. Driving the Appellant's car was a violation of his juvenile rehabilitation probation. The Appellant was aware the Student did not have a permit or license at the times she allowed him to drive, but was unaware of the legal restrictions on his future driving. She did not inform the probation officer she had repeatedly allowed him to drive her car, or had promised to give him her car. Nor did she inquire into any restrictions.

INTERACTION AT SCHOOL

30. The Student was assigned to be a teaching assistant (TA) in the high school guidance office during 4th period starting in October 2006, when he returned to high school. This assignment was made by Cecilia Jacobs, school guidance counselor, in part so Ms. Jacobs could keep an eye on him and monitor his progress during his re-integration to school after rehab. The Student was distractable, and distracted others when the guidance office did not have enough work to keep him busy the entire period.

31. The Appellant invited the Student to visit her in her special education classroom during 4th period, which was her planning period. She helped him with his homework at that time.

The Student benefitted from the Appellant's assistance with his schoolwork. The amount of benefit is difficult to quantify, given the Student's mid-term return to school, the abrupt discontinuation of tutoring in or about January 2007, and the uncertainty about when the tutoring resumed.

32. The Appellant also helped two other students during her 4th period planning time. A paraprofessional (classroom instructional assistant for the special education students) was also present in the Appellant's classroom during 4th period.

33. Ms. Jacobs, the guidance counselor, initially approved of the Student spending time being tutored in the Appellant's classroom. Ms. Jacobs became concerned over the Appellant's degree of involvement with him, and about the Appellant's comments regarding the Student over the months he was in the classroom (October through early December 2006).

34. Assistant principal Unger noticed the Student in the Appellant's classroom in early December 2006. She was aware the Student was not a special education student, and aware he was assigned to the guidance office. Ms. Unger was also aware 4th period was the Appellant's planning period, when she was not supposed to be teaching, according to her employment contract. On or about December 7, 2006, Ms. Unger reassigned the Student from being a TA in the guidance office to being a TA in the attendance office, where she worked. The attendance office had greater need of a TA than did the guidance office.

35. The Appellant believed it was best for the Student to remain in her classroom. She believed Ms. Unger made the reassignment as retaliation against her. The Appellant was so certain the move of the Student to the attendance office was retaliatory that it did not occur to her there was a good reason, or any non-retaliatory motive, behind it. She became upset and exerted significant efforts to have the Student returned to her classroom.

36. The Appellant drafted a note for the Student's great-grandmother's signature, requesting the Student be returned to her classroom. Exhibit J-3, Tab 10-D. The great-grandmother signed the note. The Appellant also contacted the Student's juvenile probation officer, Ms. Rutten, on two occasions, requesting Ms. Rutten intervene with the PASD to have the Student assigned to her class. Exhibit S-11.

37. The Appellant contacted Scott Harker, PASD High School principal, and complained to him about the reassignment. Mr. Harker explained to the Appellant that it was a contractual problem for her to have a student assigned to her classroom during her planning period. He did not change the assignment.

38. The Appellant also complained multiple times to Ms. Jacobs, the guidance counselor, in an attempt to have Ms. Jacobs change the Student's assignment. The Student was never assigned to the Appellant's classroom.

39. The Appellant and Ms. Unger had a significant conflict of personality. The Appellant's outspoken criticism to the Student of Ms. Unger's authority undermined the appropriate respect for the authority of the high school administration.

40. The Appellant requested a meeting and met with Mr. Harker on December 8, 2006, to inform him she was driving the Student in her private vehicle. She showed him a note signed by the Student's great-grandmother, which gave permission to the Appellant to transport the Student in her car. The great-grandmother also gave the appellant permission to obtain emergency medical treatment for the Student, and to record him for her book research. Exhibit S-9.

41. Mr. Harker advised the Appellant of the risks associated with a teacher transporting a student in a private vehicle, including insurance coverage as well as allegations of improper contact between the teacher and student. Mr. Harker recommended the Appellant discuss the issue with Dr. Mark Jacobson, PASD risk manager.

42. During the Harker meeting, which was initiated by the Appellant, she advised Mr. Harker nothing inappropriate had taken place between her and the Student, and said she had never been alone with the Student. This was not truthful, as the Appellant had slept in the same room and/or same house with the Student at least six times as of the time she spoke with Mr. Harker.

43. The Appellant met with Dr. Jacobson on December 6, 2006, soon after her meeting with Mr. Harker. The Appellant and Dr. Jacobson provided widely diverging accounts of what was discussed in that meeting. The Appellant and Dr. Jacobson agreed on one critical point,

however; the Appellant did not advise Dr. Jacobson that she had already spent at least six and possibly seven nights sleeping in the same room and/or same house as the Student.

44. Had the Appellant informed either Mr. Harker or Dr. Jacobson that she was sleeping in the same house/trailer/room with the Student on multiple occasions, they would have taken immediate action. PASD does not have any written policies that prohibit a teacher from sleeping in the same house or trailer as a student. However, teacher-student sleepovers are generally not considered acceptable professional conduct in PASD, even where there is no sexual contact. Some exceptions include sporting events or other school-sponsored events away from school.

45. In December 2006, the Appellant wore the Student's black leather jacket which had fringe and chains. The Appellant drove the Student and his brother to the house of one of their relatives, when asked to do so by the great-grandmother. The Student and his brother did some yard work for the relative. The Appellant helped with the chores, but did not have warm clothing with her. She borrowed the black leather jacket from the Student because she was cold. When she returned the Student and his brother to their great-grandmother's, she continued to wear the Student's jacket, at least a half-hour, while inside. She kept the jacket on because she remained cold. Some members of the Student's extended family saw the Appellant wearing the Student's black leather jacket that day after they returned felt uncomfortable at the sight of the Appellant in the teen's clothing.

46. The Appellant accompanied the Student and his great-grandmother to a juvenile probation revocation hearing on January 3, 2007. At that time, the Appellant advised Ms. Ruffen, the Student's juvenile probation officer, that she wished to obtain custody of the Student. She wanted Ms. Ruffen's assistance. Ms. Ruffen explained the process involved in obtaining custody, particularly for a non-relative, in light of the fact that both the Student's natural parents are alive, plus two step-parents, his grandparents, and at least one great-grandmother.

47. The Appellant believed she would be a better guardian, surrogate parent, or adoptive parent, than any of the Student's actual biological family members. She did not think of herself

as a teacher in relation to the Student; she thought of herself as extended family, his future guardian and future adoptive parent. She believed the Student had no one else to act effectively on his behalf.

48. Despite her knowledge of the Student's history, it did not occur to the Appellant that the Student was manipulating her, or not telling her the truth, until sometime in 2008 or 2009, a year or more after the events at issue in this proceeding. For a long time, she believed everything he told her. It was only within the year prior to this administrative hearing, that she began to feel the Student might have manipulated her.

49. The Appellant believed Ms. Rutten supported the idea of her obtaining custody of the Student. Ms. Rutten did not support this. Ms. Rutten initially supported the Appellant's tutoring of the Student, but changed her opinion starting at least as early as January 2007. Ms. Rutten came to believe the Appellant was an enabler, making excuses for the Student's failure to comply with what was required of him. Ms. Rutten believes the Appellant was co-dependent, meaning the Appellant believed she was helping, but in actuality, it was not a healthy relationship for the Student. She believes the Appellant's conduct went beyond appropriate boundaries and believes the Student did not benefit from his relationship with the Appellant. Ms. Rutten believes it is important for adults and authority figures to model good behavior for the Student, and for him to accept the consequences of his own actions, not to have a teacher trying to provide excuses for his failure to comply. Ms. Rutten was unaware of the sleepovers, and unaware the Appellant allowed the Student to drive her car. Had she been aware of the driving, she would have sought contempt of court proceedings against the Appellant.

50. By the time the Appellant came to know the Student, he had been convicted of 4th degree assault, referred for rape in the 2nd degree (not charged), charged with obstructing a law enforcement officer, convicted of four instances of MIP; he had multiple truancy referrals, and he had been in juvenile justice detentions several times. He had multiple probation violations, largely as a result of failing to appear for the many required probation, counseling and substance abuse sessions.

INVESTIGATION BY PASD, CONTINUING CONTACT

51. On or about December 21, 2006, Mr. Harker called the Student in during Winter break to speak with him about his reassignment from guidance office TA to attendance office TA. Assistant superintendent Michelle Reid also participated in the meeting. The discussion included the Student's involvement with the Appellant. By this time, PASD administration had heard stories about one or more sleepovers, and were becoming concerned. The Student was interviewed alone, with no adult or family member present. He denied he had slept in the same place as the Appellant, and said he had no plans to see her over Winter break. He did not mention driving her car. He did not voice any objection to being the attendance office TA.

52. The Appellant learned about the interview almost immediately. Within an hour of its conclusion, she telephoned the assistant superintendent's house to speak with her about it. The Appellant was very concerned the Student had been called in alone and questioned about his relationship with her, without any parent or guardian present.

53. On January 3, 2007, (the day the Appellant appeared in court with the Student) Mr. Harker sent a letter to the Appellant, scheduling a meeting with her the following afternoon to discuss concerns regarding her relationship with a PASD high school student. Exhibit J-2, Tab 6. On January 4, 2007, assistant superintendent Reid issued a letter advising the Appellant she was placed on non-disciplinary administrative leave with pay effective immediately, pending investigation of an alleged inappropriate relationship with a PASD high school student. Exhibit J-2, Tab 7. The letter advised the Appellant:

In order to preserve the integrity of the District's investigation, until further notice you are directed not to contact or communicate in any way with current or former students of the District, current or former staff of the District and witnesses to the events of this investigation, except through this office. Failure to comply with this directive will result in disciplinary action, including the possibility of termination.

54. On February 12, 2007, PASD issued a letter to the Appellant, advising her it had retained an outside investigator. Exhibit J-2, Tab 8. Her administrative leave with pay was continued, and she was again advised not to discuss the matter with anyone other than her attorney, union representatives, minister/priest, therapist, etc. Failure to comply with the no-contact directives was punishable by disciplinary action.

55. A predetermination meeting was held May 24, 2007. During that meeting the Appellant admitted she was again having contact with the Student for tutoring, and disclosed additional sleepovers about which PASD had been unaware. She conceded she was aware of the no-contact directives, but explained it was more important to help the Student with his schoolwork than to comply with the directives.

56. On May 25, 2007, PASD issued another letter to the Appellant, reiterating the no-contact directive. Exhibit J-2, Tab 10.

57. On August 24, 2007, PASD's superintendent, Dr. Cohn, issued a letter to the Appellant, acknowledging receipt of her appeal of the notice for probable cause. Exhibit J-2, Tab 12. Her termination from employment was stayed pending resolution of the appeal. She was advised that until the termination was final, she remained an employee of PASD and was subject to its direction. PASD reiterated the no-contact directives.

58. Thus, PASD provided written notice to the Appellant on five different occasions over eight months (January through August 2007) that she was not allowed by PASD to contact the Student or any of his family members, pending completion of its investigation.

59. The Appellant did not see the Student or his family for a short while after receipt of the initial no-contact directives. Sometime after January 4, 2007, she ran into him at the Dream Center, where she volunteered, and said hello, but did not speak to him. She requested permission to attend his step-great-grandfather's funeral when he died soon after the no-contact directive was imposed. PASD administration heard from some of the Student's family members they did not want the Appellant at the funeral, so PASD did not grant permission.

60. The Student initiated contact with the Appellant by calling her each of the three times he was confined in juvenile detention in or about February, March and April, 2007.

61. The Appellant and her daughter sent two or three letters by mail to the Student while he was in juvenile detention. They wrote the letters as if the letters had been written by a kitten the Student had given to the Appellant. They used fictitious names and addresses for the envelopes' return address. One of the letters included a candy bar, which was considered contraband at the juvenile detention facility. When it was attempted to return the contraband candy bar to the sender, it was discovered that the fictitious name and address had been used. The letters were ultimately determined to have been sent by the Appellant, who admitted sending them. Her explanation was that it was essentially a harmless prank, done for fun. The letters violated the no-contact directives.

62. The Student and his great-grandmother went to the Appellant's house in or about March or April 2007, to pick up the many possessions he had left there. The Appellant spoke with the Student briefly on that occasion, and spoke with his great-grandmother. This was a violation of the PASD no-contact directives. The Appellant attended a church fundraiser with the Student's great-grandmother in April 2007 at the home of another extended family member, in violation of PASD's no-contact directives. She began tutoring the Student again in May 2007, in violation of PASD's no-contact directives. She conceded in testimony that she did not think about the directives "that much." She knew they had not been lifted, but her priority was to get the Student's grades back up. She thought PASD's directives were about to be lifted soon, as she was aware the investigation was about to be concluded.

63. The Appellant's involvement with the Student and his great-grandmother was not well received by the Student's extended family. Initially some family members felt the Appellant's involvement was a good thing, as she assisted him with his academics and took him to AA and NA meetings, and drove him around town. However, when some family members saw the Appellant wearing the Student's black leather jacket, heard about some of the sleepovers, and learned of the degree of the Appellant's involvement, they no longer believed the relationship was good for the Student or for the extended family.

64. The Appellant wanted to take the Student with her to South Carolina during Summer 2007, to a conference put on by her church. Exhibit J-3, Tab 17. The Appellant's proposed

sleeping arrangements at the conference would have placed her and the Student in the same motel room at night. The Appellant requested permission from Ms. Rutten, juvenile probation officer, for the Student to go to the church conference. The Student was not legally able to leave Port Angeles, even to travel to a family member's house in a neighboring town, without Ms. Rutten's permission. Travel to another state would have required contact with and permission of the South Carolina equivalent of Washington's juvenile rehabilitation agency, as the receiving state. Ms. Rutten did not give permission for the Student to travel to South Carolina with the Appellant. The Appellant did not request PASD permission for the trip. The trip would have violated PASD's no-contact directives.

65. Although the Appellant testified she told at least two PASD staff members about the sleepovers prior to Winter break 2006, this testimony is found not to be credible. There is no corroborating evidence any PASD staff member received such information from the Appellant prior to her being placed on administrative leave.

66. The certificated educators who testified expressed the opinion that the Appellant's overnights were inappropriate, unprofessional, and not to the standard of conduct expected by professional educator staff/teachers. Even the Appellant admitted the conduct would not generally be considered appropriate.

67. Disrespect for and challenges to authority figures are particularly inappropriate types of behavior for adults to model for this Student, because of his significant criminal activities. Similarly, respect for rules is important behavior to model for the Student. The Appellant did not consider these factors in her interactions with the Student. The Appellant's conduct is reviewed in the context of this particular Student. This Student's significant juvenile justice involvement, history of conflict with authority figures (juvenile justice determination of guilty of resisting officers in August 2006, and multiple school truancies), the Appellant's actions of allowing the car driving, promising the gift of a car, spending multiple overnights together, warning the Student that others learning of their relationship would not approve and not understand, providing multiple inappropriate gifts, speaking disrespectfully of a school

administrator, and giggling at the Student's sad personal history were at best examples of poor judgment and inappropriate conduct.

68. The Appellant testified credibly that she did not have sexual contact with the Student, and was not attempting to groom him for sexual purposes. PASD initially investigated this matter as one involving inappropriate conduct, and/or sexual grooming. No issue of sexual contact between the Appellant and the Student is alleged by OSPI in this matter.

69. However, the Appellant single-mindedly believed that she and only she could rescue the Student. She hid the extent, nature and degree of intimacy of her relationship with him, including sleepovers, gifts, promises and driving privileges, from PASD staff and from his juvenile probation officer. She was clearly aware, because she conceded at the hearing, that much of what she did was not generally acceptable conduct between a teacher and student, and that people would talk about it, if they knew, and would not understand. Her actions were wilful, and demonstrated a clear abandonment of generally recognized professional standards, and a fundamental disregard of the Student' safety.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action, and authority to issue a final decision by OSPI as authorized in Chapter 28A.410 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including Chapter 10-08 Washington Administrative Code (WAC), Chapter 181-86 WAC, and 392-101 WAC.

2. The Professional Educator Standards Board (PESB) has the authority to develop regulations determining eligibility for and certification of personnel employed in the common schools of the state of Washington. OSPI is the administrator of those statutes and regulations and is empowered to issue, suspend, or revoke teaching certificates. RCW 28A.410.010.

3. Any certificate authorized under Chapter 28A.405 RCW may be revoked or suspended based upon the complaint of any school district superintendent for unprofessional conduct,

among other categories of behavior. RCW 28A.410.090. The April 11, 2007, complaint letter sent by Superintendent Cohn triggered OSPI's duty to investigate the Appellant.

4. Good moral character and personal fitness required of certificated personnel are a continuing requirement for holding a professional educational certificate under the regulations of the PESB. WAC 181-86-014. The terms are defined as follows:

As used in this chapter, the terms 'good moral character and personal fitness' means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:

(3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

WAC 181-86-013.

5. Unprofessional conduct is defined by WAC 181-86-060 as:

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.

6. In order to suspend or revoke certification, 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." WAC 181-86-170(2). In all other proceedings, "including reprimand, the standard of proof shall be a preponderance of evidence." WAC 181-86-170(3). (Emphasis added.)

7. Title 181-87 WAC (Professional Educator Standards Board - Professional Certification) generally does not apply to the private conduct of educational practitioners except where the education practitioner's role as a private person is not clearly distinguishable from the role of an education practitioner and the fulfillment of professional obligations. WAC 181-87-020. Although not cited by the Appellant, this appears to be the basis of her defense. She asserts her relationship with the Student was that of an extended family member or a guardian, and were not related to her being a teacher. This view is not adopted.

8. The Appellant's relationship with the Student was founded upon her standing as a teacher at the high school. She met the Student through PASD, and got to know him through tutoring him in her classroom at the high school. She thought he was assigned to her classroom during 4th period, or was going to be, and that he should be. She worked hard to get him assigned to her 4th period classroom, including writing emails, and lobbying his great-grandmother, his school counselor, and the principal. When she resumed contact with the Student in violation of multiple no-contact directives, according to her own admission it was for the purpose of tutoring him. Her explanation of her motivation to defy the no-contact directives underscores the foundation of the Appellant's relationship with the Student rested on her being a teacher and him a student.

9. The Appellant substituted her judgment for that of other professionals in the Student's life, including his juvenile probation officer and his school counselor. She was so certain her involvement with the Student was the only way he could be rescued from his negative family situation that she was willing to violate the no-contact restrictions placed upon her by PASD in order to maintain contact. This conduct meets the definition of unprofessional conduct; it was flagrant disregard or clear abandonment of generally recognized professional standards in the course of her supervision of the Student.

10. The Appellant understood at the time of her actions, and acknowledged during the hearing, that her contact with the Student would not be considered appropriate if people knew of it. Under the circumstances, an unrelated female adult teacher and male 15 year old student, sleeping in the same room/house/trailer ten or eleven nights in a one month period was clearly inappropriate. According to other certificated educational professionals, it was conduct that did not meet professional standards.

11. The inappropriate and unprofessional nature of that conduct was compounded when the Appellant misrepresented the extent of her relationship with the Student to PASD administrators. At her meetings with Mr. Harker and Dr. Jacobson in early December 2006, the Appellant did not disclose the sleepovers, and misrepresented the amount and type of contact she had with the Student. She told Mr. Harker she had not been alone with the Student, except for time spent tutoring him (underscoring the teacher-student nature of the relationship), driving him, and interviewing him. The Appellant's failure to disclose was a material misrepresentation to PASD administrators, and it was conduct which did not meet the standards expected for a certificated education professional.

12. Some of the Appellant's conduct and interaction with the Student does not meet the definition of either unprofessional conduct or a lack of good moral character or personal fitness, but demonstrated poor judgment and a lack of professionalism. A lack of professionalism is not equal to unprofessional conduct.

13. The gifts the Appellant gave to the Student demonstrated her generous heart, but also her poor judgment. A teacher less emotionally involved would not have given so many gifts, including the expensive snowboard, to an unrelated student. A less emotionally involved teacher would more likely have screened or evaluated the items selected by the Student, rather than simply purchasing each and every item the Student chose to put on his on-line Christmas wish-list. That behavior standing alone, however, would not rise to the level of unprofessional conduct.

14. Similarly, the fact that the Appellant wore the Student's jacket did not rise to the level of an act of unprofessional conduct. It was a topic during this proceeding because it was unusual conduct which struck family members as odd, and triggered their concern.

15. The Appellant knew the Student had multiple juvenile justice violations, even if she did not know the specifics of each. Allowing a 15 year old student with multiple juvenile justice violations to drive her car, not only on private property, but also on a public road, was unprofessional conduct. It sent a message to the Student that violating laws is acceptable, so long as one does not get caught. The conduct was unacceptable even though the Student only drove on a public roadway a small amount compared to the amount of driving on his great-grandmother's private property. It is the act that was wrong, and that set a bad example, rather than the number of minutes or miles, or even feet or yards. Further, sending the 'kitten letters' to the Student with a fictitious return address while he was confined by juvenile justice authorities was odd behavior, not appropriate and not professional, given that the letters had the effect of deceiving juvenile justice officials.

16. The context of the Appellant's actions is significant. Their relationship developed over a relatively short time. They were not long-standing family friends. The Appellant first met the Student briefly at the end of the 05-06 SY, then did not see him until October 2006. She very quickly drew very close to the Student. From the first interview with him, she laughed at inappropriate times during the interviews when the Student told of emotionally and physically painful, abusive, drug and alcohol fueled family events. Within less than two months of starting the interviews, she slept in his bedroom and in his own bed, with the Student in the same room, and slept in the trailer and/or in the same house a total of 10-11 time in a one-month period. She gave him inappropriate gifts and promised another inappropriate gift, her car. She also wilfully concealed information about the nature, extent and degree of intimacy in her discussions with PASD administrators and the Student's probation officer. The incidents were not isolated; they were clustered in time and intense.

17. Fundamentally, the Appellant's attitude toward the Student, that she knew what was best for him, and no one else knew as much, or was as well positioned to assist him, was

unprofessional conduct. The Appellant withheld information about the degree of her intimacy with the Student from PASD administrators and staff, and from his probation officer. She ignored the professional opinions of other educators and juvenile justice workers who were also involved in the Student's education and care. Other than allowing the Student to drive on a public road, her conduct was not illegal, but that does not render the conduct appropriate or acceptable for a certificated professional. Certificated staff who engage in unprofessional conduct run the risk that they will be caught, and they will be disciplined, not just by loss of their job, but by a sanction affecting their certification.

18. Behavior does not have to be criminal or sexual in nature to be inappropriate or unprofessional and below acceptable standards. The Appellant's conduct in the course of her professional practice was in flagrant disregard and/or clear abandonment of generally recognized professional standards in the course of her supervision of the Student. The fact that the Appellant realized her conduct would not be considered appropriate is a significant factor which underscores the flagrant disregard and clear abandonment of generally recognized professional teaching standards. The fact that she told the Student that others would not understand also underscores her awareness of the standards and her breach of them. Her belief that she was the only one who understood the Student and could help him is not a defense. The Appellant's assertion that she was not acting as a teacher, but was acting *in loco parentis* to the Student, is not adopted.

19. The pertinent standard for suspension of a teaching certification is set forth at WAC 181-86-070(2) as follows:

...

(2) The certificate holder has committed an act of unprofessional conduct or lacks good moral character but the superintendent of public instruction has determined that a suspension as applied to the particular certificate holder will probably deter subsequent unprofessional or other conduct which evidences lack of good moral character or personal fitness by such certificate holder, and believes the interest of the state in protecting the health, safety, and general

welfare of students, colleagues, and other affected persons is adequately served by a suspension. Such order may contain a requirement that the certificate holder fulfill certain conditions precedent to resuming professional practice and certain conditions to resuming practice.

20. The standard is somewhat different for a revocation. WAC 181-86-075 provides:

Grounds for issuance of a revocation order. The superintendent of public instruction may issue a revocation order under one of the following conditions:

(1) The superintendent of public instruction has determined that the certificate holder has committed a felony crime under WAC 180-86-013(1), which bars the certificate holder from any future practice as an education practitioner.

(2) The certificate holder has not committed a felony crime under WAC 180-86-013(1) but the superintendent of public instruction has determined the certificate holder has committed an act of unprofessional conduct or lacks good moral character or personal fitness and revocation is appropriate.

21. Unprofessional conduct is also defined at WAC 181-87-080 to include sexual misconduct. That is not alleged or at issue in this proceeding.

22. OSPI proved by clear and convincing evidence that the Appellant committed acts of unprofessional conduct during the 2006-07 SY. Having reached this conclusion, it is unnecessary to determine whether she also lacked good moral character and personal fitness.

23. The determination of acts of unprofessional conduct does not end the inquiry. The appropriate sanction for the discipline must be determined next. In order to determine the appropriate level and range of discipline, OSPI or its designee must consider certain

specified factors, at a minimum, prior to issuing any disciplinary order. WAC 180-86-080. These factors include the following:

- (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.

24. **Factor (1).** The seriousness of the acts and the actual or potential harm to the Student was testified to by Ms. Rutten, probation officer. Her professional opinion is that the Appellant was in a co-dependent relationship with the Student, and enabled him to continue in his unacceptable ways by providing excuses for him to avoid doing what the court required him to do. The Student's juvenile justice history made it especially important to model good behavior in a law-abiding manner. The potential harm to this 15 year old was significant. The Appellant repeatedly determined that she knew best what the Student needed; she knew better than the probation officer, the court, PASD administrators and the school counselor. She knowingly and intentionally violated five PASD directives to have no contact with the

Student. Those directives were the collective decision of other education professionals. It was not clear from her testimony whether the Appellant understood this point, even in mid-2009, although she had begun to suspect the Student might have been untruthful to her, and manipulated her.

25. **Factor (2).** There is no evidence of any criminal history on the part of the Appellant. Had Ms. Rutten known the Appellant was allowing the Student to drive her car, their might have been contempt of court proceedings against the Appellant for the probation violation, and the Student might have had additional juvenile justice problems.

26. **Factor (3).** The Student was 15 years old, but involved with the criminal and juvenile justice systems far beyond his chronological age. Given his unusual history, it is difficult to assess his maturity level, and easier to assess his vulnerability to inappropriate adult influence, according to his probation officer. The Appellant was in her early 60s, and had been a certificated teacher for approximately 25 years. The Appellant was certainly of sufficient age and experience as a teacher to be able to determine appropriate behavior. It appears she was influenced by her maternal feelings toward the Student, and not sufficiently guided by her professional judgment.

27. **Factor (4).** The acts occurred beginning in October or November 2006. The sleepovers ended, presumably, in December 2007, but the Appellant's insistence on remaining personally and professionally involved with the Student as a tutor continued throughout the following year. She continued to work with him in violation of the no-contact directives, and ultimately lost her job due to that conduct, but testified she didn't pay much attention to the directive. The acts are not remote in time.

28. **Factor (5).** The Appellant's belief that she was the best and only chance the Student had, despite the significant involvement of other professionals (probation officer, juvenile court judge, school counselor, PASD administrators, great-grandmother) and her concealment of important aspects of her relationship with him from those professionals demonstrated a disregard for his health, safety and welfare. The fact that she never even considered that his assignment to attendance office TA was made for any reason other than retaliation against

her was in clear disregard of his safety and welfare. Allowing the Student to drive her car, even a bit, on a public roadway demonstrated a disregard for his health, safety and welfare. This was not an average 15 year old boy, taken out for a fun drive on family property to learn to drive. This was a boy whose extensive involvement with juvenile justice authorities over many years made him particularly susceptible to conduct which defied authority.

29. **Factor (6).** There is no evidence of a behavioral problem, such as a diagnosed mental illness, or criminal conduct.

30. **Factor (7).** The evidence which demonstrated a lack of fitness for teaching does not relate to physical fitness to teach, but relates to the Appellant's lack of professional detachment, and her insistence on seeing herself as the Student's savior or parent, rather than his tutor.

31. **Factor (8).** One governmental entity (PASD) imposed significant discipline (job termination) against the Appellant for her behavior.

32. **Factors (9) and (10).** The aggravating circumstances were the knowing and wilful disregard of decisions made by other education and juvenile justice professionals, and the court (the terms of probation), and the untruthful statements and omissions she made to PASD administrators, along with misrepresentation of the degree of intimacy.

33. There was evidence of mitigating circumstances. The Appellant genuinely and fervently, believed her actions were appropriate, were in the Student's best interest, and were unrelated to her status as a school teacher. That she was wrong on those points does not change the fact that her motivation was to assist the Student. She provided tutoring to the Student which helped his grades. The evidence supports the determination that the Appellant saw herself in a maternal role, and to that end, engaged in unprofessional conduct. She had received good evaluations as a teacher, with no prior discipline.

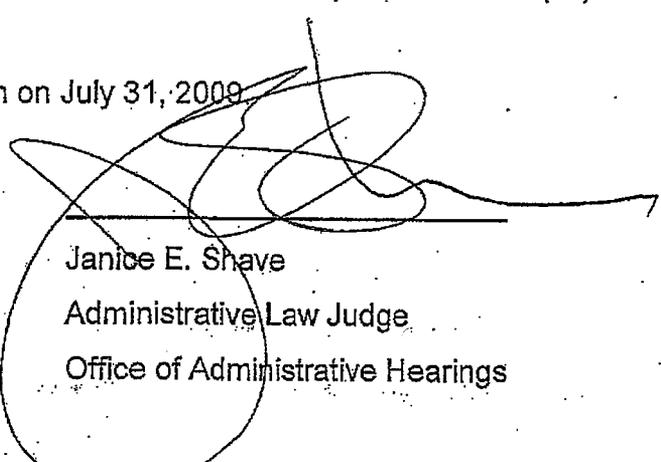
34. Consideration of the above factors leads to the following conclusion: The appropriate discipline for this certificated individual under the above circumstances is suspension for twelve months.

35. OSPI seeks imposition of a twenty-four month suspension. The evidence supports a twelve-month suspension. The Appellant's actions were knowing and wilful, but not sexual or ill-intentioned. The evidence supports the determination that she repeatedly made poor choices, and exercised her own judgment based on faulty premises, but not that she intended to cause harm to the Student. This was unprofessional conduct which should be able to be remedied by a twelve-month sanction, as determined by the professional educators who make up the APCAC. Under the facts presented in this hearing, the twelve-month suspension is appropriate.

ORDER

The Appellant's educational certificate is suspended for a period of twelve (12) months.

Dated at Seattle, Washington on July 31, 2009



Janice E. Shave
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 and OSPI. The filing of a petition for reconsideration is not required before seeking judicial review.

In accordance to 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 and that no stay of reprimand, suspension, or revocation shall exist until the Appellant files an appeal in a timely manner pursuant to WAC 181-86-155.

Any person whose certificate has been suspended or revoked by OSPI in accordance with the procedures of WAC 181-86-155 may appeal that decision to the Professional Educator Standards Board by filing a notice of appeal with OSPI or the secretary of the Professional Educator Standards Board within 30 days of the date of mailing the decision of the OSPI, or his designee, an ALJ at OAH. If a petition for reconsideration is filed, this 30-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing an appeal to the PESB commences with the date of the mailing of this decision.

Following an appeal to the PESB, this matter may be further appealed to a court of law. WAC 181-86-155; RCW 34.05.542.

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. lan

Via Certified Mail and US Mail

Linda Capo

[REDACTED]

[REDACTED]

Charlie Schreck, Director, OPP, OSPI

PO Box 47200

Olympia, WA 98504-7200

Jon Howard Rosen, Attorney at Law

Hoge Building, Suite 1200

705 Second Avenue

Seattle, WA 98104-1798

Anne Shaw, Assistant Attorney General

PO Box 40100

Olympia, WA 98504-0100

cc: Administrative Resource Services, OSPI

Janice E. Shave, ALJ, OAH/OSPI Education Caseload Coordinator