

NO. 45534-0

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

Jason Len,

Appellant,

v.

Office of Superintendent of Public Instruction,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Teachers hold a position of trust in society that requires adherence to professional standards designed to protect the public. Teachers who clearly abandon those standards, such as Jason Len, are subject to discipline.

For a period of two years, Mr. Len used his status as a teacher to improperly insert himself into the personal lives of several students, to the discomfort of many parents (one mother was shocked to discover he had spent the night in her son's room). He spent an inordinate amount of time with at least half a dozen favored boys; driving them around, taking them out to eat, hanging out with them in parks after closing, and watching them play video games well past midnight in a bedroom, basement, and hotel room. He never once asked the parents for permission to interact with their children in this manner. He also shared sleeping areas with these boys and held a sleepover at his house under the auspices of a math team event.

Mr. Len's employer, Bellevue School District's International School, was unaware of his conduct. When it learned of his actions it found Mr. Len's conduct to be an alarming "failure to respect appropriate professional boundaries with students." Explicit no-contact directives were issued by the District, which Mr. Len violated.

Mr. Len has tried to characterize his conduct as normal, while minimizing the extent of the conduct and, in many instances, testifying dishonestly about the circumstances. The Superintendent of Public Instruction's Office of Professional Practices found that Mr. Len transgressed the bounds of professional conduct. Administrative Law Judge Michelle Mentzer also rejected Mr. Len's characterizations and found he lacked credibility. Parents, students, teachers, and the principal testified that Mr. Len's conduct was not normal. Mr. Len's conduct demonstrated a clear abandonment of generally recognized standards, warranting a 12-month suspension of his teaching certificate with a reinstatement condition that Mr. Len obtain a psychological evaluation and treatment.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Judge Mentzer properly relied on the testimony of the International School Principal, several teachers, and the director of the Office of Professional Practices to conclude that Mr. Len violated generally recognized standards in the treatment and supervision of current and former students?
2. Whether Judge Mentzer's determination that Mr. Len testified dishonestly and lacked credibility was supported by substantial evidence?
3. Whether Judge Mentzer properly determined that Mr. Len's conduct warranted a 12-month suspension of his certificate and a psychological evaluation as a condition precedent to recertification under WAC 181-86-080's eleven factors?

4. Whether Judge Mentzer properly held a *de novo* adjudicative hearing under the Administrative Procedure Act?

III. COUNTERSTATEMENT OF THE CASE

A. Facts Constituting Jason Len's Misconduct

Jason Len has held a Washington State teaching certificate since 1998, the year he began teaching at the International School (I.S.) in the Bellevue School District (District). CP at 6 (FF 1), 7 (FF 2).¹

The I.S. is a combined middle and high school spanning grades six through twelve. During his 10-year tenure at I.S., Mr. Len primarily taught math and science to middle school aged boys. CP at 7 (FF 3). He also served as an advisor to the school's math/science team for several years, advisor to the school's robotics team and student government for one year, and—of particular note here—as a chaperone on school field trips and student social functions. CP at 7 (FF 3), 9 (FF 18).

The key facts in this case are, for the most part, uncontested. Over a period of two years, from 2006 to 2008, Mr. Len spent an enormous amount of time socializing with several high school aged

¹ The recitation of facts in this brief is primarily adopted from the December 18, 2012, final order entered in the administrative hearing below: the Amended Findings of Fact, Conclusions of Law, and Order. CP at 42-70. This order superseded an earlier final decision issued on December 11, 2012, to make minor, nonsubstantive changes. CP at 80-108. The Amended Order is the final agency action that Mr. Len has petitioned this Court to review. CP at 1. Additionally, the transcript of the administrative proceeding is included in the Clerk's Papers (CP) at pages 1106-2200. All citations in this brief refer to the relevant CP number and, as appropriate, a specific reference to line numbers is made. Line numbers are separated from page numbers using a colon (e.g., CP at 1375:20-25).

students—mostly sophomores—outside of school. All of these boys met Mr. Len as students at the I.S., and most of them had been Mr. Len’s students when they were younger. CP at 7 (FF 7).

Mr. Len socialized with these boys by taking them out to meals, giving them rides in his personal vehicle, and watching them play video games. CP at 7-8 (FF 8). Frequently, he spent time with the boys one-on-one. CP at 8-9 (FF 9, 13-14). At other times, he socialized with groups of boys. CP at 7-8 (FF 8). Among other things, Mr. Len took them on outings to local parks and malls, drove them across Lake Washington to Alki Beach in West Seattle, and spent extended periods of time at some of the boys’ homes—often, as Judge Mentzer found, “until the small hours of the morning.” CP at 7-8 (FF 8). He took the boys to restaurants, such as Applebee’s, Red Robin, and Sushi Land. CP at 8 (FF 9). Mr. Len bought favored students gifts, such as bandanas, t-shirts, small souvenirs, and a toy helicopter. CP at 8 (FF 10). He also loaned Student I² money to buy a pair of shoes. CP at 8 (FF 10).

The boys themselves often contacted Mr. Len and asked him to join in on their teenage activities. They asked him to drive them around town in his minivan and to come to their homes to hang out. Mr. Len,

² During the adjudicative hearing, each student received a letter designation to protect the student’s privacy.

too, texted or called the boys on his own to ask if they wanted to spend time together. CP at 8 (FF 11).

Mr. Len had no social relationship with these boys' parents, with one exception.³ CP at 8 (FF 12). Even when parents were present, Mr. Len interacted with the boys, not their parents; he seemed uncomfortable around parents and did not engage in "typical adult" conversations. CP at 1294:8-10, 1295:25 to 1298:1, 1378:16 to 1386:23, 1795:1-20. When Mr. Len took the boys out, he never told the parents where they were going unless they specifically asked, and he never sought the parents' permission to spend time with the boys. CP at 8 (FF 11).

Mr. Len spent the most one-on-one time with one boy, Student E, who graduated from the I.S. in 2007. While Student E was a student, he and Mr. Len met socially on a nearly weekly basis—just the two of them—spending up to four hours with each other at a time. They drove around, hung out at parks, had meals together, and talked. CP at 8 (FF 13). Student E's relationship with Mr. Len was not like the relationships Student E had with other teachers. CP at 1556:4-25, 1558:12 to 1561:24, 1564:21-23.

³ The exception was Student H, whose parents met Mr. Len through their son and, because of their shared background of living in Hawaii, they sometimes socialized together. CP at 8 (FF 12).

Student E's mother was uncomfortable with her son's relationship with Mr. Len, and she was unaware that Mr. Len sometimes took her son as far as Alki Beach in Seattle. CP at 21 (FF 64), 22 (FF 72). But for the fact that he was a teacher, Mr. Len would not have had this type of access to Student E. CP at 1794:20 to 1795:13. Mr. Len's conduct also made Student E's stepfather very uncomfortable, and ultimately, Student E's mother wrote to Mr. Len and asked him to confine his interactions with her youngest son to school-related activities. CP at 23 (FF 74).

During a number of school sponsored trips, Mr. Len spent time in sleeping areas with students. *See* CP at 9 (FF 15) (in spring 2006, during a weeklong school trip to Orcas Island, he stayed in the boys' room until 1 a.m., at times with the lights out and wrapped in his sleeping bag on the floor); 9 (FF 16) (in spring 2007, he allowed Student D, a high school aged boy, to sleep on the floor of Mr. Len's separate sleeping quarters during a Science Bowl trip to Oregon).

During a February 2008 trip to a jazz festival in Idaho, Mr. Len invited several boys to spend the night in his room, in violation of curfew, playing video games on his personal Xbox™ game console that he had brought on the trip; Mr. Len—dressed in his pajamas—mostly watched the boys play, only sleeping in his bed for part of the night. CP at 10 (FF 23), 16 (FF 46-47). When Mr. King, the jazz choir advisor, later

found that Mr. Len had helped these students break curfew, he was surprised and disappointed. CP at 10 (FF 23).

Mr. Len also held a party for a group of students the night before a high school math team competition in spring 2007, and he invited several boys to sleep over. CP at 9 (FF 17). No other adults were present. In direct contravention of District policy, he did not obtain any advance approval from the I.S. administration to sponsor this party and sleepover at his home. The school's principal knew nothing about the event until after it happened. CP at 9 (FF 18), 13-14 (FF 34-36).

In July 2007, Student K, a former I.S. student, invited Mr. Len to a family barbeque at his home, along with several of the I.S. students who socialized with Mr. Len. A handful of these school aged friends intended to sleep at Student K's home because they were leaving the following morning on a trip with Student K and his stepfather. Without the consent or knowledge of Student K's parents, Mr. Len stayed through the night in Student K's bedroom watching the boys play video games. The next morning, Student K's mother was extremely shocked when she discovered Mr. Len in her son's bedroom. CP at 9 (FF 19), 14 (FF 37-38).

Later in July 2007 Mr. Len took four of these boys, with parental consent, on a weeklong road trip to the Oregon coast. Three of the boys

were in high school at the time; the fourth, Student E, had just graduated. During the trip, Mr. Len shared hotel rooms, cabins, and tents with the boys. In one cabin there were four foldout sleeping platforms. Mr. Len slept on one of these platforms with Student H, the two lying side-by-side in their sleeping bags. CP at 8-9 (FF 14), 9-10 (FF 15, FF 20), 14-15 (FF 39-43).

Mr. Len's conduct continued throughout the summer and into the following school year. In the summer of 2007, Mr. Len took several boys to Wilburton Park in Bellevue. Student K's mother knew her son was with Mr. Len, so she pulled into the park when she saw Mr. Len's minivan. Student K's mother witnessed Mr. Len's minivan speed away from her vehicle, driving above the speed limit and failing to slow down when rounding curves. Student K's mother attempted to follow the minivan but was unable to do so. Later, she learned Mr. Len was taking Student K back to the boy's house. CP at 10 (FF 21).

After the school year started, Mr. Len attended a dance at the I.S. He was not an official chaperone at the event (called the "Tolo Dance") and the record does not clearly establish why he was there. Three girls, Students L, M, and N, were at the dance with their dates—the boys with whom Mr. Len socialized. When the boys suddenly left the dance without telling the girls they were leaving, the girls became visibly upset.

Mr. Len tried to persuade the girls to reconcile with the boys by offering to drive them to meet the boys at a local restaurant. The girls did not like Mr. Len interjecting himself into their personal affairs, and they turned him down. CP at 10 (FF 22), 15-16 (FF 44-45). The next week, Mr. Len approached the girls again and encouraged them to patch things up with the boys for the sake of class unity. Student M became so upset she spoke angrily to Mr. Len and used profanity. CP at 10 (FF 22), 15-16 (FF 45).

In March 2008, Mr. Len drove several boys to a mall to purchase a video game with a midnight-release. The group returned to the home of Students E and G to play the game late into the night. Mr. Len didn't leave until approximately 3 a.m. This was not the only visit that lasted beyond midnight. The boys' mother was aware of at least five nights when Mr. Len stayed at her house until 2 or 2:30 a.m. She normally went to bed around 10:30 or 11 p.m., but these nights she laid awake until Mr. Len left because his presence made her uncomfortable. CP at 10 (FF 23), 1793:24 to 1794:6, 1818:11 to 1819:4.

Mr. Len suggested his conduct was generally accepted within the I.S. community but called no witnesses to support his assertion. CP at 17 (FF 50). The testimony of students, parents, teachers, and the principal indicates that it was not generally accepted for teachers to interact with

students at their homes without explicit parental permission, stay late in their homes, break curfew with students, exchange phone numbers, drive students in their personal vehicles, take students out to eat in groups or one-on-one, sleep over at teachers' houses, sleep in the same room or bed as a student, or engage in any of the conduct Mr. Len touted as acceptable. CP at 17-20 (FF 51-62), 1276:14-17, 1298:8-11, 1319:3 to 1321:22, 1334:14 to 1336:6, 1432:25 to 1433:19, 1446:8 to 1450:9, 1466:16 to 1474:4, 1604:25 to 1617:25, 1783:7 to 1784:21, 1800:8-14, 1803:18-20, 1878:14 to 1900:20, 1944:13-22. Mr. Len's conduct caused parents to talk to their boys about whether any sexual contact had occurred and suggest that Mr. Len's interest may not be as innocent as it seemed. CP at 1296:23 to 1297:22, 1380:7-17, 1808:19-25, 1809:11-18, 1816:1-11.

The I.S. principal finally learned about Mr. Len's extensive extracurricular relationship with students in March 2008 and directed Mr. Len to: not talk to current or former I.S. parents or students about the District's investigation into Mr. Len's conduct; not socialize with students outside of school as if they were peers; and to limit his interactions with students to those of any "normal" "professional teacher/student relationship." CP at 11 (FF 25). Mr. Len was also involuntarily transferred to another school in fall 2008. CP at 11 (FF 26).

Upon completion of the District investigation in November 2008, Mr. Len was reprimanded for this “failure to respect appropriate professional boundaries with students” and directed to stop engaging in his “alarming pattern of behavior.” CP at 802, 805. He was directed to: not visit students’ homes without explicit permission from administrators; have no telephone, email, or other communication with District students outside the normal requirements of teacher-student communication on school-related matters; and refrain from any social or other contact with District students away from school. CP at 11-12 (FF 26). If he unexpectedly ran into students outside of school, Mr. Len was “directed to promptly separate [him]self from the situation in a polite and professional manner.” CP at 11 (FF 26), 1753:3 to 1754:8.

In addition to the no-contact directives, the District imposed a number of directives designed to limit Mr. Len’s interactions with students in school-sanctioned activities. CP at 798-99 (restricting where he could park, banning him from chaperoning or supervising students on overnight trips, and prohibiting him from being the sole chaperone/supervisor for any evening or nonschool day local events). It was the District’s hope that the transfer and directives would be sufficient to cause Mr. Len to change his behavior, but it was not. CP at 11 (FF 26), 1753:3 to 1754:8.

Mr. Len ignored the no-contact directives. In May 2008, within two months of the first directives, Mr. Len was overheard talking with I.S. students about the District's investigation. CP at 12 (FF 28), 1974:14 to 1975:21. After being transferred, he continued to talk with Student H for two school years, 2008-09 and 2009-10. CP at 12 (FF 29), 1838:25 to 1839:10, 1844:2-22. Mr. Len also met with Student I, another I.S. student, in person several times during the two years following Mr. Len's departure from I.S. CP at 12 (FF 30), 16-17 (FF 48-49).

Following the District's investigation, reprimand, and reassignment of Mr. Len, the District superintendent transmitted a complaint letter to the Office of the Superintendent of Public Instruction (OSPI), as required by Washington law. *See* CP at 794-806; *see also* WAC 181-86-110; WAC 181-87-095. OSPI initiated an investigation of the matter on December 12, 2008. CP at 930.

B. The Teacher Disciplinary Process

OSPI's Office of Professional Practices (OPP) investigates complaints and enforces Washington's code of professional conduct for teachers. RCW 28A.410.010(2), .095(1). Teachers are required to have good moral character and personal fitness, and to act professionally. RCW 28A.410.090; WAC 181-86-014; WAC 181-87-015. An act of unprofessional conduct is grounds for a reprimand, suspension, or

revocation of a teacher's education certificate. RCW 28A.410.090; WAC 181-86-065 through -080.

Upon receipt of a complaint alleging unprofessional conduct by a teacher, OPP investigates to ascertain "the existence of any alleged violations of or noncompliance" with the rules of professional conduct. RCW 28A.410.095(1); WAC 181-86-100(2).

Once an investigation is concluded, OPP issues what it calls "proposed orders." RCW 28A.410.095(4). These orders inform the teacher of OPP's factual findings and the disciplinary action—reprimand, suspension, or revocation—OPP intends to take. WAC 181-86-130. In addition, proposed orders inform teachers of the administrative appeal rights available under OPP's rules. WAC 181-86-130. The teacher has 30 days to appeal the proposed order or it becomes final. WAC 181-86-135.

An appeal triggers an "informal review" governed by WAC 181-86-145. The appealing teacher must submit written reasons supporting his or her belief that OPP's proposed discipline is unwarranted. OSPI appoints an independent "review officer" who convenes the Admissions and Professional Conduct Advisory Committee (APCAC). WAC 181-86-145(2). APCAC is a nine-member committee consisting of three certificated teachers (including one private school

teacher), three educational staff associates (nonteaching licensed school professionals such as counselors, nurses, and psychologists), and three school administrators, all currently practicing in their respective fields. WAC 181-86-085. The committee reviews informal appeals and provides recommendations to the review officer. WAC 181-86-095.

The review officer—acting with the advice of the Committee members—may uphold, reverse, or modify OPP’s proposed order. WAC 181-86-145(3). The review officer customarily calls this a “final order.”

A teacher may, however, request another level of appeal—a “formal review process” or “formal appeal.” WAC 181-86-150. A “formal administrative hearing” is then held “in conformance with the Administrative Procedures Act (APA), chapter 34.05 RCW” before an administrative law judge. WAC 181-86-150(2).

C. OPP, APCAC, and Judge Mentzer All Concur That Mr. Len Committed Acts of Unprofessional Conduct

OPP concluded its investigation of the District’s complaint against Mr. Len on March 8, 2011, when it issued a proposed order that would suspend Mr. Len’s education certificate for 12 months, and require him to complete a psychological evaluation before his certificate could be reinstated. CP at 932-938. Mr. Len timely appealed this proposed order

to APCAC and OSPI's designated review officer, Dr. Gene Sharratt. CP at 940. Following the informal review, APCAC and Dr. Sharratt agreed that OPP's proposed discipline was appropriate; a final order was issued on November 14, 2011. CP at 942-948. Mr. Len appealed that decision. CP at 950; WAC 181-86-150.

Several months of prehearing activity followed, during which Mr. Len and his counsel were advised that the hearing would be conducted as a contested case hearing pursuant to the APA, and the procedural rules of OSPI and the Office of Administrative Hearings (OAH). CP at 304. The hearing was delayed three times at Mr. Len's request, resulting in nearly nine months to prepare for the hearing. CP at 258-59, 272-73, 284-85, 292-94.

Judge Mentzer conducted the five-day adjudicative hearing beginning August 6, 2012, to determine whether clear and convincing evidence supported suspension of Mr. Len's certificate for 12 months with conditions on reinstatement. CP at 293. Judge Mentzer issued the agency's final decision on December 18, 2012, concluding that Mr. Len committed acts of unprofessional conduct in five ways that constituted a flagrant disregard or clear abandonment of generally recognized standards in the course of assessing, treating, instructing, or supervising students. CP at 5-33; *see* WAC 181-86-070(2). He violated a host of

District, school, and local city rules—and helped students violate rules—in the course of supervising students. CP at 27 (CL 14). He engaged in professional misconduct by selecting some students for “vastly differential treatment as favorites.” CP at 27 (CL 16). He “lavish[ed] meals and gifts on students.” CP at 28 (CL 20). He interfered with relationships between parents and students, usurping the parental decision-making role. CP at 28 (CL 21). And he engaged in conduct that disregarded professional teacher-student boundaries—“resembl[ing] grooming behavior for sexual abuse”—and raised potential legal liability for his employer. CP at 29 (CL 23). Judge Mentzer also made 17 specific findings regarding Mr. Len’s untruthful testimony and lack of credibility. CP at 13-17 (FF 33-49).

Judge Mentzer issued the agency’s final decision on December 18, 2012, and it became effective that same date. CP at 33. Mr. Len sought superior court review of Judge Mentzer’s order. As he did not request a stay, he completed his 12-month suspension on December 18, 2013. CP at 1-4. The superior court affirmed the final order in its entirety. CP at 2239-2241. Mr. Len appeals.

IV. STANDARD OF REVIEW

The APA governs judicial review of final orders issued by OSPI in teacher certification matters. RCW 34.05.570(3). Grounds for reversing an agency's order are limited under the APA: Mr. Len has the burden of proving that Judge Mentzer erroneously interpreted or applied the law, that the order is not supported by substantial evidence, or that the decision is arbitrary or capricious. RCW 34.05.570(1)(a), (3)(d), (e), (3)(i).

The reviewing court does not evaluate witness credibility or reweigh the evidence; rather, the court should accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Kraft v. Dep't of Soc. & Health Serv's.*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008).

Challenged findings must be upheld if supported by substantial evidence,⁴ which exists if there is "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." *In re Disciplinary Proceeding Against Ferguson*, 170 Wn.2d 916, 927, 246 P.3d 1236 (2011). This standard requires this Court to "view inferences in a light most favorable to the party that prevailed in the

⁴ The "clearly erroneous" standard cited by Mr. Len was replaced by the "substantial evidence" standard when the APA was amended in 1989. The clearly erroneous standard of review was applicable under the former APA until 1989. *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 604, 886 P.2d 1147 (1995). However, this case involves facts occurring after 1989, to which the current APA applies. See RCW 34.05.902.

highest forum that exercised fact-finding authority.” *Benchmark Land Co. v. Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (quoting *Schofield v. Spokane County*, 96 Wn. App. 581, 588, 980 P.2d 277 (1999)). Evidence may be substantial even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The testimony of one witness, if believed, constitutes substantial evidence, even if contradicted by other witnesses. See *Vermette v. Andersen*, 16 Wn. App. 466, 558 P.2d 258 (1976).

Questions of law are subject to *de novo* review but substantial weight is given to an agency’s decision when it has expertise in a particular area. *Kraft*, 145 Wn. App. at 717; *Markam Group, Inc. v. Dep’t of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

When reviewing mixed questions of law and fact, the court must (1) determine which factual findings are supported by substantial evidence; (2) make a *de novo* determination of the correct law; and (3) apply the law to the applicable facts. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the administrative law judge before interpreting the law. *William Dickson Co. v. Puget Sound Air Pollution*

Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

V. SUMMARY OF THE ARGUMENT

Following a full hearing on the merits, Judge Mentzer determined by clear and convincing evidence that Mr. Len violated generally recognized professional standards by: 1) violating school and District rules, a local city ordinance, and drawing “students into committing” violations with him; 2) treating select male students as favorites; 3) spending money on and lending money to students; 4) interfering “with relationships between parents and students and usurp[ing] the parental decision making role”; and 5) violating appropriate student-teacher boundaries and creating “potential liability for the School District.” CP at 27-29 (CL 14-23). She also found that Mr. Len was dishonest during these proceedings, that he lacked credibility, and exhibited a behavioral problem.

Judge Mentzer correctly allowed for the presentation of testimony and evidence at the adjudicative hearing without limiting the evidence to OPP’s investigative record. After reviewing all of the evidence and considering the factors relevant to the level of discipline, Judge Mentzer concluded that Mr. Len’s conduct and behavioral problem warranted a

12-month suspension and a psychological evaluation as a reinstatement condition. Judge Mentzer's order reflects a proper application of the law to the facts and is fully supported by substantial evidence.

VI. ARGUMENT

A. Substantial Evidence Supports Judge Mentzer's Findings That Mr. Len's Conduct Fell Well Outside the Bounds of Professional Conduct; Individuals With Knowledge of the Standards Governing Teacher Conduct Testified to the Parameters of Appropriate Teacher Conduct and Evidence Demonstrates That Mr. Len's Conduct Was Improper, if Not Alarming

1. Teachers Who Clearly Abandon Professional Standards in Their Interaction With and Supervision of Students Are Subject to Discipline

Teacher discipline is designed to "protect the health, safety, and general welfare of" Washington's students and to hold teachers "accountable for acts of unprofessional conduct." WAC 181-87-010(1) and (2); *see also Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 602-603, 903 P.2d 433 (1995) (professional discipline of a social worker and counselor recognizing that the primary purpose of professional discipline is to protect the public).

Unprofessional conduct occurs when a teacher demonstrates a "flagrant disregard or clear abandonment of generally recognized professional standards in the . . . [a]ssessment, treatment, instruction, or

supervision of students.” WAC 181-87-060.⁵ “Student” is broadly defined and includes students enrolled “in any school or school district served by the education practitioner” and former students under 18 years old who have been under the “supervision, direction, or control” of the educator. WAC 181-87-040. Private conduct is subject to the professional conduct standards “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.

OSPI has the burden of proving unprofessional conduct by clear and convincing evidence, which exists if the evidence shows the ultimate fact at issue to be highly probable. *See* WAC 181-86-170; *In re Welfare of C.B.*, 134 Wn. App. 336, 346, 139 P.3d 1119 (2006).

Mr. Len asserts that a more stringent standard should apply claiming that teacher disciplinary proceedings are quasi-criminal. *See* Br. Appellant at 14-15 (citing *Nguyen v. Dep’t of Health Med. Quality Assurance Comm’n*, 144 Wn.2d 516, 29 P.3d 689 (2001)). *Nguyen* does not support this assertion. It has been limited to physician disciplinary proceedings and adds nothing to the analysis in this case because the clear

⁵ Mr. Len’s focus on good moral character is irrelevant; Judge Mentzer did not discipline him for lacking good moral character, she disciplined him for unprofessional conduct. *Cf.* CP at 25-27 (CL 9-14); Br. Appellant at 10-11; WAC 181-86-013.

and convincing standard of proof already applies under WAC 181-86-170. *See Hardee v. Dep't of Soc. and Health Serv's.*, 172 Wn.2d 1, 7-9, 256 P.3d 339 (2011); and WAC 181-86-170.

Further, Mr. Len's contention that WAC 181-87-060 should be construed using the doctrine of lenity is not supported by the cited authorities. Br. Appellant at 14-15. Mr. Len relies on a dissenting opinion which explicitly recognized that the doctrine of lenity applies to penal statutes that can result in imprisonment or a fine. *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 347-48, 126 P.3d 1262 (2006) (quoting *State v. Eilts*, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980) (citations omitted)). Not only is this position unpersuasive, as it relies on a dissenting opinion, but it is also inapposite given that teachers cannot be punished by imprisonment or a fine under OSPI regulations.⁶

2. Testimony of Education Professionals Provides Substantial Evidence That Mr. Len's Conduct Fell Outside of the Bounds of Professional Conduct

This appeal presents a question of fact: whether there is substantial evidence that Mr. Len engaged in unprofessional conduct. *Heinmiller*, 127 Wn.2d at 605, (quoting *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 743, 818 P.2d 1062 (1991)) (understanding among members of a

⁶ The other authority Mr. Len cites, *Pacific Mut. Life Ins. Co. of California v. State*, 161 Wash. 135, 138, 296 P. 813 (1931), pertains to taxation, not professional discipline, and is irrelevant.

profession that particular conduct is unacceptable is a question of fact); *see also Johnson v. Dep't of Health*, 133 Wn. App. 403, 411-412, 136 P.3d 760 (2006) (professional standards can be proven by a person who is not a member of a profession if s/he has work-based knowledge of the standards).

In *Heinmiller*, testimony from social work professionals established the professional standards applicable to social worker relationships with former clients. The court stated that the “critical inquiry” in the case was to determine “the common understanding among social workers” with regards to the standard. *Heinmiller*, 127 Wn.2d at 605.⁷ In *Johnson*, testimony from a Department of Health program manager with years of experience handling complaints, investigations, and disciplinary hearings established the professional standards applicable to counselors. *Johnson*, 133 Wn. App. at 411-412.

OSPI establishes generally recognized professional standards under WAC 181-87-060 using the testimony of educators, administrators, and others with specific knowledge of the standards observed by the professional education community. It is also relevant here that APCAC is made up of current practicing educational professionals who are in a

⁷ The court in *Haley* notably based its analysis on a California Supreme Court teacher discipline case, *Morrison v. State Bd. of Educ.*, 1 Cal.3d 214, 461 P.2d 375 (1969). *See Haley v. Med. Disciplinary Bd.*, 117 Wn.2d at 741-43.

unique position to understand and apply current generally accepted standards of professional conduct. *See* WAC 181-86-085, -095.

In this case, Judge Mentzer's findings of unprofessional conduct by Mr. Len are supported by substantial evidence from individuals with knowledge of the standards governing professional teacher conduct: teachers, the principal, and the OPP director. *See* CP 1494:4 to 1499:9, 1500:8 to 1504:25, 1506:19 to 1507:10, 1513:12 to 1514:21, 1515:7-9, 1516:3 to 1517:5, 1518:25 to 1519:17, 1539:20-23, 1604:25 to 1612:12, 1615:22 to 1616:12, 1619:10-17, 1623:17 to 1624:24, 1627:9 to 1629:8, 1656:1-23, 1657:15-24, 1665:15-25, 1685:2-11, 1714:7-11, 1715:7-14, 1716:8-11, 1725:3-7, 1751:1-10, 1757:20 to 1758:14, 1872:8-10, 1880:25 to 1881:22, 1882:1 to 1888:19, 1890:12 to 1891:6, 1892:5 to 1893:19, 1894:7-23, 1895:18 to 1899:1, 1900:9-20, 1913:25 to 1914:9, 1917:12-19, 1925:11-22, 1928:1-5, 1930:7-15, 1931:11 to 1932:6, 1933:18 to 1934:4, 1937:3-13, 1956:15-21, 1961:5-13, 1962:3 to 1963:6, 1965:1 to 1973:17, 2005:18 to 2008:15, 2010:13 to 2011:6, 2011:20-25, 2012:16 to 2013:5, 2014:1-21, 2015:2-11.

3. The Record Contains Overwhelming Evidence of Mr. Len's Clear Abandonment of Generally Recognized Standards

Judge Mentzer determined that Mr. Len clearly abandoned generally recognized professional standards through numerous acts, falling

into five different categories of unprofessional conduct. As demonstrated below, each finding was supported by substantial evidence in the record.

a. Mr. Len Violated School and District Policies and Local Ordinances

Judge Mentzer found that Mr. Len engaged in unprofessional conduct by violating a District rule, a school rule, and a local city ordinance. CP at 27 (CL 15).

Teachers are required to adhere to District policies and procedures governing field trips. CP at 1513:3-23, 1611:15 to 1612:12. Despite Mr. Len's familiarity with these policies and procedures, he did not complete any paperwork, request District approval, or obtain parental permission slips before hosting a sleep over in his home under the auspices of a math team event. *See* CP at 27 (CL 15), 810-11, 813-14, 1442:3 to 1446:7, 1448:7-16, 1459:3-9, 1465:15-24, 1617:4 to 1622:23, 1624:11-23, 1943:2-6. This reflected a complete disregard for District policies that enabled Mr. Len to hold a sleepover in his home; conduct which itself is improper.⁸

Teachers are expected to set and enforce rules, including curfews on overnight field trips. *See* CP at 1513:18-24, 2012:18 to 2013:1. When curfew is in effect, students are required to be in their rooms.

⁸ It is not generally acceptable for teachers to invite students to sleep over at their houses. *See* CP at 1515:7-9, 1607:24 to 1608:23, 1965:17-25, 1966:1-22.

CP at 1511:11-13. Rather than set and enforce the rules, Mr. Len brought his personal Xbox™ console on a field trip for the specific purpose of having five boys spend the night in his room playing video games, in violation of the curfew requirements. CP at 27 (CL 15), 1249:14 to 1251:24, 1498:18 to 1499:9, 1510:22 to 1511:13, 1584:2 to 1586:6. The teacher who sponsored the field trip testified it was alarming that a chaperone, “the person who had responsibility, [was] breaking one of the rules of the trip.” CP at 1513:18-24.

While it is the duty of teachers to provide students with guidance about morality, Mr. Len violated local city ordinances with students by taking them to parks after their posted closing times. CP at 27 (CL 15); *see* RCW 28A.405.030. Mr. Len admits that his outings to parks, including Alki Beach on at least three occasions, lasted until at least midnight. CP at 1188:16-21, 1547:4-13. Bellevue parks close “one-half hour after sunset.”⁹ Seattle parks close at 11:30 p.m.¹⁰

Judge Mentzer had substantial evidence to conclude that Mr. Len committed unprofessional conduct when he violated District policies and the law.

⁹ Bellevue City Code § 3.43.330 *available at* <http://www.codepublishing.com/wa/bellevue>

¹⁰ Seattle Municipal Code § 18.12.245 *available at* <http://clerk.ci.seattle.wa.us/~public/code1.htm>

b. Mr. Len Singled out Certain Students for Favoritism

Judge Mentzer found that Mr. Len engaged in unprofessional conduct through his “vastly differential treatment” of certain students. CP at 27 (CL 16). Teacher, paraeducator, and principal testimony established that favoritism falls outside of generally accepted professional standards. CP at 1353:16-21, 1518:25 to 1519:6, 1623:7 to 1626:10. Parents testified that no other teachers developed similar relationships with their students. As a result, the parents talked to their boys about the possibility that Mr. Len had ulterior motives. CP at 1296:23 to 1297:22, 1298:8-11, 1380:7-17, 1432:25 to 1433:19, 1800:8-14, 1803:18-20, 1808:19-25, 1809:11-18, 1815:20 to 1816:11.

The record is replete with evidence that Mr. Len paid special attention to a handful of favored boys. Between 2006 and early 2008, Mr. Len spent one night a week going out with students E and G, sons of a single mother, and their friends. CP at 1791:16-19, 1793:1-8. Mr. Len took the students “out to eat a lot” sometimes paying for the meals. CP at 1796:14-23. Mr. Len always drove the boys in his van, and did not tell the mother where he was taking her sons unless she affirmatively asked. CP at 1792:8-22, 1795:14-20.

Mr. Len cultivated a particularly close relationship with Student E, one of the two boys, who estimated that he and Mr. Len went out to eat one-on-one between 30 and 50 times during his high school years. CP at 1180:5-11, 1546:3-10, 1797:3-20. Mr. Len once invited Student E to spend Thanksgiving alone with him; Student E's mother said no. CP at 1800:21-23.

Mr. Len also singled out Student K for favoritism after the student left the I.S. Mr. Len became "unusually active" in the student's life. CP at 1377:17-21, 1434:9-16. Mr. Len transported Student K and his friends in his personal vehicle "to various locations during light hours, dark hours," and locations unknown to the student's mother several times a week. CP at 1377:23-24, 1383:8-13, 1384:11-24, 1420:17-22. Mr. Len did not obtain permission from Student K's parents to drive the student in his vehicle, and continued to drive Student K around even after Student K's mother told her son not to ride with Mr. Len. CP at 1290:12-16, 1378:2-4, 1387:25 to 1388:10. Student K's mother's concern was validated when she observed Mr. Len driving at high speeds with her son in his van. CP at 1395:14-24, 1398:6-16.

In 2007, Mr. Len spent the night in Student K's room without his mother's "knowledge or authorization." CP at 1295:5-14, 1379:16 to 1380:17, 1389:17-19, 1390:1-3, 1391:13-16, 1417:23 to 1418:14. Mr. Len

admitted that he was in the student's bedroom until after sunrise, a situation that shocked Student K's mother. CP at 1390:2-3, 1391:13-16, 1392:12-14, 1573:18 to 1574:1.

Mr. Len also intervened on behalf of male students in a personal dispute with female students. CP at 24 (CL 6). Mr. Len, without solicitation, offered to drive several girl students to an IHOP restaurant in order to reconcile with their dates, who had left the dance early. CP at 1350:3-15.

Substantial evidence supports Judge Mentzer's finding that Mr. Len's disparate treatment of favored students reflects a clear abandonment of professional standards.

c. Mr. Len Bought Gifts, Meals, and Lent Money To Students

Judge Mentzer found that Mr. Len committed acts of unprofessional conduct by making numerous purchases for students, and even lent money to one student. CP at 28 (CL 19). Students, teachers, and administrators testified that this was outside of generally accepted standards governing teacher-student interactions. CP at 1271:22-24, 1516:9-14, 1519:7-12, 1894:7-16, 1898:11 to 1899:1, 1934:15-23, 1937:5-8. Nevertheless, Mr. Len purchased gifts and meals for favored

students, likely adding up to thousands of dollars, in clear abandonment of professional standards. CP at 8 (FF 9-10), 1854:22 to 1855:23.

d. Mr. Len Interfered in Parent-Child Relationships

Judge Mentzer found that Mr. Len committed acts of unprofessional conduct by interfering in the relationship between students and parents. CP at 28 (CL 21). The principal, OPP Director Slagle, and teachers testified that this conduct violated generally recognized professional standards. CP at 1625:23 to 1626:10, 1878:14 to 1882:19, 2005:18 to 2007:20. Yet Mr. Len, an experienced teacher in his 30's, never engaged parents to obtain permission to socialize with their children, drive them places, or break curfews. He never asked parents if he was welcome in their homes; he simply inserted himself into their lives causing them loss of sleep, angst, and shock. CP at 28 (CL 21), 1390:2-3, 1391:13-16, 1392:12-14, 1573:18 to 1574:1. Student K disobeyed his mother to spend time with Mr. Len. CP at 1388:4-10. Mr. Len did not inquire with parents about any restrictions related to conduct, health, or safety of the boys, such as whether parents were opposed to all-nighters spent playing video games in Mr. Len's hotel room. CP at 28 (CL 22). Accordingly, he failed to observe generally accepted standards of professionalism which undermined the parental role.

e. Mr. Len Violated Boundaries and Exposed the District to Potential Liability

Judge Mentzer found that Mr. Len committed unprofessional conduct because he violated established teacher-student boundaries and subjected the District to potential liability. CP at 29 (CL 23). A teacher, principal, and the OPP director, all testified that Mr. Len's conduct created potential liability given the extent to which it deviated from generally accepted professional standards. CP at 1624:11 to 1625:22, 1890:2 to 1891:16, 1897:7 to 1898:9, 2006:19 to 2008:15. In addition to the meals, gifts, rides, late nights in parks and student homes, and other activities described above, Mr. Len shared sleeping spaces with students. CP at 1233:1-18, 1637:25 to 1638:17, 1658:16 to 1659:18, 1838:15-19. Mr. Len himself admitted that sharing such a close sleeping space with students was inappropriate. CP at 1172:11-18.

Mr. Len asserts that the trip to the Oregon coast was private conduct to which the code of professional conduct does not apply. *See* Br. Appellant at 23. This argument ignores the fact that several current students went on the trip with Mr. Len. CP at 1230:22 to 1231:24. And, under the provisions of WAC 181-87-020, Judge Mentzer has authority to conclude that Mr. Len committed unprofessional conduct on the trip because his role there was not clearly distinguishable from his role

as an educator. *See* CP at 29 (CL 24). Thus, Judge Mentzer properly concluded that Mr. Len clearly abandoned appropriate teacher-student boundaries when he engaged in the above listed conduct, including the sharing of sleeping areas and a sleeping platform (bed) during the trip to the Oregon coast.

B. Judge Mentzer's Findings That Mr. Len Lacked Credibility Are Either Unchallenged or Are Supported by Substantial Evidence

Judge Mentzer made 17 findings that Mr. Len was not credible in his testimony. CP at 13-17 (FF 33-49). Reviewing courts give deference to a fact-finder's determinations as to witness credibility and the weight to be afforded to credibility. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001). Judge Mentzer had the opportunity to observe witnesses and evaluate their credibility. Moreover, the record contains substantial factual support for her credibility determinations.

First, several findings that Mr. Len was not credible are verities on appeal because he does not assign error to them. *Tapper*, 122 Wn.2d at 407 (unchallenged findings are verities on appeal); RAP 10.3(g), 10.4(c). The following findings are verities: CP at 13 (FF 33) (Mr. Len not credible with regards to his Thanksgiving invitation to Student E), 13-14 (FF 34-36) (math team party held overnight at Mr. Len's home in spring 2007), (FF 46-47) (behavior on a jazz choir field trip in February 2008).

Judge Mentzer also found that Mr. Len lacked credibility when he testified that he was invited to spend the night at Student K's home. CP at 14 (FF 37-38). Mr. Len testified that Student K's father asked Mr. Len to supervise his sons while Mr. K looked for a lost wallet. CP at 1220:5-18. Student K's father never lost his wallet. CP 1295:17-22. Both parents testified that Mr. Len was not invited to stay overnight at their house; the mother was shocked to discover him, and the father said that he would not have made an invitation because the boys were capable of supervising themselves and his wife was home. CP at 1295:3 to 1296:11, 1378:5-18, 1379:16 to 1380:6.

Mr. Len questions the credibility of the parents' testimony, but his arguments are unpersuasive. Br. Appellant at 34-38.¹¹ It is irrelevant whether the parents removed Mr. Len from their home because the issue is whether the parents invited Mr. Len to stay. Moreover, Student K's mother did not even know that Mr. Len was in the family's house. Additionally, Judge Mentzer's credibility finding relied in part on inconsistency between Mr. Len's testimony at hearing and his interviews with Principal Bang-Knudsen shortly after the incident. *Cf.* CP at 14

¹¹ The suggestion that the parents support Mr. Len because they desire positive results from this proceeding is not supported by their testimony. The student's father testified that he was concerned with the level of interaction between Mr. Len and students, and the mother testified that she was concerned and uncomfortable with the interactions between Mr. Len and her son. CP at 1297:10-22, 1380:7-17.

(FF 38), 1226:9-18, 1649:9 to 1650:12. Mr. Len's testimony is also inconsistent with the testimony of parents who he claims were present at the time of the alleged invitation. CP at 1799:14-21. Mr. Len contends Finding of Fact 38 was erroneously based on facts that witnesses could not recall. However, it rests on testimony of multiple witnesses that contradicted the absolute assertions in Mr. Len's testimony. Mr. Len could not keep his story straight, which provided substantial evidence to support Judge Mentzer's finding that Mr. Len was not credible. *See* CP 14 (FF 38).

Judge Mentzer also found Mr. Len's testimony untruthful as to whether he slept in the same bed as a student during the 2007 road trip to Oregon. CP at 14-15 (FF 39-43). Mr. Len testified that he shared a bed for the sole purpose of watching a movie. CP at 1233:8 to 1234:9. But this testimony is contradicted by the remainder of the record. Immediately after the incident, Mr. Len told Principal Bang-Knudsen that he shared a bed with the student and did not elaborate that it was only for watching a movie. CP at 1638:18 to 1639:9, 1698:8-15. Student H testified that he shared a "sleeping platform" (bed) with Mr. Len in a cabin that had no television. CP 1838:24. Judge Mentzer found that this testimony was more credible than Mr. Len's. CP at 15 (FF 43). Though sharing the bed was certainly inappropriate conduct, it was the

untruthfulness of Mr. Len's testimony that prompted this particular credibility finding. *See* CP at 14-15 (FF 39-43). Judge Mentzer had substantial evidence to support her finding that Mr. Len was untruthful when he initially admitted to sharing a bed, changed his testimony to watching television on a bed, and then unequivocally denied sleeping next to the student.

Finally, Judge Mentzer found Mr. Len's testimony not credible with respect to his compliance with Principal Bang-Knudsen's no-contact directives. CP at 16-17 (FF 48-49), *see also* CP at 657. Mr. Len testified that he did not violate Principal Bang-Knudsen's directives issued March 13, 2008. *See, e.g.*, CP at 1137:13 to 1139:9, 1200:2-7, 1256:7-23, 1701:1-4. However, Ms. Knickerbocker saw and overheard Mr. Len discuss the District investigation with students in May 2008. CP at 12 (FF 28), 1974:14 to 1975:21.

Furthermore, Students H and I testified about extensive contact after March 2008. CP at 1844:9 to 1845:4, 1861:14 to 1863:8. Mr. Len testified that he had contact with Student I to discuss his senior project, but Student I testified that the majority of this contact took place during his junior year, and did not mention anything about a senior project. CP at 1862:4 to 1863:8, 2116:21 to 2117:10. Judge Mentzer had substantial evidence to support her finding that Mr. Len was not credible

in his testimony about his interactions with students after receiving Principal Bang-Knudsen's directive.

In summary, unchallenged findings establish that Mr. Len was not credible on several topics and substantial evidence supports other findings that Mr. Len was not credible. For this reason, Judge Mentzer's credibility determinations are entitled to deference. The findings that Mr. Len lacked credibility should be upheld.

C. Mr. Len's Conduct Warranted a 12-Month Suspension of His Certificate and a Psychological Evaluation as a Condition Precedent to Certification

Judge Mentzer properly considered and applied WAC 181-86-080 to determine that Mr. Len's conduct warranted a 12-month certificate suspension and a psychological evaluation because his conduct fell well outside the "personal boundaries for appropriate student-teacher relationships," he repeatedly violated his principal's directives regarding limiting his interactions with students, and his "repeated untruthfulness." CP at 30-32 (CL 31, 38-39).

1. The Appropriate Level of Discipline Is Determined Using Enumerated Factors and Should Be Designed to Deter Future Violations and Protect the Public

Upon finding that an educator has engaged in unprofessional conduct, OSPI determines the appropriate level and range of discipline by considering the following factors:

- (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. A suspension may be imposed if it will: probably deter subsequent unprofessional conduct and protect "the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension." WAC 181-86-070(2).

An agency's sanction is afforded significant discretion and deference. This is because the agency applies its unique expertise, based on its holistic analysis of the conduct and witness credibility, to determine the appropriate level of discipline. *See, e.g., McGuire*, 144 Wn.2d at 652-53; *Dickson Co.*, 81 Wn. App. at 411; *Tapper*, 122 Wn.2d at 403.

2. Judge Mentzer Properly Weighed and Considered the Relevant Disciplinary Factors

Judge Mentzer determined that seven of the eleven factors supported a 12-month suspension with conditions. Seven factors weighed against Mr. Len because: (1) his misconduct was serious and caused actual harm to parents and boys and potential harm to the District; (2) he was an experienced teacher who was two decades older than the students with whom he engaged in misconduct; (3) his conduct spanned two years and was not remote in time; (4) his conduct demonstrated “a disregard for health, safety or welfare” of students, parents, and the parent-child relationship; (5) his conduct demonstrated a behavioral problem because he minimized and lied about his conduct and repeatedly violated no-contact directives; (6) his conduct demonstrated a lack of fitness to teach; and (7) his violation of no contact directives and his dishonesty to the tribunal were aggravating factors. WAC 181-86-080(1), (3)-(7), (9); CP at 30-31 (CL 26, 28-32, 34).

It is undisputed that Mr. Len’s conduct occurred when he was an experienced teacher almost twenty years older than the boys. *See generally* Br. Appellant; WAC 181-86-080(3). Additionally, this troubling conduct took place over two years, even after his principal

directed him to change his conduct. WAC 181-86-080(4) and (7); *see* CP at 30 (CL 28-29, 31-32), 1794:20 to 1795:13, 2009:2-10.

Mr. Len's misconduct was serious. His interactions with these boys caused parents anxiety, guilt, shock, and loss of sleep; they even felt compelled to talk to the boys in an effort to determine whether inappropriate sexual contact was occurring. CP at 10 (FF 23), 1296:23 to 1297:22, 1380:7-17, 1390:2 to 1392:14, 1573:18 to 1574:25, 1794:1-6, 1808:19-25, 1809:11-18, 1816:1-11, 1818:11 to 1819:4. Mr. Len's conduct caused actual harm by "usurping the parental decision-making role," creating conflict between parents and boys, and drawing students into violating rules with him. CP at 30 (CL 26), 1188:16-21, 1249:14-21, 1250:16-22, 1251:14-24, 1513:18-24, 1547:4-13, 1584:15 to 1586:6, 1591:15-19 Mr. Len showed some students "extreme favoritism" and "significant financial favors," both of which can be harmful to the nonfavored students while simultaneously creating a sense of obligation to Mr. Len on the part of favored students. CP at 30, 1271:22-24, 1516:9-14, 1519:7-12, 1796:14-23, 1854:22 to 1855:23, 1898:11 to 1899:1, 1934:15-23, 1937:5-8. Mr. Len also placed students at risk of harm by speeding in his vehicle, and much of his conduct exposed the District to potential liability. CP at 30 (CL 26, CL 30), 1378:1-4, 1390:2-3,

1391:13-16, 1392:12-14, 1395:14-23, 1398:17-25, 1609:22 to 1610:17, 1623:17-23, 1624:11 to 1626:10, 2006:19 to 2008:15.

Mr. Len's behavioral problem is also supported by his repeated violations of the District's prohibition on contact with students.¹² These violations demonstrate Mr. Len was either unwilling or unable to conform his conduct to appropriate teacher-student interactions. CP at 30 (CL 31); WAC 181-86-080(6); *see* CP at 1974:9 to 1975:7, 1756:18-25. Similarly, his "repeated untruthfulness . . . about his interactions with students" demonstrated a behavioral problem. CP at 30 (CL 31), 1637:3-24, 1647:7 to 1648:18, 1671:14-20 (vague responses when events occurred within a week of the principal's interview); 709-710, 790-791, 962-963, 1295:15 to 1296:11, 1572:18-22, 1799:14-21 (claim of parental request or consent), 682-683, 705-706, 1445:14-23, 1458:6 to 1459:9, 1465:15 to 1466:15, 1943:2-15 (claim sleepover at Mr. Len's house was not planned), 1253:2-22, 1512:13 to 1514:4-6 (claim that Mr. King knew of and allowed choir trip curfew violation).

Mr. Len simply asks this Court to substitute its judgment for Judge Mentzer's and assign weight to arguments that she rejected. He supports

¹² Mr. Len argues that Judge Mentzer incorrectly relied on the call that Ms. Knickerbocker overheard between Mr. Len and a student, to find a violation of the no-contact directive. *See* Br. Appellant at 19-21. However, Judge Mentzer's finding is not premised on this fact. Judge Mentzer concluded that Mr. Len violated the no-contact directive when Ms. Knickerbocker overheard him discussing the investigation with students during a walkathon in May 2008. CP at 12 (FF 28), 1974:14 to 1975:21.

his argument with broad mischaracterizations without citation to the record. *See* Br. Appellant at 25-33. For example, he claims that Judge Mentzer ignored the fact that some students testified in support of Mr. Len. Br. Appellant at 30. In fact, Judge Mentzer noted student support for Mr. Len, and determined that some of the factors weighed in Mr. Len's favor. CP at 31 (CL 35) (student support and lack of evidence of sexual impropriety), 30 (CL 27) (no criminal history), (CL 33) (school district imposed discipline).

Mr. Len claims that Judge Mentzer should have found that he "always conducted himself professionally when in the presence of his students outside of school." Br. Appellant at 30. To accept this argument, this Court would have to ignore the testimony of several education professionals supporting the findings that Mr. Len's "alarming" conduct reflected a clear abandonment of generally accepted practices. *See, e.g.*, CP at 798, 1513:20-23, 1970:10 to 1972:17, 1889:5-23, 1892:5 to 1899:1, 1934:15-23, 1937:5-8, 1965:17 to 1967:21.

Mr. Len argues that discipline imposed on other teachers, and the District's failure to place him on administrative leave, somehow excuses or mitigates his misconduct. Br. Appellant at 25-26. Judge Mentzer determined that the discipline of other teachers was not relevant because the conduct was different. CP at 30 (CL 33). She also found that the

District's response was based in part on the incorrect assumption that Mr. Len "was capable of correcting his conduct once removed from the students with whom he had developed close relationships." CP at 30-31 (CL 33), 1753:3 to 1754:8. This assessment was incorrect. Even after an involuntary transfer to another school, Mr. Len continued contact with favored students in violation of the District's no-contact directives. CP at 1974:14 to 1975:21, 1838:25 to 1839:10, 1844:2-22.

After considering all of the evidence, Judge Mentzer agreed with OPP and APCAC that a 12-month suspension was the appropriate discipline to protect the public and deter future misconduct.

3. Judge Mentzer Properly Imposed a Psychological Evaluation as a Disciplinary Condition in This Case

Judge Mentzer had a legal and factual basis for requiring Mr. Len to submit to a psychological evaluation as a condition for reinstatement of his teaching certificate. *See* CP at 32 (CL 39), 948. OSPI's regulations explicitly authorize imposition of "conditions precedent to resuming professional practice."¹³ WAC 181-86-070(2). Such conditions "protect the health, safety, and general welfare of the citizens of the state of Washington." WAC 181-86-010.

¹³ Review of the teacher disciplinary orders submitted by Mr. Len reveals that similar conditions have been imposed to address boundary violation concerns when OSPI has disciplined other teachers. CP at 32 (CL 39), 567, 577, 583, 587, 589, 608, 612-13, 618.

In this case, Judge Mentzer concluded that the psychological evaluation was appropriate given that Mr. Len's conduct fell so far outside acceptable boundaries "for appropriate student-teacher relationships" that it resembled "grooming." *See* CP at 29 (CL 23), 32 (CL 39). Such serious, and sustained, misconduct must be addressed in order to protect students and parents and ensure that Mr. Len can and will conform his conduct to appropriate standards in the future, particularly in light of his violation of the no-contact directives and dishonesty in this case. *See* WAC 181-86-070(2) (suspension used if it can adequately deter conduct and protect the public). As a result, a psychological evaluation is not only appropriate but, arguably, the only way that a suspension could be justified because it is the only way to ensure that Mr. Len is truly capable of conforming his conduct to the bounds of professional conduct.

Additionally, Judge Mentzer's finding of a behavioral problem,¹⁴ which is one of the factors relevant to "the appropriate level and range of discipline," is supported by substantial evidence. *See* WAC 181-86-080(6). Mr. Len's repeated violation of the no-contact directives,

¹⁴ The term behavioral problem is not defined in teacher disciplinary regulations. However, dictionary definitions of "behavioral" are very broad. *See e.g. Webster's Third New International Dictionary* 199 (1993) ("of or relating to behavior" and behavior means "the manner in which a person behaves when reacting to social stimuli or inner need or a combination thereof."). *See State v. Chester*, 82 Wn. App. 422, 427, 918 P.2d 514 (1996) (dictionary definition is used when a word is not defined in a statute).

his efforts to minimize and obscure the scope, and the nature of his misconduct through dishonest testimony is properly characterized as a behavioral problem. See CP at 30 (CL 31), 1838:25 to 1839:10, 1844:2-22, 1863:4 to 1864:8, 1974:14 to 1975:21, 2116:21 to 2117:10; see also *supra* at VI. B. This behavior demonstrates that he either cannot, or will not, conform his conduct to boundaries required by his employer and the law. As such, it gives rise to grave concerns about whether he should be allowed to teach in the future. The only way to allay these concerns and protect students, parents, schools, districts, and the public in general, is through a psychological evaluation.

Mr. Len's contention that Judge Mentzer could not conclude, under WAC 181-86-080(6), that he had a behavioral problem is nothing more than an invitation for this Court to substitute its judgment for Judge Mentzer's evaluation of the evidence.¹⁵ Mr. Len's claim that a behavioral problem can only be proven through a particular type of evidence is not supported by the plain language of WAC 181-86-080(6), or any other

¹⁵ An attorney challenging factual findings on appeal must do more than "argu[e] his version of the facts while ignoring testimony by other witnesses that supports each finding." *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003).

applicable legal authority.¹⁶ Br. Appellant at 41 (arguing that expert testimony, firing, emergency suspension, or alarming behavior are required to support making a psychological evaluation a condition for reinstatement); *Cf.* WAC 181-86-070(2) *and* CP at 798 (District’s description of his behavior as “alarming”).

The sole case cited by Mr. Len in support of his argument is *State v. Hooper*, 154 Wn. App. 428, 225 P.3d 446 (2010). Br. Appellant at 42. *Hooper* pertained to a criminal statute that grants convicted juvenile sex offenders the opportunity to seek relief from registration requirements, and a court’s attempt to impose a blanket requirement on all offenders to take two tests (polygraph and psychological evaluation) as necessary elements of proof to establish their claims for relief. *Hooper* is irrelevant here; where WAC 181-86-070(2) explicitly authorizes the imposition of conditions, and OSPI imposed the condition based on extensive fact-finding pertaining to Mr. Len’s behavior as a teacher.

D. OSPI Was Properly Allowed to Present Evidence and Testimony at the Formal Administrative Hearing Below

Mr. Len contends that Judge Mentzer erred as a matter of law when she allowed OSPI to introduce evidence at the hearing that went

¹⁶ “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

“beyond anything within the records acquired by OPP” during its investigation. Br. Appellant at 43-48. This, however, misapprehends the law.

The hearing that Judge Mentzer conducted was an “adjudicative proceeding” under the APA, which is the appropriate method for suspending or revoking a professional license.¹⁷ *Supra* at II. B.; WAC 181-86-150(2); RCW 34.05.422(1)(c). As an adjudicative proceeding, the presiding officer is required to “afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence” as necessary “for *full disclosure of all relevant facts and issues.*” RCW 34.05.449(2) (emphasis added). To that end, the APA provides for the issuance and enforcement of subpoenas, payment of witness fees, limited discovery as authorized by the presiding officer, discretionary application of evidentiary rules, and placement of witnesses under oath. *See* RCW 34.05.446, .452.

Here, OSPI alleged that Mr. Len had engaged in unprofessional conduct, requiring a 12-month suspension of his teaching certificate. Under the controlling regulations, OSPI had the burden of proof and the

¹⁷ Mr. Len seems to argue that the use of the terms *de novo* and appellant by Judge Mentzer somehow transformed these proceedings into something other than an adjudicative proceeding under the APA. He cites no authority to support this, and to accept this argument the Court would have to ignore the plain language of the governing rules, statutes, and the APA. *See* Br. Appellant at 45.

concomitant right to present all relevant evidence to meet its burden. WAC 181-86-170(2); RCW 34.05.449(2). Nothing in the APA, the teacher disciplinary rules, or case law suggests otherwise.

Nevertheless, Mr. Len maintains that another statute, RCW 34.05.494,¹⁸ provides that the agency record in a case like this consists *solely* of documents considered or prepared “for the reviewing officer for any review.” Br. Appellant at 45-46. And that means that, here, Judge Mentzer could only properly review the materials that the parties submitted to the review officer, Dr. Sharratt, and the APCAC members. This, however, is incorrect. RCW 34.05.494 applies by its terms to *brief adjudicative proceedings* under RCW 34.05.482-.494. OSPI conducts formal adjudicative proceedings under RCW 34.05.410-.473. WAC 181-86-150(2).¹⁹

¹⁸ Mr. Len cites to RCW 34.05.094 in his brief, which does not exist. It appears that the quoted language is from RCW 34.05.494. Therefore, it is assumed that this is the statute on which he is relying.

¹⁹ For this reason, Mr. Len’s reliance on *Lenca v. Emp’t Sec. Dep’t*, 148 Wn. App. 565, 200 P.3d 281 (2009) is also unavailing. *See* Br. Appellant at 46-47. In that case, the court of appeals observed unremarkably that its role was to review the reviewing officer’s final order in a brief adjudicative proceeding, not the initial presiding officer’s. *Lenca*, 148 Wn. App. at 575. Nothing in that case addresses the authority of administrative law judges to consider relevant evidence admitted in formal adjudicative proceedings under RCW 34.05.449(2). Mr. Len’s subsequent suggestion that OSPI’s designation of OAH as the final decision maker somehow “contravene[s]” OAH’s status as an independent state agency under RCW 34.12.010 is likewise baseless. There is nothing in the law that suggests ALJs assigned by OAH are precluded from rendering final agency decisions.

Mr. Len argues that *Hoagland v. Mt. Vernon Sch. Dist. No. 320*, 95 Wn.2d 424, 623 P.2d 1156 (1981), precluded Judge Mentzer from holding an adjudicative hearing. However, the cited footnote in *Hoagland* merely stands for the proposition that superior courts in teacher *employment* cases are held to the same standard of review as superior courts are in teacher *certification* cases. *Hoagland*, 95 Wn.2d at 427 n.2. No case or statute supports Mr. Len's claim that an *adjudicative proceeding* regarding teacher certification must be limited to the evidence considered by the investigative agency.

Mr. Len's argument not only lacks legal authority, it would result in a lower level of due process than is required under the APA. As Judge Mentzer pointed out when Mr. Len raised this same contention below, "Under [this] 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 OPP proceedings." CP at 24 (CL 6).

Judge Mentzer correctly ruled that the evidence presented at the adjudicative proceeding was not limited solely to OPP's investigative record, or to the documents that Dr. Sharratt and APCAC reviewed. Mr. Len's arguments to the contrary have no support in the law and must be rejected.

VII. CONCLUSION

Judge Mentzer's final agency order is supported by substantial evidence, carefully and correctly applies the governing law, and appropriately concludes that Mr. Len's unprofessional conduct merits the discipline he received. Judge Mentzer's order should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of June 2014.

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON.**

JASON LEN,

Appellant,

v.

OFFICE OF SUPERINTENDENT OF
PUBLIC INSTRUCTION,

Respondent.

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I certify under penalty of perjury under the laws of the state of Washington that a copy of the Brief of Respondent for the Office of Superintendent of Public Instruction was served on counsel at the following address by email and U.S. Mail Postage Prepaid via Consolidated Mail service:

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Legal Assistant

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