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66167-1

No. 66167-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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JULI GRIFFITH & LENORA STAHL-QUARTO,

Appellants,

v.

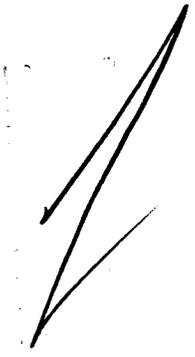
SEATTLE SCHOOL DISTRICT,

Respondent.

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BRIEF OF THE APPELLANT

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

Attorney for the Appellant

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i-ii
TABLE OF AUTHORITIES.....	ii-iv
I. INTRODUCTION.....	1-2
II. ASSIGNMENTS OF ERROR.....	2
A. The hearing officer failed to give due weight to the parents of special education students to exempt their children from WAAS Portfolio testing, even if that exemption was exercised after the testing began and during the Districts investigation into the teachers' conduct.	
B. The hearing officer's conclusion that the 10-day suspensions were "minimal discipline is not supported by applicable law.	
C. The hearing officer failed to effectively compare similar discipline for more egregious conduct	
D. The hearing officer improperly concluded that appellant Juli Griffith was not disciplined for two instances of misconduct, and therefore received discipline twice for the same offense.	
E. The hearing officer misapplied case law on insubordination under the facts of this case.	
III. STATEMENT OF THE CASE.....	3
A. Statement of Facts.....	3-7
B. Proceedings before the Hearing Officer.....	7-8
IV. ARGUMENT.....	9-50

A. Standard of Review.....	9-11
B. <u>Statement of Applicable Federal &amp; State Law.....</u>	11-19
C. <u>The Hearing Officer Failed to Give Appropriate Weight to the Parental Waivers from Testing that were in The Record.....</u>	19-32
D. <u>The Conclusion that the Proposed 10-day Suspensions were “Minimal” Discipline and Therefore of Less Significance is not Supported by any Reading of Applicable Law. ....</u>	32-39
E. <u>The Discipline Imposed upon Another Teacher Who Refused to Administer the WASL to His Middle School Students was an Inadequate Comparator in Deciding Whether The Proposed Discipline in this Case Was Appropriate.....</u>	39-43
F. <u>Juli Griffith Discipline Twice for Insubordination Violates Principals of Fundamental Fairness.....</u>	43-48
G. <u>The Hearing Officer’s Conclusion that Both Teachers Were Insubordinate is Not Supported by an Application of CaseLaw to These Facts.....</u>	48-50
V. CONCLUSION.....	50

## TABLE OF AUTHORITIES

### Cases

<i>Civil Service Commission of the City of Kelso v. City of Kelso</i> , 137 Wn. 2d 166, 173, 969 P.2d. 474 (1999).....	40
<i>Clarke v. Shoreline Schl. Dist.</i> , 106 Wn.2d 102, 110-11 (1986). .....	8,12,19,33,34
<i>Denton v. S. Kitsap Schl. Dist.</i> , 10 Wn.App. 69 (Div. 2 1973) .....	32
<i>Dept. of Environmental Protection v. Barker</i> , 654 So.2d 594 (Fla.App. 1995).....	47
<i>Foster v. King Cnty.</i> , 83 Wn.App. 339, 346-7 (Div. 1 1996).....	10
<i>Gehr v. S. Puget Snd. Com. Coll.</i> , 155 Wn.App. 527 (Div. 2 2010) .....	10
<i>Hoagland v. Mt. Vernon Schl. Dist.</i> , 95 Wn.2d 424, 428, 623 P.2d 1156 (1981).....	33
<i>James v. Sewerage &amp; Water Bd. of New Orleans</i> , 505 So.2d 119, (La.App. 1987).....	47
<i>Ladnier v. City of Biloxi</i> , 749 So.2d 139, 153 (Miss.App. 1999) .....	47
<i>McCorkle v. Sunnyside Schl. Dist.</i> , 69 Wn.App. 384, 391 (Div. 3), <i>rvw.den.</i> , 122 Wn.2d 1012 1993).....	10
<i>Pryse v. Yakima Schl. Dist.</i> , 30 Wn.App. 16, 22-23 (Div. 3), <i>rvw.den.</i> , 96 Wn.2d 60 (1981).....	10
<i>Schaffer v. Weast</i> , 546 U.S. 49, 53, 126 S.Ct. 528 (2005).....	14
<i>Settlegoode v. Portland Pub. Schls.</i> , 371 F.3d 503, <i>cert den.</i> , 125 S.Ct. 478 (2004).....	20

*Simmons v. Vancouver Schl. Dist.*, 41 Wn.App. 365, 704 P.2d 648  
(Div. 3 1985).....48,49

*Winkleman v. City of Parma Schl. Dist.*, 550 U.S. 516 (2007)  
.....16

**Statutes**

RCW 28A.155.010 et seq.....12  
RCW 28A.155.045.....13,15,17  
RCW 28A.155.090.....15,21  
RCW 28A.155.170.....13,17  
RCW 28A.300.010.....16  
RCW 28A.300.040.....16  
RCW 28A.405.210.....8  
RCW 28A.405.300.....1,7,9  
RCW 28A.405.310.....1,7,9,47  
RCW 28A.405.320.....9  
RCW 28A.405.340.....9  
RCW 28A.655.061.....11,12

20 U.S.C. § 1400.....12  
20 U.S.C. § 1401.....15  
20 U.S.C. 1412.....12  
20 U.S.C. § 1414.....14  
20 U.S.C. § 1415.....14  
20 U.S.C. § 6301 et seq.,.....11  
20 U.S.C. § 6311.....11

**Regulations**

WAC 181-82A-202.....3,4  
WAC 392-172A-03090 - 03115.....12  
WAC 392-172A-01040.....17  
WAC 392-172A-03090.....13  
WAC 392-172A-03095.....14  
WAC 392-500-090.....15  
WAC 392-501-601(1).....6  
WAC 392-501-705.....6  
  
34 CFR 200.6(a).....4

## I. INTRODUCTION.

This appeal challenges the Seattle School District's (District) proposed imposition of separate 10-day disciplinary suspensions upon two special education teachers of the Seattle School District (District), Juli Griffith (Juli) and Lenora Stahl-Quarto (Lenora), for their failure to administer an alternative achievement test (Washington Alternate Assessment System, hereinafter "WAAS") to elementary special education students under their instructional care and supervision. The WAAS is an alternate version of the Washington Assessment of Student Learning (WASL) administered to children with learning disabilities. The District claimed the appellants' failure to test as directed was insubordination; the teachers asserted in defense that they were following the wishes of the students' parents to exercise a permitted opt-out from the testing of their children.

Each teacher challenged the proposed discipline under RCW 28A.405.300 & .310. A hearing officer ruled in favor of the District and the superior court affirmed the hearing officer. The teachers assert the hearing officer erred as critical facts were not

considered, and applicable law was not properly applied, and now appeal to this court for further review.

## **II. ASSIGNMENTS OF ERROR**

The appellants identify the following assignments of error in this appeal:

1. The hearing officer failed to give due weight to the right of parents of special education students to exempt their children from WAAS Portfolio testing, even if that exemption was exercised after the testing began and during the District's investigation into the teachers' conduct;
2. The hearing officer failed to find that the acts of the teachers was excused by the District's lack of referable policies and/or guidelines;
3. The hearing officer failed to effectively compare similar discipline for more egregious conduct;
4. The hearing officer improperly concluded that appellant Juli Griffith did not receive disciplined twice for the same offense.
5. The hearing officer misapplied caselaw on insubordination under the facts of this case.

### **III. STATEMENT OF THE CASE.**

#### **A. Statement of Facts.**

Juli Griffith (Juli) and Lenora Quarto/Stahl (Lenora) were special education teachers assigned to the Green Lake Elementary School of the Seattle School District (District) and, pursuant to WAC 181-82A-202(1)(k), held special education endorsement from Washington's Office of Superintendent of Public Instruction (OSPI). Tr. 544-45; 616 & 618. The 12 children in kindergarten through 5<sup>th</sup> grades taught by Juli and Lenora were severely disabled with "severe cognitive" or "medically fragile" disabilities, and were placed in Team "A" separate from all other students in the school. Tr. 545, 547 & 616. Four full-time paraprofessionals assisted the two teachers in educating the 12 children. Tr. 547. It was undisputed at hearing that the Team "A" students are among the most physically, mentally and emotionally challenged within Seattle's public schools. Tr. 545:1-3; 18-25.

It was undisputed that these students are capable of the most basic human functions. Tr. 509-10; 527 – 528; 547:20-23;

548:3-9. One parent (Student 4)<sup>1</sup> testified that her 11-year old 4<sup>th</sup> grade daughter was at the physical level of her nondisabled 2-year son, further opining that her 2-year old was also mentally advanced beyond his disabled 11-year old sister. TR at 527:21-25; 528:1-6. Other testimony and exhibits including those outlining the students IEPs (Exh. H - D-25; D-26; D-27; D-28; D-29 & D-30), reveal the very limited physical and emotional capacity for each of these children.<sup>2</sup> The students low functioning level required that instructional methods and class environment be based upon an established, consistent routine by Ms.Griffith and Quarto.

According to federal law, a child is eligible to participate in alternate testing upon a prior determination by the student's "IEP team" that "the child. . .cannot participate in all or part of the State assessments. 34 CFR 200.6(a). The WAAS portfolio was available for students with learning disabilities that rendered them incapable of taking the WASL. During school year 2008-09 (SY 08-09), three of each teacher's six students were eligible for testing under the WAAS. Tr. 555.

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<sup>1</sup> The parties agreed that the names of the students would not be revealed; anonymous designations have been used in the record.

<sup>2</sup> See also, Tr. 549:2-9, referring to 5<sup>th</sup> grade level special ed. student who was "immersed" in morning kindergarten of the general education program.

In late November 2008, both teachers were informed by their principal, Cheryl Grinager,<sup>3</sup> in a series of emails that each would attend one-day District-provided training on WAAS administration to be held either December 1<sup>st</sup> or 2<sup>nd</sup>. Exhs. 40 & 41. Lenora attended the training; Juli did not remaining in class with the students of both teachers.<sup>4</sup> Tr. 43 & 629. Juli was issued a Letter of Warning by Principal Grinager for not attending the training with a threat of further discipline. Ex. 43. She did not grieve that Letter as permitted by the collective bargaining agreement between the District and the Seattle Education Association. Ex. 66.

It was undisputed at hearing that, beginning in the fall 2008, first from principal Grinager and thereafter by other administrators, both Ms. Griffith and Ms. Stahl-Quarto were directed to administer the WAAS portfolio to their eligible students. It is also undisputed that neither teacher did so. Both teachers believed that such refusal was based upon (1) state policy that allowed parents to waive their children's WASL/WAAS Portfolio testing, (2) district policy that

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<sup>3</sup> Ms. Grinager held only an endorsement as an administrator in Washington state (Tr. 77 & 78), and as she had no prior experience in Special Education instruction was not endorsed by the State in that area of specialty. *Id.*; WAC 181-82A-202(k).

<sup>4</sup> The teachers had a mutual agreement that the fragile constitution of the disabled students in Team A would not be well-served if both teachers were simultaneously absent. Tr. 556 & 632.

allowed parents to “opt out” their children from WASL/WAAS testing, and (3) express refusal by the parents/guardians of each of the six children that they submit to WAAS testing. Tr. 558-563.

From December 2008 through March 2009, the teachers and District administrators discussed the District’s directive to administer the WAAS and the teachers’ belief that the students should be exempted.<sup>5</sup> The District investigated the teachers’ for their inactions. Exs. 46 & 47. Neither Juli nor Lenora denied they had not administered the WAAS to the eligible students in their respective classes; each simply asserted they were following the intentions of the students’ parents. Tr. 580-81.

Upon completion of its investigation, and despite receiving written waivers from each of the parents or guardians of the

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<sup>5</sup> During the period that the proposed testing of the students was at issue, there was no formal procedure for a parent to exempt his/her elementary grade level child from WAAS testing. WAC 392-501-601(1) permitted a parent to appeal to the superintendent of OSPI if “special, unavoidable circumstances” prevented the student, during the student’s twelfth grade year, from successfully demonstrating his or her skills and knowledge on . . . a Washington alternate assessment available to students eligible for special education services.” Among the cited examples of “special, unavoidable circumstances” were “Failure to receive an accommodation during administration of the assessment that was documented in the student’s [IEP] that is required in the federal IDEA. . . . WAC 392-501-601(2)(d).

Newly enacted WAC 392-501-705 now creates a procedure that primarily relies upon the special education teacher’s assessment of student “awareness” allowing the student to obtain a waiver; this regulation expressly applies to twelfth grade special education students, not those in elementary schools. The sole source of challenge of students testing must come from the student’s parent.

affected students (Exs. 53-57), in separate letters issued March 2, 2009, Superintendent Goodloe-Johnson proposed a ten-day suspension for each teacher for refusing to administer the WAAS Portfolio test to the students. Exs. 50 & 51. Each teacher timely requested a hearing under RCW 28A.405.300. Exs. C & D.

**B. Proceedings Before the Statutory Hearing Officer.**

A hearing officer was selected pursuant to RCW 28A.405.310(4) and a hearing held June 22 - 23 & 29, 2009. The hearing officer's initial ruling issued August 20, 2009, upholding the proposed disciplinary recommendation for Lenora Quarto, but requesting clarification as to the proposed discipline for Juli Griffith upon arguments made by Ms. Griffith that she was being twice disciplined for the same conduct. Ex.L. The District responded to the request for clarification on August 22, 2009. Ex. M. Ms. Griffith and Ms. Quarto thereafter filed their consolidated motion for reconsideration, arguing that Ms. Griffith had been improperly disciplined twice for the same offense, or if that was not the case, the discipline imposed upon Ms. Quarto was clearly excessive in comparison with that of Ms. Griffith. Ex. N.

The hearing officer denied the motion and confirmed her original conclusions. Ex. P. She concluded that the 10-day

suspension for each teacher was an appropriate level of discipline under the facts where each teacher engaged in unjustified insubordination. She did so by ruling that: (1) the parents had not consented to their children's exemption from WAAS Portfolio testing at the time Ms. Griffith and Quarto were initially refusing to perform the testing; (2) the discipline was minimal under caselaw because it was a suspension rather than a discharge; (3) the factors enunciated by the supreme court in *Clarke v. Shoreline Schl. Dist., infra.*, were "not all that relevant in this case" but nonetheless "support[ed] a 10 day suspension without pay."; (4) an application of the "seven tests of just cause" as required under the District-SEA collective bargaining agreement supported a finding that a suspension was appropriate discipline; and (5) the teachers refusal to obey these "reasonable rules and regulations" constituted insubordination sufficient to justify "an unpaid suspension." Exhs. L & P.

The appellants' asserted before the superior court that these rulings were in error based upon both the facts and the law. The superior court affirmed the hearing officer's rulings. CP 128-132.

## IV. ARGUMENT

### A. Standard of Review.

Under Washington law public school teachers are entitled to an annual contract. RCW 28A.405.210. School districts may not take “adverse action” against teachers unless specific procedures are followed, e.g., the District superintendent must issue a probable cause letter specifying the circumstances that support any proposed discipline. RCW 28A.405.300 and .310. This letter constitutes the sole basis for the proposed discipline. RCW 28A.405.310(8). The teacher may challenge proposed discipline by timely filing an appeal, which is heard by an independently appointed hearing officer. RCW 28A.405.300 & .310(1) & (4).

The district must prove each and every allegation recited within its letter of probable cause at hearing by a preponderance of the evidence. *Id.*, §§ .300 & .310(8). A teacher may appeal a hearing officer’s adverse ruling before the superior court. RCW 28A.405.320. The superior court’s review “shall be confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at hearing. . . .” RCW 28A.405.340. The court may:

affirm the decision of the . . . hearing officer or remand the

case for further proceedings; or it may reverse the decision if substantial rights of the employee may have been prejudiced because the decision was:

...

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the legislature authorizing the decision and order; or

(6) Arbitrary or capricious.

Where an appeal asserts an “error of law” has occurred, the court conducts *de novo* review. *McCorkle v. Sunnyside Schl. Dist.*, 69 Wn.App. 384, 391 (Div. 3), *rvw.den*, 122 Wn.2d 1012 (1993).

Where the appeal challenges the hearing officer's ruling on grounds that it is “clearly erroneous,” a more intensive review by the court is required:

The “clearly erroneous” standard provides a broader review than the “arbitrary or capricious” standard<sup>6</sup> because it mandates *a review of the entire record and all the evidence* rather than just a search for substantial evidence to support the administrative finding or decision.... Judicial review under the “clearly erroneous” standard set out in RCW 34.04.130(6)(e) also requires consideration of the “public policy contained in the act of the legislature authorizing the decision.”. . .Consequently, that public policy is “a part of the standard of review.” [T]herefore, the record must be examined under the clearly erroneous standard and

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<sup>6</sup> By comparison, a decision is arbitrary and capricious if it reflects “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Gehr v. S. Puget Snd. Com. Coll.*, 155 Wn.App. 527 (Div. 2 2010), *citing*, *Foster v. King Cnty.*, 83 Wn.App. 339, 346-7 (Div. 1 1996).

reversed if, after reviewing the entire record, we are left with a definite and firm conclusion a mistake has been committed.

*Pryse v. Yakima Schl. Dist.*, 30 Wn.App. 16, 22-23 (Div. 3), *rev.den.*, 96 Wn.2d 60 (1981) (citations omitted; emphasis added).

Where there is a mixed question of law and fact, i.e., evaluation of the facts through consideration of applicable law, the court defers to the hearing officer's factual findings, but applies the law to those findings through its independent review. *Clarke v. Shoreline Schl. Dist.*, 106 Wash.2d 102, 110-11 (1986).

#### **B. Statement of Applicable Federal & State Law.**

Preliminary to this appeal's arguments, an outline of the state and federal laws that govern the public education of disabled students must be considered.

In 2001, Congress amended existing an education law through the "No Child Left Behind Act" ("NCLB"), 20 USC 6301 *et seq.*, establishing two mandates: (1) each child is entitled to a "free appropriate public education"; and, (2) each state's education agency must adopt a federally-approved testing method to assess the performance of students within their jurisdiction. *Id.*; 20 U.S.C. §§ 6301 & 6311(b)(1). Washington enacted RCW 28A.655 *et seq.* in response, establishing the WASL as the means of evaluating

public school students' academic progress and achievement. RCW 28A.655.061(1).

High school students who passed the WASL received a "certificate of achievement" that is a mandatory prerequisite to graduation. RCW 28A.655.061(2) & (3). Students who are learning disabled under federal and state laws need not pass the WASL, but could take an alternate test, which if taken successfully resulted in the issuance of a "certificate of achievement." RCW 28A.655.061(5); 28A.155.090(7).

Congress also enacted the Individuals with Disabilities in Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* This law, which operates in tandem with the NCLB Act, addresses the educational needs of disabled children, and imposes a comprehensive policy upon the states in their educational placement and instructional plan. The IDEA not only "ensure[s] that all children with disabilities have available to them a free appropriate public education [FAPE]," but the law further "ensure[s] that the rights of children with disabilities *and parents of such children* are protected" in securing such an education. 20 U.S.C. §§ 1400(d) (1) (A)-(B) (emphasis added).

Washington's legislature has enacted parallel laws that implement the mandates of IDEA for state-wide public education. RCW 28A.155.010 - .180. IDEA and state law prescribe that each student of special education's academic goals be outlined within an Individualized Education Program ("IEP"). 20 U.S.C. §§ 1412(a)(4) & 1414(d); WAC 392-172A-03090 - 03115. The IEP must also address each child's program for test assessment. Special education students who cannot complete the WASL, even with accommodations, will receive a certificate of individual achievement under RCW 28A.155.045, which promotes "multiple ways to demonstrate [the child's] skills and abilities *commensurate with their individual education programs.*" (emphasis added). By contrast, students who are simply incapable of meeting alternate WASL alternate testing standards receive a certificate of attendance, which is neither a high school diploma nor a certificate of individual achievement. RCW 28A.155.170(1) & (3)(a) & (b).<sup>7</sup>

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<sup>7</sup> In conformity with federal law, the WAC for Special Education also provides guidelines for the Individualized Education Plan process for each child. WAC 392-172A-03090, entitled "Definition of individualized education program," not only gives meaning to the term IEP, but anticipates that it will provide:

"A statement of any individual appropriate accommodation that are necessary to measure the academic achievement and functional performance of the student on state and district-wide assessments; and

The IDEA emphasizes the role parents are to play in the process of designing the education program for their disabled children.<sup>8</sup> Parents are a required participant of the school's team that develops each disabled student's IEP. 20 U.S.C. § 1414(d)(1)(B). The law expressly acknowledges that the "concerns" parents have "for enhancing the education of their child" must be part of the team's considerations. 20 U.S.C. § 1414(d)(3)(A)(ii). IDEA further accords parents additional protections that apply throughout the IEP process.<sup>9</sup> The IDEA imposes general procedural

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If the IEP team determines that the student must take an alternate assessment instead of a particular regular state or district-wide assessment of student achievement, a statement of why:

(A) The student cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the student.

WAC 392-172A-03090(1)(f)(i) & (ii).

These provisions make clear that the IEP team, including the parent, determines a student's capacity for assessment through alternate methods, and if not why not. And since the WAC further identifies "parents of the student" among the mandatory participants of the IEP team in addition to educational providers from the district, the WAC clearly contemplates that parents are both informed and active participants in any testing decision related to their students. WAC 392-172A-03095(1).

<sup>8</sup> See, 20 U.S.C. 1414(a)(1)(D)(i)(II) (providing for educational "special services") & 1414(a)(2) (providing for student re-evaluations not more than once a year but at least every 3 years); *see also*, *Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct. 528 (2005) (emphasizing parent's role in this process).

<sup>9</sup> See, *e.g.*, 20 U.S.C. § 1414(d)(4)(A) (requiring the IEP Team to revise the IEP when appropriate to address certain information provided by the

safeguards that protect the informed involvement of parents in the development of an education for their child.<sup>10</sup> A central purpose of “ensuring” parental protections is for them to be informed of the efforts being made toward their children’s receiving a “free appropriate public education. . .in conformity with the [IEP]’ ” 20 U.S.C. § 1401(9) & (9)(D).<sup>11</sup>

Special education students unable to participate in WASL testing because of their learning incapacity may be assessed under the “Washington Alternative Assessment System (WAAS) Portfolio. The WAAS was adopted as an alternate to WASL testing by virtue of the mandates within the NCLB and IDE Acts and state law. *See,*

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parents); 20 U.S.C. § 1414(e) (requiring States to “ensure that the parents of [a child with a disability] are members of any group that makes decisions on the educational placement of their child”).

<sup>10</sup> See, *e.g.*, 20 U.S.C. § 1415(a) (requiring States to “establish and maintain procedures ... to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education”); 20 U.S.C. § 1415(b)(1) (mandating that States provide an opportunity for parents to examine all relevant records). See generally 20 U.S.C. §§ 1414 & 1415.

<sup>11</sup> The right of prior approval by parents before testing may be ordered is reinforced by WAC 392-500-090, entitled “Pupil tests and records – Tests – School district policy in writing” which specifies that:

School districts shall develop and adopt written policies relative to testing, kindergarten through grade twelve, which policies shall include *an outline of procedures by which parents or legal guardians of a student may become acquainted with the nature of tests and their uses in helping children.*

(emphasis added).

RCW 28A.155.045. The WAAS is the testing mechanism that would be applied to the children of Team A at Green Lake Elementary School taught by Juli and Lenora, but only if it is an appropriate test, and only if the testing is agreed upon during the IEP conference by all those participating, especially the students parents.

In *Winkelman v. City of Parma Schl. Dist.*, 550 U.S. 516 (2007), the Supreme Court held that the right to a “free appropriate public education” belonged to both disabled students and their parents upon the statutory axiom that the IDEA in its entirety requires parental involvement and their essential cooperative participation in forming the child’s educational goals and programs with a school’s teaching and ancillary staff.

The Superintendent of Public Instruction, as the elected official with authority over all public schools within the state of Washington, RCW 28A.300.010 & .040, is expressly authorized to adopt rules necessary to implement special education services:

[P]art B of the federal individuals with disabilities education improvement act [sic] or other federal law providing for special education services for children with disabilities and . . . ensure appropriate access and participation in the general education curriculum and *participation in statewide assessments for all students with disabilities.*

RCW 28A.155.090(7) (emphasis added).

In accordance with this mandate, the Superintendent has adopted pertinent regulations. See, WAC 392-172A. These regulations deal in detail with the IEP process. Parental consent is prominent throughout and OSPI has promulgated a controlling definition for “Consent” that applies throughout the various regulations:

(1) Consent means that:

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity. . . .
- (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

WAC 392-172A-01040.

This language establishes the meaningful role that parents play in their children’s public education, and the importance that their consent be informed, and not merely acquired through some degree of formalized process masquerading as disclosure.

Washington law further recognizes that children with learning disabilities may be unable to meet assessment standards for regular graduation yet insures their opportunity to participate in state educational programs. RCW 28A.155.045.<sup>12</sup> The statute addresses student testing as follows:

[T]he determination of whether the high school assessment system is appropriate shall be made by the student's *individual education program team*. . . [T]he superintendent of public instruction shall develop the guidelines for determining which students *shall not be required to participate in the high school assessment system and which types of assessments are appropriate to use*

*Id.* (italics added).

It is clear that Washington's testing laws are designed to focus upon high school student graduation requirements. Nothing in the law creates consequences for lower grade level students who satisfy or fail their testing requirements. Washington's scheme concedes that certain special education students will not ever meet WASL exit requirements, or those of its alternative testing programs, yet have still provided for their academic recognition in

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<sup>12</sup> In addition, RCW 28A.155.170, entitled "Graduation ceremony – Certificate of attendance – Students with individual education programs," confers participating special education students who have reached majority with the right to participate in their schools' graduation ceremonies and receive a "certificate of attendance," an award that is distinctive from the foregoing "certificate of individual achievement." The law acknowledges that special education students shall have an opportunity to participate in graduation ceremonies notwithstanding their inability to meet exit standards.

the state's education program. Implicit in this law is an acknowledgment that some students cannot succeed at testing, yet failure will not render futile their efforts. It is the confluence of these legal protections, and their influence on the performance of the appellants' duties in this case, that require close review of the facts brought by this appeal.

**C. The Hearing Officer Failed to Give Appropriate Weight to the Parental Waivers from Testing that were in The Record.**

In *Clarke, supra.*, the Supreme Court established the following factors to be considered by the reviewing judicial officer:

- (1) The age and maturity of the students;
- (2) the likelihood the teacher's conduct will have adversely affected students or other teachers;
- (3) the degree of anticipated adversity
- (4) the extenuating or aggravating circumstances surrounding the conduct;
- (5) the likelihood that the conduct may be repeated;
- (6) the motive underlying the conduct; and
- (8) whether the conduct will have a chilling effect on the rights of the teachers.

106 Wn.2d at 114, *citing, Hoagland v. Mt. Vernon Schl. Dist.*, 95 Wash.2d 424, 428, 623 P.2d 1156 (1981). The *Clarke* court further

summary the foregoing enumerated factors into the following inquiry: (1) was the teacher's deficiency unremediable; or, (2) did it lacks any positive educational aspect or legitimate professional purpose. *Id.*<sup>13</sup> The *Clarke* court further informed that not all of the enunciated factors will apply in every disciplinary scenario. *Id.*

In *Settlegoode v. Portland Pub. Schls.*, 371 F.3d 503, *cert den.*, 125 S.Ct. 478 (2004), the Ninth Circuit Court of Appeals, in addressing a constitutional tort action by a teacher who was terminated for challenging District special education policies, held that "Teachers are uniquely situated to know whether students are receiving the type of attention and education that they deserve and, in this case, are federally entitled to. We have long recognized "the importance of allowing teachers to speak out on school matters," *Connick v. Myers*, 461 U.S. 138, 162, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), because " '[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions' " on such matters. *Id.* . . . This is so with respect to disabled children, who may not be able to communicate effectively that they lack appropriate facilities. *Teachers may therefore be the only guardians*

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<sup>13</sup> *Clarke* involved a teacher termination for sub-standard performance; *Hoagland* addressed a teacher's termination for misconduct unrelated to his job performance.

*of these children's rights and interests during the school day.*" 371 F.3d at 512 (emphasis added).

In the latter part of November 2008, Principal Grinager directed Juli and Lenora to attend the WAAS training December 1<sup>st</sup> and 2<sup>nd</sup>. Exh. D-40 & 41. Juli did not attend the training (she had attended such training the prior year); Lenora did attend (Exh. D-43; Tr. 629:8-12), provided by Melonie Miller (Tr. 263-64), who distributed an admittedly incomplete Power Point document. Exh. D-64; Tr. 279-80. Ms. Miller confirmed that students could avoid WAAS testing if parents so specified. *See*, Ex. 33; Tr. 287-88. The District acknowledged at hearing that parents had the right to effect a testing exemption. Tr. 279-80.

Lenora testified that the method of effecting a parental exemption was asked and left unanswered during the training. TR at 641:1-13. Nothing in the record ever established the existence of a District process that was prerequisite to an effective parental exemption. The absence of any specific form for an exemption placed the IEP's creation process as the sole method of determining students' WAAS testing participation.

The facts at hearing established that on December 1<sup>st</sup> & 2<sup>nd</sup> 2008, when the District's presenter conceded that a parent may

exempt his/her child from WAAS portfolio testing, with Lenora in attendance at that training, and when the parent of Student 4 clearly and unequivocally exercised her right not to have her child tested, the District still directed the teachers to proceed with testing subject to discipline.

The testimony also conclusively established there was no referable policy concerning the effect of parental rights except that the IEP prepared for each student was to have some reference to proposed testing. Ex. 70. Contrary to state law requiring such a policy, the hearing officer was not submitted any document adopted by the District that would provide the parents of disabled, WAAS-eligible students to “become acquainted with the nature of tests and their uses in helping students.” Nor was anything from the District presented at any IEP meeting to provide meaningful guidelines advising parents of their rights to determine if WAAS testing of their children was appropriate.

The cumulative effect of the laws establish meaningful guidelines connecting the vital participation of parents to the process that evaluates student performance, and recognizes the very real need to structure testing to the abilities of those fragile students who possess severe cognitive disabilities, and administer

it when the students are deemed ready by the IEP team and not by disconnected District administrators. The District, for reasons that were never completely explained at hearing, simply insisted that the WAAS eligible students of Ms. Griffith and Ms. Quarto submit to testing. *See, e.g.*, TR at 529 (“Parent of Student 4”). The Director of Elementary Instruction simply said that testing was required without citation to commanding authority for such a conclusion. Tr. 309:11-18. In so testifying, the District’s witnesses contradicted their own policy, to the extent a power-point document can be equated as such.

The IEP for the Green Lake students who would have been WAAS eligible were presented at hearing. Exhs 25<sup>14</sup>, 26<sup>15</sup>, 27<sup>16</sup>, 28<sup>17</sup>, 29<sup>18</sup> and 30.<sup>19</sup> While each document reveals a team approach

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<sup>14</sup> Exhibit 25 is two years of IEPs for Student No. 1, who was placed in 3<sup>rd</sup> grade during SY 2008-09, and taught by Juli Griffith.

<sup>15</sup> Exhibit 26 contains two years of IEPs for Student No. 4, who was moved to a 4<sup>th</sup> grade GLE from 2<sup>nd</sup> grade on December 8, 2008, and taught by Lenora Stahl; as of December 1, 2008, she was not eligible for WASL/WAAS testing purposes.

<sup>16</sup> Exhibit 27 contains two years of IEPs for Student No. 6, who was assigned a 4<sup>th</sup> grade GLE in an IEP completed in June 2008; he was taught by Lenora Stahl.

<sup>17</sup> Exhibit 28 contains two years of IEPs for Student No. 7, completed on March 18 of 2008 and 2009, who was assigned to a 3<sup>rd</sup> grade GLE during SY 2008-09, and taught by Juli Griffith.

to educational goals, including the parent or legal guardian for each child, not one of the IEPs contain a written reference to the WAAS testing process, the intent to administer that test to any student, nor do they inform any parent of their individual right to waive such testing.

And because most of the IEP meetings between the parents and the instructional staff were held well in advance of the Fall of the 2008, or after the issue over WAAS testing came to the forefront in November/December 2008, the District's negligence in not providing such information to the students' parents, but still insisting that the Ms. Griffith and Ms. Quarto administer them anyway, is inconsistent with the entire IEP process. It is thus apparent that, despite the legal requirement that the IEP process is the principal device for communicating the intent to administer WAAS, it was clear that the IEP process was not used to inform parents of the District's intention to force their children to submit to WAAS testing during the period December 2008 - March 2009.

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<sup>18</sup> Exhibit 29 contains two years of IEPs for Student No. 8, completed May 22 of 2008 and 2009, who was assigned to 5<sup>th</sup> grade GLE during SY 2008-09, and taught by Juli Griffith.

<sup>19</sup> Exhibit 30 contains two years of IEP for Student No. 10, completed January 10, 2007 and January 22, 2008, who was assigned to 4<sup>th</sup> grade GLE during SY 2008-09, and taught by Lenora Stahl.

The parent of Student 4 participated in an IEP meeting December 8, 2008, and was informed at that time of the District's intent to subject her child to WAAS testing. Ex. 26. She objected to such testing of her child, citing the child's incapacity to perform basic life functions let alone submit to an academic achievement evaluation. Ex. 26, p.1; TR at 529-30. It was also at that meeting that, for the first time, the District required that the WAAS testing form to be appended to the student's IEP following a discussion of testing as appropriate was even raised during an IEP meeting where a parent was in attendance. *Compare*, Ex. 26 & Ex. 27, 28 & 29. Bu the form itself is defective.<sup>20</sup> Whether included or left out of any IEP, the form only discusses testing and fails to discuss a parent's right to object to the testing, nor does it even come close to disclosing the testing process as required under WAC. Tr. 216-217.

Because the completion of most of the students' IEPs preceded the District's adoption of WAAS training and time-tables in late Fall 2008, the first "data collection point" of WAAS portfolio information for each student did not arrive until December 12, 2008. TR. 349:20-21. Teachers who attended the District's WAAS training of December 1<sup>st</sup> or 2<sup>nd</sup> had only 8 school days to compile and

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<sup>20</sup> Most of the IEP exhibits, especially those from 2007, do not contain such a page.

interpret the necessary information, in addition to performing their regular teaching duties. Thus, the remainder of the WAAS portfolio data collection process was inherently at odds with the IEP goal setting process.

The next (second) data collection point occurred in February 2009. Exh. D-50. This was much further out, but the significance of this date must be considered within the overall timetable of events that were transpiring with the two appellants.

As a matter of fundamental fairness to the appellants, it is incredibly difficult for them to demand that they follow a policy where none exists. If it is recognized by District representatives and administrators that a parent may exempt his or her child from WAAS testing, but there is no specific procedure in place to explain how such an exemption is secured, then the absence of a procedure defining the methodology that must be followed implies that any act by the parent should be deemed valid. And equally connected to that logical assessment is the expectation that, without definable guidance to the district's teachers, they should not be subjected to discipline if they take action on their own in this respect.

In fact, the teachers were being asked to test these children in violation of the law. All parents of the WAAS eligible students taught by Juli Griffith and Lenora Stahl-Quarto clearly communicated to the District at some point during the assessment period that none wished their child to be tested. The record shows that during the District's investigation into the teachers' actions, and before any discipline was imposed, all 5 parents of the WAAS-eligible students sent writings to either Principal (Grinager) and/or the Superintendent (Goodloe-Johnson) expressly conveying the unequivocal expectation that their child not be subjected to WAAS testing. Exhibits 53-57 & 68. Notwithstanding this affirmation by the parents of their protected rights, the hearing officer concluded that the teachers' knowledge of parental preferences occurred after the initial directives to test were given. Exh. L, pp. 5-6. But given the continuing nature of the testing period – concluding in March 2009 - and the District's ongoing investigation into the teachers' actions in late January through mid-February, and the District's failure to contact the parents to affirm the teachers' assertions, this conclusion is an erroneous assessment of the facts through application of the law.

The hearing officer concluded that the parental waivers were simply too late to justify the teachers' actions. L at 5-6 & 8. It was established at hearing that the relationship between the teachers for the Team A students and the parents of the students was a close one, both because of the children's disabilities and the requirement that IEP progress be provided on an almost daily basis. See, Tr. 623:11-17. As a consequence, conversation between the teachers and parents was a regular, common component of the students' instructional program. It is completely plausible that, despite a failure of memory from the two testifying parents that they discussed WAAS Portfolio testing with the appellants in the Fall of 2008, each teacher had a reasonable and affirmative understanding that no parent intended his/her child to be so tested. Tr. 676:6-7. While neither of the parents who testified at hearing could recall when the issue was discussed (Tr. 511-12 – January 2009; Tr. 528-29 – December 8, 2008; 532:13-19), the record is clear that all parents affirmed their agreement with Ms. Griffith's and Ms. Stahl-Quarto's position that none wanted their children tested. Exh. D-52-57. And since none of the IEP's prepared for the students contained essential documentation of the parents position on WAAS testing, it was unreasonable to conclude

that the parents' written waivers were untimely. The hearing officer's rejection of this affirmation stands in the face of the meaningful nature of the parents' positions, because they were articulated during the period when testing was occurring and should have treated as effective waivers.

No parent other than Parent 4 held an IEP amendment meeting to discuss WAAS testing goals. Ex. 25-30. The absence of IEP meetings with the other four parents renders the informality of an oral exchange on consent between the teachers and the parents entirely believable. The hearing officer's failure to so acknowledge stands in the face of this record.

Furthermore, the teachers' representation of parental intent could also have been investigated by the District, but it curiously and inexplicably neglected to speak with a single parent during its investigation into Juli Griffith's or Lenora Stahl's conduct.<sup>21</sup> Both teachers urged the principal to make contact with the parents; she did not. Tr. 544. Both teachers, when being interviewed during the

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<sup>21</sup> The District did not call as a witness the investigator from Human Resources who is referenced in the exhibits (Jeanette Bliss – Exh. 46 - 49) to explain the district's investigative process, or whether an effort was made to contact any parent who wrote to the District's administrators. Thus, the record contains no evidence that the District knew, at the time of the imposition of discipline, whether any parent had orally communicated an intent to not have their child tested under the WAAS Portfolio during the period December 2008 through March 2009.

disciplinary investigation, suggested that the District contact the parents of the test-eligible students. Tr. 622. That never happened. Tr. 319.

The testimony was therefore unrebutted at hearing that the first separate interviews of Ms. Griffith and Ms. Stahl-Quarto conducted on January 30, 2009, before a District panel comprised of Jeannette Bliss, Joan Bell, Gloria Mitchell,<sup>22</sup> Cheryl Grinager, and Eva Edwards, quickly switched from an inquiry into the teachers' justifications for not testing the students, to an attack on the sufficiency of the individual parent's exercise of their right to exempt their child from WAAS testing. *See*, Exh. 52. However, it was also established at hearing that both Ms. Griffith and Ms. Quarto were under the impression, as was their union representative, Allan Sutliff, that the meeting concluded with the expectation that the District, upon receipt of written exemptions from all parents, would establish parental confirmation sufficient to address the issue conclusively. TR at 447:4-7.

After the January 30<sup>th</sup> meeting, 4 additional written parent requests for exemption were delivered to District administrators. Exhs. 53-55 & 68. Including the request for exemption received on

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<sup>22</sup> Gloria Mitchell is not in charge of special education or related training, according to Cheryl Grinager. TR at 79:7-9.

January 27<sup>th</sup> (Exh. 52), all five of the parents whose children were enrolled at Green Lake Elementary School and were WAAS eligible confirmed in writing to the District that their child was not to be tested under the WAAS. The representations made by Juli Griffith and Lenora Stahl-Quarto that the parents of the students did not want them tested was now supported by written documents to District administrators to confirm their representations.

The hearing officer's failure to find that the District's refusal to accept these letters as evidence of parental intent and mitigation by the teachers is error. According to the Superintendent, they were discounted because "they were received after the fact and after the insubordination." Tr. at 240:22-23. However, the superintendent was unable to cite a single rule, regulation, statute or policy that rendered those written notices without effect. Principal Grinager testified that if a parent did not want to have his/her child tested under WASL, WASL with accommodations, or WAAS, the District had no authority to disregard that preference and test the student anyway. TR at 104:14-25. The hearing officer's conclusion that the writings were late-received and therefore without effect is insupportable, particularly where the Superintendent herself acknowledged that parents have the right to refuse to have their

child submit to WASL/WAAS testing. TR at 246:6-8; 248:17-19. And though the superintendent, who testified that parents “can write a letter” seeking exemption, Tr. 248:17-22, she could not identify any source that required such a writing, nor had she consulted the IEPs for the students of Juli Griffith or Lenora Stahl-Quarto to see if those documents contained any mention of the parents’ preferences as to the testing of their children. TR at 249:8-18.

The appellants cite the foregoing error as a basis for reversing the hearing officer’s conclusions.

**D. The Conclusion that the Proposed 10-day Suspensions were “Minimal” Discipline and Therefore of Less Significance is not Supported by any Reading of Applicable Law.**

Relying upon *Denton v. S. Kitsap Schl. Dist.*, 10 Wn.App. 69 (Div. 2 1973), the hearing officer concluded that the proposed 10-day suspensions were not sufficiently serious in their impact to support a finding of probable cause. Ex. L at 8. *Denton* is clearly inapposite, both on its facts and as a matter of law. In *Denton*, in ruling upon a teacher discharge, the court made a passing comment that a “discharge” was less drastic in its impact upon the individual than the “revocation of a teaching certificate.” This comment was apparently related to the court’s analysis in giving

substance to the scope of the term “sufficient cause” for discipline as it appeared in the governing statute. 10 Wn.App. 72 (comparing “immorality” as basis for revocation of a certificate and sexual relations with a student as “sufficient cause” for discharge).

However, since *Denton* issued, the Supreme Court enunciated the appropriate factors to be considered in teacher discipline cases where sufficient cause must be proven. *Hoagland v. Mt. Vernon Schl. Dist.*, 95 Wash.2d 424 (1981); *Clarke v. Shoreline Schl. Dist.*, 106 Wn.2d 102 (1986). In *Clarke* eight specific factors must be considered in a sufficient cause analysis, though not all are applicable in every instance. 106 Wn.2d at 105-06. And while the hearing officer applied the *Clarke* factors to her ruling, it cannot be said that the application and weight of those factors in light of her perception that *Denton* somehow reduced the value of those assessments required a relaxation of the proof that would stand as a valid assessment of the appealed conduct. Consequently, an examination of the *Clarke* factors as applied shows in each instance they were not given the proper value they would ordinarily possess upon the record in this case.

(1) Age & Maturity of the Students. The record undisputedly established that the students eligible for WAAS testing suffered

such severe cognitive disabilities that these significant limitations affected their ability to perform basic human functions, let alone detect the teachers' alleged refusal to test them. The hearing officer concluded this factor did not apply because the proposed discipline was for insubordination. Exh. L at 8. However, it is clear that the factor should have been applied because the acts of teachers must be evaluated based upon student awareness of their actions. If the students are incapable of such awareness, then the factor should favor the teachers. The hearing officer's failure to so apply this first factor was error.

(2) The likelihood of adverse affect upon students or other teachers. The hearing officer reasoned that the teachers' refusal to test children in 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> grades would impose a "disadvantage. . .in their preparation for participating in assessments that are required for high school graduation and excluding students on the basis of disability from that opportunity. . . ." Exh. L at 8. The hearing officer further concluded that a failure to administer the WAAS test would jeopardize "federal and state funding." *Id.*

There was simply no record evidence to support the conclusion that the teachers' refusal to collect WAAS data would adversely affect the students' future ability to successfully test when

they reach the high school level, or that the failure to administer present WAAS testing somehow placed them at any disadvantage. There was no showing that the elementary level WAAS test was in any way connected to high school testing. The absence of such evidence constituted significant error in evaluating this *Clarke* factor.

There was also no record evidence that these teachers' actions influenced any other teachers in the District, a consideration that was ignored by the hearing officer.

Finally the record is devoid of proof, other than a mere statement of possible consequences under the law, that funding from the U.S. Department of Education could be possibly withheld if testing was not completed. The erroneous reliance upon this conclusion is particularly exacerbated by the established fact that a parent has the right to exempt his or her student from any testing. If the exercise of that right precludes the child's participation, then the impact on either the child or the District for funding purposes was purely speculative. This factor, if properly applied, favors the teachers. The hearing officer's analysis was erroneous as a matter of fact and law.

(3) The degree of the anticipated adversity. The degree of adversity is not great, as there is significant confusion within the District among its own administrators as to what the process permits, and how parental refusal to participate should be handled, let alone establish the presence of a referable policy that could provide a guiding resource to teachers and administrators in the performance of their duties in respect to WAAS administration.

The hearing officer erroneously concluded this factor's influence was "unknown," except she again found that the failure to test by the teachers "could result in jeopardizing state and federal funding." L at 9. As argued above, the record is devoid of any such threat to the District in this particular instance, and the hearing officer's unsupported conclusions in this regard are in error.

(4) Proximity/remoteness. The hearing officer concluded the conduct was not remote in time. L. at 9. This factor was not disputed and was conceded by appellants in their post-hearing brief. However, the *Clarke* ruling acknowledges that not all factors must be evaluated and found applicable. The failure to consider this factor has no influence on the scope of this appeal to determine the presence of error.

(5) Extenuating/aggravating circumstances. The lack of a meaningful, guiding policy and the impact of federal law on parent participation, and the District's own acknowledged acceptance of parental exemption from testing are all extenuating factors that undermine any finding of sufficient cause. While the hearing officer acknowledged that the teachers had acted in the best interests of their students, she erroneously undermined this mitigator by finding the teachers had acted independently before parental preferences were known. Ex. L at 9. In this respect, the appellants' refer the court to the cited holding within *Settlegoode, supra.*, which places on teachers primary responsibility for their students' well-being. This perception that the teachers had acted independently cannot be sustained where the District had the ability to contact the parents to ascertain their preferences on this matter, and refused to do so.

Because the teachers' had testified that, in their experience, there had been a District-sponsored waiver process, and that waiver was confirmed at the training attended by Ms. Quarto on December 2, 2008, the hearing officer's failure to give those facts due weight as well as the written parental exemptions, constituted error.

(6) Likelihood of repetition. Both teachers testified that, had the parents not objected, in conformity with District policy, they would have administered the WAAS, and will do so in the future. Tr. 655:7-13. Contrary to this testimony, the hearing officer concluded this factor was “unknown” when the record was devoid of any evidence from the District to suggest the teachers would continue to defy future directives to administer the WAAS Portfolio test to their students. The record evidence was therefore contrary to the hearing officer’s conclusion. In any event, it begs the question to insist that repeated instances of the same “misconduct” must be presented to make this factor relevant. The Supreme Court found it relevant and applicable; the hearing officer’s failure to do so constitutes error.

(7) Underlying motive: The evidence at hearing made it plain that the motive of the teachers was not to defy the District’s directive, but to apply their own specialized knowledge of the students’ abilities, and to act in conformity with the wishes of the parents, especially where neither teacher was informed at the December 2<sup>nd</sup> 2008 WAAS training that District policy was definitively to the contrary. The hearing officer concluded that the teachers were simply advancing their personal beliefs that the

WAAS was “a poor tool for assessing their students” when in fact, the teachers were doing so as part of their function to craft a federally-required IEP that would include appropriate testing for students who could effectively demonstrate a result the testing was designed to measure. *See*, Ex. A71, p.19.

(8) Chilling effect. The hearing officer concluded there was no evidence of any chilling effect on teachers’ rights if this conduct is deemed acceptable. Ex.L at 9. The actual chilling effect is upon these teachers, for what emerged from the District’s failure to provide proper guidance and adhere to federally-mandated standards is to force teachers to act in direct contravention to parental wishes if they tested their children regardless of the parents’ clearly expressed intent to the contrary. Proper application of this factor would place teachers such as Ms. Griffith and Ms. Quarto in the quandary of obeying an improper order and knowingly committing a violation of law. This finding, too, constitutes reversible error.

E. **The Discipline Imposed upon Another Teacher Who Refused to Administer the WASL to His Middle School Students was an Inadequate Comparator in Deciding Whether The Proposed Discipline in this Case Was Appropriate.**

In her analysis of the seven tests of just cause,<sup>23</sup> the hearing officer found that Ms. Griffith and Ms. Quarto were given discipline that was comparable to that of another teacher. Exh. L at 10. This is an erroneous review of that discipline, which is based upon factually and legally distinguishable conduct.

The District introduced a disciplinary letter, as well as accompanying documents, related to a 10-day suspension imposed upon Carl Chew, a teacher at Eckstein Middle School within the District. Exh. 58. During the spring of SY 2007-2008, Mr. Chew refused to administer the WASL test to his 6<sup>th</sup> grade general education students. *Id.* He did so not in consultation with any parents – who as the record shows have an established right to exempt their children from the testing – nor upon a change in testing procedures that raised legitimate concerns about the validity of the test results. TR at 472:2-5 & 473:12-17. Mr. Chew, as he testified, did so because he holds a professional disagreement with the entire testing process as a valid evaluator of students and their future abilities to progress in academics. TR at 470-71.

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<sup>23</sup> The “seven tests” are used in disciplinary cases subject to review under labor contracts, and were adopted by the Supreme Court in *Civil Service Comm. of the City of Kelso v. City of Kelso*, 137 Wn.2d 166, 173 (1999).

The Letter of Probable Cause to Mr. Chew imposing a 10-day disciplinary suspension is based upon his “[R]efusal and insubordination to your principal’s written direction to administer the WASL” thereby provoking two further justifications for discipline. Exh. 58. First, the superintendent cited the simple refusal to administer the WASL as “a state requirement and you as a member of our staff have a responsibility to do so.” *Id.* In addition, Mr. Chew’s refusal to administer the WASL “is a matter of insubordination.” *Id.* Mr. Chew did not challenge the discipline, but instead accepted it and now administers the WASL as directed.

Mr. Chew’s situation differed drastically from that of Ms. Griffith and Ms. Stahl-Quarto. First, Mr. Chew was not a special education subject to IDEA’s IEP requirements and related parental disclosure and consent for testing and assessment purposes.

Second, as Mr. Chew taught students in general education who took the WASL, there were no special education responsibilities that would have required him to determine if a test such as the WAAS was appropriate.

Third, Mr. Chew had no directives from parents that their children were not to be tested. While such parents could exercise that right, Mr. Chew testified that he did not solicit such a waiver,

nor was he aware that such waivers were expressed by the parents of the students he was to test.

Fourth, Mr. Chew was repeatedly directed to administer the test, and he flat out refused to do so without introducing any mitigating factor that would justify his refusal. Mr. Chew did so for personal reasons, i.e., he did so “as a matter of principle.” See, Exh. 58 & attachments. He did not refuse to administer the WASL upon his prior, informed assessment of individual student’s abilities to participate in the testing process with meaningful results being his primary criterion of their participation.

By contrast, Mr. Chew’s disciplinary suspension is valuable as a comparator exposing the insufficiency of the underlying facts to support the proposed discipline for Ms. Griffith and Ms. Stahl-Quarto. The facts in their cases stand in bold contrast to those that led to the imposition of a ten-day suspension upon Mr. Chew.<sup>24</sup> He refused to administer the test without an independent, valid reason. Ms. Griffith had reasons for not attending the training, and for not administering the test. These reasons were based upon rational justifications. The same holds true for Ms. Stahl-Quarto. To the

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<sup>24</sup> In making this comparison, neither Ms. Griffith nor Ms. Stahl-Quarto concedes that Mr. Chew’s discipline was appropriate based upon his actions. They limit their comparison to what was exacted as his discipline against what is proposed by the District in their respective cases.

extent Mr. Chew's case is offered as a comparator, the hearing officer incorrectly found the District's reliance upon the suspension as adequate justification for the proposed discipline in this case.

**F. Juli Griffith's Discipline Twice for Insubordination Violates Principals of Fundamental Fairness.**

In her letter of December 3, 2008, Cheryl Grinager gave Juli Griffith a "Written Warning" "regarding your non-attendance at the all-day WAAS. . .training which was held on December 1. . . ." Exh. 45. Principal Grinager stated: "You failed to comply with a directive given to you on November 24, 2008 to attend the required WAAS training held on December 1" and this "failure to follow through on this directive is viewed as insubordination." *Id.* The letter concluded with the further threat that "Human Resources will be notified regarding *next steps* in addressing this issue." *Id.* (emphasis added).

Ms. Grinager testified that she had consulted with and received approval from both Jeanette Bliss (Human Resource Manager) and Gloria Mitchell (Instructional Director – pre-K-5) before issuing the written Warning to Ms. Griffith. Tr. at 108:6-14. According to the collective bargaining agreement between the District and the teachers' union, among the express instances of

discipline that may not be imposed “without just and sufficient cause” as part of “a process of progressive discipline. . .[to] include. . .written warning. . . .” Article III Section C.5.; Exh. 67 at p. 29.

This contract provides an outline of member rights stating

Any disciplinary action. . .shall be subject to the grievance procedure including binding arbitration. . .This section shall not apply to matters covered by statutory due process procedures.

*Id.*

The hearing officer asked for supplemental briefing from the District on the issue, as it was not addressed in its post-hearing brief. Exh. L at 15. The District responded by e-mail denying that the discipline intended to incorporate both incidents (for not attending the training and not administering the WAAS Portfolio).<sup>25</sup> Ms. Griffith formalized her request for reconsideration of the matter. Exh. M. The District was asked to respond to the request (Exh. N.) to which Ms. Griffith thereafter replied. Exh. O. The hearing officer denied the request for reconsideration and ruled that the discipline was limited to the refusal to administer and not the refusal to attend training. Exh. P.

Under RCW 28A.405.300 the statutory protections available

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<sup>25</sup> For reasons to be explained by the District, the e-mail is not part of the record before this court.

to teachers (RCW 28A.405.310) only become operative when the District proposes some action that “adversely affects” their contracts with the District. A written warning does not “adversely affect” a teacher’s contract, as there neither a termination nor temporary suspension from employment, nor is it the type of disciplinary imposition that must issue from the superintendent. Nonetheless, the collective bargaining agreement governing teacher employment considers it a disciplinary consequence. Ms. Griffith, having been disciplined by her principal through this Letter of Warning, may not now be disciplined again by the superintendent, and have her conduct become the basis for the proposed 10-day suspension.

The District contended that, notwithstanding the inclusion of a reference to Principal Grinager’s Letter of Warning in Ms. Griffith’s Letter of Probable Cause, Ms. Griffith was only being disciplined for her refusal to administer the WAAS Portfolio tests to her students. Tr. 241. This representation is contradicted on its face by the Letter of Warning which informs that “Human Resources will be notified regarding *next steps* in addressing this issue.” The only reasonable interpretation for inclusion of this language is that further discipline was contemplated. And since the conduct

addressed by the Letter of Warning is reiterated in the Letter of Probable Cause, it could only be concluded that Ms. Griffith's failure to attend WAAS training became a basis for the proposed 10-day suspension.<sup>26</sup>

While the Superintendent stated at hearing that Juli Griffith was only being disciplined for her failure to administer the WAAS, this testimony was rebutted by the Letter of Probable Cause. The Superintendent did not recall what record documents she reviewed in making her determination that a 10-day suspension was appropriate. TR at 248-249 (generally). No one from Human Resources testified to explain what "next steps" were taken after Principal Grinager's referral was received. The only evidence that Juli Griffith was being disciplined for not attending the WAAS training was the Letter of Probable Cause. And regardless of the Superintendent's rationale, the reference remains in that document and an objective reader could only conclude that failure to test is a basis for the proposed discipline. The hearing officer disagreed, and refused to find that Ms. Griffith was twice disciplined. This conclusion is error as a matter of law.

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<sup>26</sup> It could also appear that the matter remained open for the purpose of filing a grievance up to and through arbitration, as this was not a disciplinary imposition subject to statutory protections.

Those cases that have addressed the matter conclude unanimously that an employee who receives discipline in one instance may not again be disciplined at a later time for the same conduct. See, e.g., *Dept. of Environmental Protection v. Barker*, 654 So.2d 594,595 (Fla.App. 1995); *Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss.App. 1999) (in which the court found that, as city policy included “written warnings” among the list of definable instances of discipline, later imposition of termination constituted double discipline for police officer who received prior warning), citing, *James v. Sewerage & Water Bd. of New Orleans*, 505 So.2d 119, 122 (La.App. 1987) (“it is a matter of fundamental fairness that a public employee not be exposed to discipline for the same offense more than once”).

The holdings of these decisions find justifiable application here. The Letter of Written Warning was a disciplinary communication under the District-SEA collective bargaining agreement. The law states unequivocally that the letter of probable cause stands as the foundational outline of alleged misconduct in support of an adverse affect. RCW 28A.405.310(8). If a warning is disciplinary, and the punishment was finalized (by Ms. Griffith’s failure to challenge it through filing of a grievance), then it should

not also be the basis for the proposed suspension. Bootstrapping that same event as the basis for imposing a 10-day suspension is simply impermissible.

The mention of the refusal to attend training was not meaningless by its inclusion, and it was not the apparent basis for cumulating Ms. Griffith's discipline. By contrast with the Letter of Probable Cause received by Ms. Quarto, they are exact except for the reference to the training refusal. *Compare*, Exhs. 48 & 49. Yet the discipline is the same. Notwithstanding the District's attempts to minimize this incorporated reference to an incident for which Ms. Griffith already received discipline, the inclusion of the refusal to attend training in the letter of probable cause was an attempt to impose additional discipline. This violates the precepts of "fundamental fairness" and should be deemed error on the part of the hearing officer to recognize that consequence as a matter of law.

**G. The Hearing Officer's Conclusion that Both Teachers Were Insubordinate is Not Supported by Applied CaseLaw to These Facts.**

Caselaw on insubordination contemplates not only repeated refusals to comply but also a certain expectation of reasonableness in the employer's directive. The hearing officer found that *Simmons*

*v. Vancouver Schl. Dist.*, 41 Wash.App. 365, 704 P.2d 648 (Div. 3 1985) was applicable to the present facts. L at 9. In *Simmons*, a teacher's discipline for insubordination was deemed proper by the fact he repeatedly engaged in the physical discipline of students, despite several prior admonishments from his superior.

The hearing officer relied upon *Simmons* to affirm the sufficiency of a 10-day suspension in this case. The facts are completely inapposite to support such a conclusion. *Simmons* should not apply, as it has none of the mitigators of *Clarke*, nor did the *Simmons* court consider let alone apply the *Clarke/Hoagland* factors or the seven tests of just cause.

The facts at hearing clearly reveal that neither teacher's actions were insubordinate. There was no reasonable, articulated directive with an explanation of specific consequences for refusal. There was no referable policy. And the assertion of parental rights related to the testing of the appellants' students was a critical factor in any analysis of alleged insubordination. While the teachers were obliged to follow their superiors' directives, they were not required to violate the law.

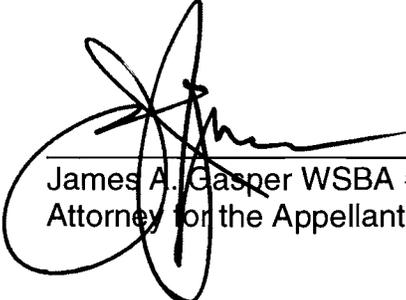
Thus, a finding that insubordination caselaw is applicable here reveals a failure on the part of the hearing officer to give

appropriate weight and a full understanding to the importance that the applicable laws and their procedures confer upon the process and appellants role as participants in that process. This is not a case of clear cut violation of legitimate restrictions on behavior or a mandatory directive. It is the punishment of individuals who acted as they understood the law to apply, and as affirmed by the District itself. Under these circumstances, the hearing officer's contrary conclusion is in error.

### **CONCLUSION**

The appellants respectfully request that, upon the foregoing record and argument, this honorable court find that there is not sufficient cause to support the disciplinary suspensions proposed by the Superintendent, and that the Letter of Probable Cause be deemed unsupported and without effect. Any reference to this Letter or the facts in support should be expunged from appellants' personnel files.

Dated this 22<sup>nd</sup> day of February 2011 in Federal Way, Washington.

By:   
James A. Gasper WSBA #20722  
Attorney for the Appellants