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NO. 66167-1-I
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

JULI GRIFFITH & LENORA STAHL-QUARTO,

Appellant,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT SEATTLE SCHOOL DISTRICT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

Cause No. 06-2-21238-0 SEA

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I. INTRODUCTION

This case was before the Superior Court on an appeal by two special education teachers, Juli Griffith and Lenora Stahl-Quarto (Appellants), from a decision rendered by Hearing Officer Patricia Aitken, pursuant to RCW 28A.405.300 and RCW 28A.405.310 (Hearing Officer's Decision). CP 1-3; AR, parts L and P.¹ The Hearing Officer's Decision upheld a decision by the Seattle School District (District) to impose ten-day, unpaid suspensions on each of Appellants for their refusals to administer state-mandated assessments of their students.

Pursuant to RCW 28A.405.320, *et. seq.*, the teachers appealed the Hearing Officer's Decision to the Superior Court. A hearing on the Superior Court appeal was held on September 24, 2010. The Superior Court affirmed the Hearing Officer's Decision by order dated September 30, 2010. CP 128-132. That order is the subject of this appeal. CP 133-155.

II. RESPONSE TO APPELLANTS' ASSIGNMENTS OF ERROR

Appellants do not specifically assign error to the September 30, 2010, Superior Court order, but instead assign five errors to the Hearing

¹ The Certified Appeal Board Record (AR), docket sub number 7, will be referred to herein by part, as delineated in the "Certification of Record of Proceedings Pursuant to RCW 28A.405.330." Citation to the hearing transcript (AR, part H) will to page and line

Officer's Decision. Appellants do not refer or cite to specific findings or conclusions of law in the Hearing Officer's Decision, making it difficult to determine precisely with what factual findings and legal conclusions they disagree. Nevertheless, the District responds to Appellants' assignments of error as follows, using the same numbers used by Appellants:

1. The District maintains that Appellants have not applied the correct standard of review (i.e., the "clearly erroneous" standard), and that the Hearing Officer's findings of fact, including without limitation, her finding that, "It would appear that the reason Appellants did not collect crucial data for the WAAS Portfolio for the collection data of December 12, 2008 was not because of parental refusals but rather based on their belief that the WAAS Portfolio was flawed, invalid, and a waste of time," AR, part L, p. 7, were not clearly erroneous and should be affirmed.

2. There is no legal basis for Appellants' argument that their refusal to administer assessments should have been excused because of the alleged "lack of referable policies" relating to parental refusal. Whether such policies existed is irrelevant in light of the Hearing Officer's factual determination that parental refusals were *not* the primary reason for

numbers, as follows: "Tr.[pp:ll]". Citation to the hearing exhibits (AR, part I) will be to the exhibit number utilized at hearing (e.g., D1, A1).

Appellants' refusal to administer the assessment. The Hearing Officer's factual determination was not clearly erroneous and should be affirmed.

3. The relative weight to accord specific evidence and the determination of the similarity of comparator evidence, including evidence of discipline imposed on another employee for comparable conduct, was a factual determination, which was properly reviewed by the Superior Court under the clearly erroneous standard and affirmed.

4. The District maintains that the Hearing Officer's factual determination that the ten-day suspension of Appellant Griffith was solely for her refusal to administer the WAAS-Portfolio, AR, part O, p. 3, was not clearly erroneous and should be affirmed.

5. The District maintains that in determining that Appellants' insubordinate refusals to administer state-mandated assessments constituted sufficient cause for the District to impose ten-day suspensions, the Hearing Officer correctly applied the law. The Hearing Officer's Decision should be affirmed.

III. STATEMENT OF THE CASE

A. Introduction

In this case, Appellants blatantly disregarded the directives of their supervisor, Principal Cheryl Grinager, and the requirements of state and

federal law. To justify their gross insubordination, Appellants have argued that their students were so severely disabled that they were unable, and thus not entitled, to participate in a required statewide assessment, and that the statewide assessment of this population of students, the Washington Alternate Assessment System Portfolio (WAAS-Portfolio), was invalid and a waste of time. Not only do these arguments belie Appellants' discriminatory assumption that their students were incapable of being accessed using (and thus, not entitled to exposure to) the general education curriculum, or of demonstrating progress toward grade-level expectations of proficiency, but they are completely misleading. Whether or not the WAAS-Portfolio was a worthwhile assessment in Appellants' view, it was a mandatory assessment under state and federal law, and Appellants were unambiguously directed by their supervisor to administer it. Their refusal to do so constituted insubordination and a breach of their statutory, professional, and contractual obligations.

If teachers were permitted to refuse to administer these assessments, or to persuade parents to refuse to have their children assessed, the state stood to lose *hundreds of millions* or even *billions* of

dollars of federal funding for public education.² Given these potential dire consequences, such refusals could not be tolerated.

In the Brief of the Appellant (Appellants' Brief), the most prominent and vehement argument is that Appellants should not be disciplined because the parents of the students Appellants refused to test eventually submitted written refusals. This argument was correctly rejected by the Hearing Officer, who, after hearing and assessing the credibility of Appellants' testimony and the testimony of the parents, concluded as a factual matter that Appellants' refusal to assess the students derived not from the refusals of parents, which occurred *after* Appellants had already refused to commence the assessment, but from Appellants' own philosophical objections to the test. AR, part L, p. 7.

Appellants' other arguments only distract from the real issue in the case: whether their refusals, for personal and philosophical reasons, to administer the statutorily mandated, statewide assessment, as they were clearly and repeatedly directed to do by their supervisor, constituted sufficient cause to suspend them for ten days without pay. The District

² According to the U.S. Department of Education, \$626,352,348 of federal funds were provided to the State of Washington for elementary and secondary education during FY 2008. The amount of funds that were to be provided to the State of Washington under the Recovery Act exceeded one billion dollars. See AR, part J, p. 3.

maintains the Hearing Officer correctly determined it did, and that the Hearing Officer's Decision was correctly affirmed by the Superior Court.

B. Factual Background

Appellants are special education teachers at Green Lake Elementary School, in the Seattle School District. For the 2008-09 school year, they taught in the same self-contained classroom of Kindergarten through fifth grade children with severe cognitive disabilities (Team A). Tr. 545:14-25; 547:1-548:17; 616:25-617:24.

Beginning in the fall of 2008, Appellants made known their refusal to administer the WAAS-Portfolio to the eligible students in their classes. *See, e.g.*, D39. They missed key data collection points for the assessment (December 12, 2008 and February 13, 2009). Tr. 24:1-3; D44; D45. After they were notified by letter dated January 27, 2009, that the District was contemplating disciplining them for their refusal to administer the assessment, D46, D47, they solicited letters of refusal from the parents of the students who were supposed to have been assessed. D52-57. All of this was in violation of state and federal law and in direct defiance of clear and repeated directives by their supervisor, Principal Grinager.

As a result of their gross insubordination, then Superintendent Dr. Maria Goodloe-Johnson, pursuant to RCW 28A.405.300, found probable

cause to suspend Appellants for ten-days without pay. AR, parts A and B. Appellants' request for hearings pursuant to RCW 28A.405.310 ensued. AR, parts C and D.

C. Procedural History

RCW 28A.405.300 requires that determinations by a school district of probable cause for an adverse effect in the contract status of certificated employees, in this case, teachers, shall be made by the superintendent and shall be communicated to the affected employee in writing. The notification must specify the probable cause or causes for the adverse effect, in this case, an unpaid suspension.

Dr. Goodloe-Johnson determined in March 2009 that there was probable cause to suspend Appellants for ten days without pay, because of their refusals to administer the statutorily mandated, statewide assessment to their students, and communicated her determination in writing to Appellants by letters dated March 2, 2009. AR, parts A and B, *infra*. The probable cause letters sent to Appellants on March 2, 2009, summarized the insubordinate conduct that formed the basis for the Superintendent's determination of probable cause for the suspensions. As to Appellant Stahl-Quarto the letter provided as follows:

During that meeting [January 30, 2009] you admitted you had received written and verbal directions from Ms.

Grinager to administer the WAAS. On February 24, 2009 when the same group met regarding the proposed suspension you indicated that you were confused by the parents being able to “opt out” of the WAAS testing. However, this is the first time in all the meetings and conversations that you had with this group or individually with your Principal or Education Director, that you voiced any concern over that process. You had opportunities all along the way for clarification and did not seek out the information.

You stated several times in our meeting that “you have not refused to do anything” and that you will do “what the parents want me to do, because the parents don’t want to have their children tested.” When I asked Principal Grinager how many of parent notices she had received she stated “None.” Since our meeting date, five (5) of those parents have submitted documentation. Nonetheless, since you did not and still do not have written authorization from all parents, you still had and continue to have an obligation to follow the law and District policy and procedures. Even though you say that you have not refused to do “anything,” in actuality you have refused to administer the WAAS. In addition, you have missed periodic data checks including crucial collection points on December 12, 2008 and February 13, 2009. You have been offered continued support and training from Special education Supervisor Joanie Bell, which you have refused.

I understand that you are taking this position as a matter of principle. However, the administration of the WAAS by the District is a state requirement and you as a member of our staff have a responsibility to do so. Further, your refusal to comply with the direction of your supervisor to administer the WAAS is a matter of insubordination.

AR, part A; D50.

As to Appellant Griffith, the letter provided as follows:

During that meeting [January 30, 2009] you admitted you told your supervisor Ms. Grinager that you refused to administer the WAAS, and that you continue to refuse to administer the WAAS, and that you received written and verbal directions from Ms. Grinager to administer the WAAS. On February 24, 2009 when the same group met regarding the proposed suspension you indicated that you were confused by the parents being able to “opt out” of the WAAS testing. However, this is the first time in all the meetings and conversations that you had with this group or individually with your Principal or Education Director, that you voiced any concern over that process. You had opportunities all along the way for clarification and did not seek out the information.

. . . . On several occasions you were notified via e-mail from and in conversation with Principal Grinager when WAAS data collection points were due, including crucial data points on both December 12, 2008 and February 13, 2009. Those deadlines were not met. During this time period from November until recently, you have had repeated opportunities to get the required training and support and you have not done so.

I understand that you are taking this position as a matter of principle. However, the administration of the WAAS by the District is a state requirement and you as a member of our staff have a responsibility to do so. Further, your refusal to comply with the direction of your supervisor to administer the WAAS is a matter of insubordination.

AR, part B; D51.

1. Issue and Standard of Proof Before the Hearing Officer

Under RCW 28A.405.310(2), a teacher may request a hearing to challenge a superintendent’s probable cause determination. Appellants timely requested hearings. AR, parts C and D. Pursuant to RCW

28A.405.310(8), the issue for hearing was whether, based on the preponderance of the evidence admitted at the hearing, the reasons set forth in the District's March 2, 2009, probable cause letters to Appellants established the existence of sufficient cause for the unpaid, ten-day suspensions.

2. Administrative Hearing

By agreement of the parties, the appeals were consolidated for hearing before the Honorable Patricia E. Aitken (retired), a member in good standing of the Washington State Bar Association. The consolidated hearing took place on June 22-23 and 29, 2009. At the hearing, the District presented evidence that Appellants refused to administer the WAAS-Portfolio for personal and philosophical reasons, and thus, engaged in insubordination justifying their unpaid, ten-day suspensions.

After post-hearing briefs were submitted (AR, parts J and L), on August 20, 2009, the Hearing Officer issued a partial decision as to Appellant Griffith and a final decision as to Appellant Stahl-Quarto. AR, part L. The Hearing Officer affirmed the ten-day suspension as to Appellant Stahl-Quarto, and as to Appellant Griffith, asked the District to clarify whether or not it was pursuing the issue of Appellant Griffith's insubordination in not attending a WAAS-Portfolio training in the fall of

2008. *Id.* The District responded via email on August 22, 2009, that the ten-day suspension was solely for Appellant Griffith's refusal to administer the WAAS-Portfolio, given that she had already received a written reprimand for the training issue. AR, part M.

3. Post-Hearing Motion

Appellants filed a motion for reconsideration of the partial order, *id.*, arguing on the one hand, that Appellant Griffith's ten-day suspension was for refusing to test *and* refusing to attend training, and therefore, the discipline on Appellant Stahl-Quarto was too severe; and on the other hand, that disciplining Appellant Griffith with a suspension for the failure to participate in training was impermissible "double jeopardy." The District responded to Appellants' motion for reconsideration to the effect that the record clearly supported the conclusion that the ten-day suspension of Appellant Griffith was *solely* for the failure to administer the test. AR, part N.

In her final decision, AR, part P, the Hearing Officer correctly ruled that the ten-day suspension of Appellant Griffith was only for the refusal to administer testing, and that there was sufficient cause for the suspension based solely on Appellant Griffith's refusal to administer the assessment.

The appeal to Superior Court followed. CP 1-3. After hearing on September 24, 2010, the Superior Court affirmed the Hearing Officer's Decision in its entirety. CP 128-132. The Superior Court's September 30, 2010, Judgment and Final Order Affirming Hearing Officer's Decision, is the subject of this appeal, pursuant to RCW 28A.405.360.

IV. AUTHORITY AND ARGUMENT

A. Standard of Review

The scope of review for an appeal of a hearing officer's decision to uphold the unpaid suspension of a teacher is set forth in RCW 28A.405.340. The court's review is "confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at the hearing. . . ." RCW 28A.405.340. A hearing officer's decision may only be overturned if the decision was:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the Hearing Officer; or
- (3) Made upon unlawful procedure; or
- (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 act of the legislature authorizing the decision or order; or
- (6) Arbitrary or capricious.

RCW 28A.405.340(1)-(6).

A court reviewing the factual determinations of a hearing officer inquires whether those determinations are “clearly erroneous in view of the entire record as submitted.” RCW 28A.405.340(5). Under this standard, the reviewing court is to determine whether, considering the administrative record as a whole and the public policy contained in the statute from which the appeal derives (in this case, RCW 28A.405.340), the decision on appeal is correct. *Pryse v. Yakima School Dist.*, 30 Wn. App. 16, 22-23, 632 P.2d 60 (1981). The hearing officer’s decision can be reversed only if the reviewing court is “left with a definite and form conclusion that a mistake has been committed.” *Id.*

Issues of law and mixed questions of law and fact are reviewed *de novo*, that is, under the error of law standard. *Franklin County v. Sellers*, 97 Wn.2d 312, 325-26, 646 P.2d 113 (1982); *Potter v. Kalama School Dist.* 402, 31 Wn. App. 838, 840, 644 P.2d 1229 (1982). To find mixed questions of law and fact sufficient to invoke the error of law standard of review, there must be a dispute as to **both** the propriety of the inferences drawn by the hearing officer from the raw facts **and** as to the meaning of the statutory term, “sufficient cause.” RCW 28A.405.300; *Pryse*, 30 Wn. App. at 23.

Because determination of the ultimate issue of whether or not there is “sufficient cause” to sustain the discipline involves the application of a legal standard to the facts as determined by a hearing officer, a hearing officer’s ultimate determination of “sufficient cause” is reviewed *de novo*. *Pryse*, 30 Wn. App. at 23. However, the clearly erroneous standard applies to the question of whether there is sufficient cause for discharge where, as in this case, a hearing officer’s decision is based upon witness credibility. *Id.*

In *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986), the Washington Supreme Court affirmed that “it is not the province of the reviewing court to try the facts *de novo* when presented with mixed questions of law and fact. . . .” *Clarke*, 106 Wn.2d at 110, *citing, Franklin County*, 97 Wn.2d at 330. The *Clarke* court further concluded that the trial court “was free to determine the correct law independent of the Hearing Officer’s decision and apply it to the facts ***as found by the Hearing Officer.***” *Clarke*, 106 Wn.2d at 110 (emphasis added).

Appellants attempt to confuse the issue of what standard of review applies by inviting this Court, as they did the Superior Court, to review whether or not the Hearing Officer gave “due weight” or “due

consideration” to specific evidence, or failed to “effectively compare” similar discipline. However, under the clearly erroneous standard of review, it is not appropriate for a reviewing court to substitute its judgment as to the credibility of witnesses or the relative weight of evidence. *Pryse*, 30 Wn. App. at 23. Applying the *de novo* standard of review to the legal issues and the ultimate determination of sufficient cause, and the more deferential, clearly erroneous standard of review to the Hearing Officer’s factual findings in this case, it is clear that the Superior Court correctly affirmed the Hearing Officer’s Decision.

B. Sufficient Cause Defined

A teacher has no inherent right to public employment. Pursuant to RCW 28A.400.300(1), however, a teacher’s employment contract includes a term of not more than one year during which the teacher cannot be discharged without “sufficient cause.” Although the term “sufficient cause” is not defined by statute, the meaning of that term has been developed by case law. In *Francisco v. Board of Directors*, 85 Wn.2d 575, 537 P.2d 789 (1975), the State Supreme Court described cause for discharge in terms of “whether the teacher has so materially breached his promise to teach as to excuse the school district in its promise to employ.” 85 Wn.2d at 575. In *Hoagland v. Mount Vernon School Dist.*, 95 Wn.2d

424, 428, 623 P.2d 1156 (1991), the Supreme Court interpreted the term as including conduct “which materially and substantially affects the teacher’s performance.” *See also, Barnes v. Seattle School District*, 88 Wn.2d 483, 487, 583 P.2d 199 (1977); *Pryse*, 30 Wn. App. at 21-22.

A school board may, by regulation or contract, prescribe conduct that will constitute sufficient cause for dismissal. *Simmons v. Vancouver Sch. Dist.*, 41 Wn. App. 365, 375, 704 P.2d 648 (1985), *rev. denied*, 104 Wn.2d 1018 (1985). When a discharge is based upon insubordination or a violation of a rule, it is not necessary to consider whether the teacher’s misconduct affected her teaching efficiency or teaching performance. *Simmons*, 41 Wn. App. at 370. The Court of Appeals has also upheld teacher dismissals where the conduct at issue lacked “any positive educational aspect or legitimate professional purpose.” *Pryse*, 30 Wn. App. at 240; *Potter*, 31 Wn. App. at 842.

Read together, the general rule emanating from Washington case law is this: sufficient cause for a teacher’s discharge exists as a matter of law where the teacher’s deficiency is (1) unremediable and materially and substantially affects the teacher’s performance, *or* (2) lacks any positive educational aspect or legitimate professional purpose. In such cases, the

teacher is deemed to have materially breached her promise to teach. *Clarke*, 106 Wn.2d at 114.

It is important to note that these are two alternate tests for sufficiency of cause. *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 209-210, 22 P.3d 841 (2001) (commenting that the “*Clarke*” rule provides two alternate grounds for finding sufficient cause). *See, also, Sauter v. Mt. Vernon Sch. Dist. No. 320*, 58 Wn. App. 121, 131, 791 P.2d 549 (1990) (sufficient cause for discharge exists as a matter of law where the teacher’s deficiency is unremediable and materially and substantially affects performance *or* where the teacher’s conduct lacks any positive educational aspect or legitimate professional purpose). This case should be analyzed under the second *Clarke* test, because Appellants’ violated state and federal law, District policy, and the directives of their supervisor, and such insubordinate conduct lacked any positive educational aspect or legitimate professional purpose.

C. State and Federal Testing Requirements

1. The IDEA and NCLB, as Implemented by the State, Require That Special Education Students’ Progress Toward Grade Level Expectations Be Assessed.

Because Appellants are special education teachers, and the District’s special education programs are federally funded, two laws (as in

effect during the 2008-09 school year) need to be considered in evaluating the sufficiency of cause for the ten-day suspensions: the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and the No Child Left Behind Act of 2001 (NCLB). Together, these laws require that special education students, like their non-disabled peers, be assessed regularly for how they are progressing as compared to specific, standardized grade-level expectations. The participation of special education students in statewide assessments of student achievements is but one arena in which state and federal law require equal treatment and equal access, regardless of disability. It is these two laws that Appellants blatantly disregarded because of their personal views of the capabilities (or lack thereof) of their students.

“The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures.” *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). The statute’s key goal is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them

for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A).

To this end, the IDEA requires states to have “in effect policies and procedures to ensure that . . . [a] free appropriate public education is available to all children with disabilities residing in the state between the ages of 3 and 21 . . .” 20 U.S.C. § 1412(a)(1)(A). Under the law, states must establish, among other things, “a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.” 20 U.S.C. § 1412(a)(2).

Central to the IDEA is its mandate that states ensure that individualized education programs (IEPs) that set forth a program of specially designed instruction be developed, implemented, and annually revised for each student in the state who is covered by the IDEA. 20 U.S.C. § 1412(a)(2). An IEP is made up of a detailed written plan of action created by a team of specialists (including educators, psychologists, physicians, and various therapists) and the parents and summarizes the student’s abilities, sets goals for his or her progress, and forecasts what type of services a child may need. 20 U.S.C. §§ 1401(14), 1414(d). The IEP must include a statement of the child’s present levels of academic achievement, including “how the child’s disability affects the child’s

involvement and progress *in the general education curriculum.*” 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa) (emphasis supplied).

The primary responsibility for developing, implementing, and updating IEPs under the IDEA falls to the “local educational agencies” (LEAs), which in Washington, include school districts, like the District in this case. *See* 20 U.S.C. § 1414 and § 1401(19)(A). As Appellants and their union witness, Mark Anderson, who was called as an expert witness about the IEP process and consent requirements under IDEA, testified, it is the special education teacher who manages the IEP process and ensures, on behalf of the District, that the essential components of an IEP are in place. Tr. 428:9-429:8.

States must also take care that all special education students participate in regular statewide assessment programs with appropriate accommodations, and if students cannot, that they take alternate assessments where necessary, and in the manner indicated in their respective IEPs. 20 U.S.C. § 1412(a)(16)(A). All statewide assessments *must* be aligned with the state’s academic content and achievement standards that are mandated by Section 1111(b) of NCLB. 20 U.S.C. § 1412(a)(16)(C)(ii)(I).

States are authorized under NCLB's rules to define alternate academic achievement standards for children with the most significant cognitive disabilities, who are entitled to special education and related services under the IDEA, and who take an alternate state assessment. 34 C.F.R. § 200.1(d). Such standards must be developed through a documented and validated standards-setting process and be aligned to the state's regular education academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible. *Id.* States' academic content standards are to specify what **all** students are expected to know and be able to do. They are to be either grade-specific or may cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8. 34 C.F.R. § 200.1(b). If a state adopts alternate academic achievement standards for special education students with the most significant cognitive disabilities, as Washington has done, the state **must** measure the achievement of children with disabilities against those standards. 20 U.S.C. § 1412(a)(16)(C)(ii)(II).

A student's IEP **must** include a statement of any individually appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on statewide

assessments. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa). And if a student's IEP team determines that the student must take an alternate assessment, the IEP must contain a statement describing why the child cannot participate in the regular "high school assessment system" (which in Washington in 2008-09 was the Washington Assessment of Student Learning (WASL)), and that the particular alternate assessment selected is most appropriate for the child. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(bb). IEPs must also contain a description of benchmarks or short-term objectives for students who take alternate assessments aligned to alternate achievement standards. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(cc). Thus, while the IEP must specify which assessment is to be used, it does not, and indeed cannot, exempt a student from being assessed altogether against state grade-level expectations.

As Appellants and their union witness, Mr. Anderson, testified, it is the special education teacher who manages the IEP process and ensures, on behalf of the District, that the essential components of an IEP, including a description of what type of assessment is to be administered, are in place. Tr. 428:9-429:8.

As detailed above, federal law, namely the IDEA and NCLB, mandates that Washington must administer alternate assessments to

students in grades 3 through 8 who are not able to participate in the WASL.³ And, under federal law, that statewide alternate assessment must be aligned to students' grade-level content. 34 C.F.R. § 200.1(b).

Statewide assessments are subject to their own rigorous requirements under NCLB. 20 U.S.C. § 6311(b). Indeed, Washington's assessment system, including the WAAS-Portfolio, was subjected to extensive peer review by the U.S. Department of Education and approved by letter on August 6, 2008.⁴ As the evidence at hearing established, Washington is one of only 20 states whose alternate assessment of severely disabled students had been approved by the U.S. Department of Education. Tr. 172:19-25.

The Office of the Superintendent of Public Instruction (OSPI) for the State of Washington issues guidelines and regulations directing teachers and IEP teams to develop learning activities that generate student work that school districts can use to document students' progress toward the state's alternative academic achievement standards. *See* Chapter 28A.655 RCW; Chapter 392-501 WAC. The state does not require that students or school districts meet grade-level standards. Under federal law, however, OSPI must measure what progress students, even severely

³ *See also*, 34 C.F.R. 300.320(a)(2), and WAC 392-172A-03090(1).

disabled students, are making toward these standards. 20 U.S.C. § 1412(a)(16)(C)(ii)(II).

2. Appellants Mischaracterize the Testing Requirements.

Appellants' explanation of the testing requirement is incorrect and misleading. They state that the IEP team, which includes the parents, "determines a student's capacity for assessment through alternate methods, and if not why not," Appellants' Brief, p. 14, n. 7, and that:

The WAAS is the testing mechanism that would be applied to the children . . . taught by [Appellants], but only if it is an appropriate test, and only if the testing is agreed upon during the IEP conference by all those participating . . ."

Id. at p. 16 (emphasis supplied). This is a misleading characterization of the law, because it assumes the IEP team has the discretion to determine that no assessment is appropriate.

While Appellants correctly note that the IEP team determines whether this "high school assessment system" is appropriate, Appellants' Brief, p. 18, they apparently do not understand that the "high school assessment system" referred to in RCW 28A.155.045 for the 2008-09 school year was the WASL, not the alternate assessments. Thus, the IEP team was tasked with determining if the WASL was appropriate, and if not, provide for an alternate method of assessment. But that does not

⁴ See <http://www.ed.gov/admins/lead/account/nclbfinalassess/wa7.html>.

mean the IEP team could opt out of assessment altogether. The IEP team could no more avoid the testing requirement than it could avoid any other of the required provisions of an IEP. Thus, an IEP must identify *which* assessment is appropriate for the student, not *whether* assessment is appropriate for the student. OSPI and the Department of Education have already determined that the WAAS Portfolio is an appropriate alternate assessment for students like those taught by Appellants. Tr. 172:19-176:4.

Appellants also correctly point out that a student's ability to meet grade level standards as evidenced by testing, determines what recognition that student receives upon the culmination of his or her public school experience (e.g., a high school diploma for those passing the WASL, a certificate of academic achievement for those demonstrating progress toward grade level expectations on an alternate assessment like the WAAS Portfolio, and a certificate of attendance, for those who have not demonstrated progress, but have attended school). Appellants' Brief, pp. 18-19. However, Appellants completely misstate the law when they argue, "Implicit in this law is an acknowledgment that some students cannot succeed at testing . . ." *Id.*, at p. 19. Quite to the contrary, Washington law entitles each and every student, regardless of how disabled he or she may be, to demonstrate educational progress toward grade level standards

and receive appropriate recognition. Indeed, if Appellants are doing their jobs as special education teachers, their students are making meaningful progress toward grade level expectations, and are thus entitled to an appropriate recognition of that fact at graduation. Appellants' assumption that their students could not make such progress was, frankly, discriminatory in that it deprived their students of the opportunity to demonstrate their progress toward grade level expectations and receive the recognition they deserve.

In this case, as found by the Hearing Officer, Appellants refused to provide for testing options in student IEPs and then refused to administer the state-mandated assessments, because they felt the tests were meaningless and a waste of time. AR, part L, p. 7. Even though it was their job to do so, Appellants did not address testing in the IEPs of their students until after directed to do so at a meeting with a special education administrator present. D26; Tr. 346:13-18. Regardless of their personal beliefs, they were required by law, their contracts, and their supervisor to include the testing page in IEPs and administer the appropriate assessment. Because they refused to do so, the District had sufficient cause to discipline them with unpaid suspensions.

D. The Superior Court's Order Upholding the Hearing Officer's Decision Should Be Affirmed.

1. The Hearing Officer's Factual Determination That Appellants' Refusal Was Based on Principle, Not Parental Wishes, Should Be Affirmed.

Appellants' entire parental waiver argument is based on their argument that they refused to administer the assessment because parents did not want their children tested. However, the Hearing Officer did not find their testimony or argument on this point credible. The fact that parents eventually came to see the testing the same way Appellants did, is not probative of what motivated Appellants when they first made up their minds prior to the fall of 2008 not to administer the assessments. By the time the parents expressed their objections to the testing in January and February 2009, Appellants had already acted on their own personal beliefs by not administering the assessment. The Hearing Officer's credibility determinations cannot be disturbed on appeal, and her factual determination as to why Appellants refused to administer the assessment is amply supported by the administrative record.

a. It Is Undisputed That Appellants Refused to Administer the WAAS-Portfolios in Defiance of State and Federal Law and the Directives of Their Supervisor.

Appellants admitted they refused to administer the assessment. CP

21. Appellants also conceded they were directed in the fall and winter of

2008 by their supervisor, Principal Grinager, to submit WAAS-Portfolios for six of their students who were eligible to take the assessment (in third, fourth, or fifth grades). CP 20-21, 38. Thus, the question presented is not whether Appellants defied the law and their supervisor, but why they did so.

Appellants refused, claiming the eligible students were too severely disabled to participate. *See, e.g.*, D39, D42. Contrary to this claim, the WAAS-Portfolio is specifically designed to assess the 1% of students who are the most severely disabled, like those served by Appellants. *See generally*, testimony of Judy Kraft, Tr. 152-220. Indeed, two of the students Appellants claimed at hearing were incapable of participating actually met standard in math when the WAAS-Portfolio was administered to them the prior year, and one of these students also met standard in writing. *Id.* at Tr. 135:17-137:22; D4. Moreover, the communications Appellants had with parents and others concerning the WAAS-Portfolio evidence either their complete lack of understanding of the assessment, even though they were provided with ample training opportunities, or that they were deliberately misleading parents.

Appellants' argument, Appellants' Brief, p. 27, to the effect that they were being asked to test students "in violation of the law" is circular

and unsupported by the evidence. The argument assumes that the parental refusals made testing illegal, and more importantly, that parental refusals are what caused Appellants to refuse to administer the assessment in the first place. The evidence submitted at hearing clearly established that Appellants made up their minds not to test *before* they prepared the applicable IEPs, *before* testing was to commence, and importantly, *before* a single parent objected to testing. It was this initial refusal for which Appellants were disciplined, not their ongoing refusal after the parents submitted written objections to having their students tested.

b. The Parents' After-the-Fact Written Refusals Were Irrelevant to a Determination of Sufficient Cause.

Appellants testified that even before the 2008-09 school year started, based on their experience administering the assessment in 2007-08, they had decided the test was flawed, invalid, and a waste of their time. Tr. 607:1-3; 669:6-8. Though Appellants each testified that parents had expressed their refusals at various points in the fall of 2008, neither obtained written verification of these alleged refusals until they were notified on January 27, 2009, of the February 10, 2009, disciplinary meeting. This was long after they missed the first data point in December. *See* D46, D47, and D52. Indeed, the mother of Student 1, the only parent

of one of Appellant Griffith's student to testify, explained, "I don't recall [WASL, WAAS-Portfolio] being on my radar at all until after Christmas break in January." Tr. 511:17-18. Her belated verbal and written refusal can in no way justify Appellant Griffith's refusal to give the assessment to Student 1, as the parent's refusal was expressed weeks after Appellant Griffith had already made up her mind not to administer the assessment and missed the first data collection point.

The only evidence presented to corroborate Appellants' testimony that parents had expressed their refusals verbally before the first data collection point was that of the parent of Student 4. She testified that she expressed her refusal to have her child assessed at a December 8, 2008, IEP meeting. *Id.* at Tr. 528:7-18. When asked why she refused, the parent of Student 4 explained:

Q. You were directed by Ms. McCloud to contact Cheryl Grinager about your not wanting to have your student assessed, correct?

A. About not – not – having my student want to take *the WASL*. That's what I was supposed to contact Cheryl about.

Q. Right. And your objection was to her taking the WASL, correct?

A. Yes.

Q. Did Ms. Stahl ever explain to you what the WAAS-Portfolio consists of?

A. Yes. She explained to me her understanding of the test.

Q. Okay. And what did she tell you about it?

A. *Her feeling was that it wasn't relevant to* [Student No. 4] and to her progress as – oh, God – sorry. It wasn't relevant to *her progress as a student.*

Id. at Tr. 535:20-536:11 (emphasis supplied).

As is clear from this testimony, Student 4's mother's understanding of what the assessment consisted of came solely from Appellant Stahl-Quarto, and she clearly was confused about what assessment was to be given. If she thought her student was to be given a test booklet and a pencil and asked to read and respond to grade-level questions, she was right to believe such an assessment was not appropriate for her student. It is clear that Appellant Stahl-Quarto's explanation of the assessment, such as it may have been, added to this parent's misunderstanding that the assessment "wasn't relevant to her progress as a student." Significantly, this testimony also evidences this parent's lack of understanding that no matter how disabled her student was, she was entitled to have the student's educational progress measured against grade level expectations, just like any non-disabled child.

Even more importantly, Appellants' communications with Principal Grinager, Judy Kraft, and the Superintendent all prove that their refusals were based on principle (i.e., their belief that the test was "inauthentic and ridiculous" and a waste of time, and that their students

were incapable of being assessed against grade level standards), not parental refusals. *See* D39, D42, D45. Although Appellant Stahl-Quarto testified that parental refusals were the most important reason she did not administer the assessments, Tr. 672:9-15, parental refusals were not even mentioned in her November 20, 2008, D39, and November 26, 2008, D42, correspondence. In fact, in her November 20, 2008, memo to Judy Kraft, Appellant Stahl-Quarto stated, “My main concern is what will happen if I refuse to administer this assessment to my students.” D39. The first time Appellant Stahl-Quarto even referenced parental wishes as a basis for her refusal to give the assessment was in her January 7, 2009, email to Principal Grinager, D45, which was after she had already missed the first data collection point in December 2008.

Even if the parents did, as Appellants maintain, express their verbal refusals prior to the commencement of the assessment in December 2008, the evidence established that Appellants essentially solicited the refusals. Both parents who testified said they only refused *after* Appellants had described the assessment and how they felt it was inappropriate for their children. Melonie Miller testified that she was convinced Appellants had persuaded parents to refuse, contrary to instructions teachers are provided in WAAS-Portfolio and IEP training,

because refusals are rare. To have every eligible student in a class refuse indicates the teacher is actively seeking refusals and probably misrepresenting to parents what the assessment consists of. Tr. 260:8-261:5.

The evidence at hearing established conclusively that Appellants refused to administer the assessment because of their personal views of the efficacy of the assessment, and that the parental refusals were at best an afterthought, and at worst, were solicited in a thinly veiled attempt on Appellants' parts to undermine student participation in the mandatory assessment and protect their own jobs, to the detriment of their students and the District.

c. The Lack of a District Policy Concerning Parental Refusals Was Irrelevant to a Determination of Sufficient Cause.

Appellants argue that they should not be required to follow a policy that does not exist. This sort of bait-and-switch argument is easily rebutted, first and foremost, because there were applicable policies and procedures regarding parental rights with respect to testing. *See*, D33 and 34.

Appellants also state in their Brief, without citation, that state law requires that there be a policy “concerning the effect of parental rights,” or

allowing parents of special education students to “become acquainted with the nature of tests and their uses in helping students.” Appellants’ Brief, p. 22. There is no requirement in state law for such a policy.⁵ To the contrary, state law makes it quite clear that all information about the testing requirements, accommodations, alternative testing, etc., is to be provided to parents in the context of the IEP process, *for which Appellants were responsible* as special education teachers and managers of their students’ IEPs. The state and federal mandate make clear that districts must measure student achievement compared to grade level expectations, and encouraging parents not to have their students tested clearly violates the spirit, if not the letter, of this mandate.

Also, and most importantly, Appellants were not disciplined because they failed to obtain written refusals from parents in violation of some unwritten policy. Rather, as found by the Hearing Officer, Appellants were disciplined for refusing to give the assessment based on their personal and philosophical objections to it, and not because parents had already refused. Appellants’ obtaining parental refusals was correctly

⁵ Appellants’ argument assumes that because parents can refuse to have their children tested, the District is required to have such a policy. This argument can be rejected, because it simply does not follow from the fact that parents can refuse to have their students tested, that the District is required to publicize this fact and provide policies and procedures for how parents can express their refusal. Appellants have cited no authority to the contrary.

found by the Hearing Officer to be Appellants' after-the-fact attempt to avoid discipline for what clearly were their unilateral decisions not to test their students. There being no written policy about how teachers can obtain refusals from parents is not relevant.

d. The Fact That the IEPs Did Not Address Testing Only Supports the Hearing Officer's Decision.

Remarkably, Appellants argue that "the District" was negligent in not notifying parents of the testing requirements and options in the annual IEP meetings. Appellants' Brief, p. 24. They argue, "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," *id.* at p. 22, and:

[D]espite 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 . . ."

Id. at p. 24.

These arguments can be rejected, first and foremost, because they assume that children are "forced" to participate in testing – this is not true, as Appellants themselves argue. *See* Appellants' Brief, p. 21; Tr. 279-80, 287-88; D34. ***To be absolutely clear: the District respects the wishes of parents who elect not to have their students tested, and teachers are not***

required to administer tests to students whose parents have submitted written refusals. However, teachers are required to do their best to explain District, state, and federal requirements to parents and ensure compliance. In any event, it is beside the point in this case that the District respects parental refusals. As found by the Hearing Officer, Appellants refused to administer the assessment to students whose parents had not yet objected to testing.

The argument can also be flatly rejected because it was *Appellants'* responsibility to provide for some form of testing in the IEP documents, regardless of their personal views of the test. Thus, any failure by “the District” to provide required information to the parents at an IEP meeting was actually a failure *by Appellants*. Their argument to the contrary is disingenuous at best.

Appellants describe the IEP process as though they were external to it and only passively received direction from an IEP document developed without their input by someone else from the District. *See, e.g., id.* at pp. 22-26. Nothing could be further from the truth. As the law and the evidence at hearing established, it was Appellants, as the special education teachers and managers of the IEP process, who were responsible for ensuring that parents were informed of the testing options and

requirements, for recommending which testing option was appropriate for each student, and including the necessary testing information at the IEP meeting and in the IEP document. As the ones who were responsible for making sure the IEPs of their students were compliant, Appellants cannot now complain that deficiencies in the IEPs or the process, *for which they were responsible*, justified their refusals to administer the assessments.

Appellants also argue that the IEP forms concerning testing were “defective” because they did not “discuss a parent’s right to object to testing, or disclose “the testing process as required under WAC.” Appellants’ Brief, pp. 25 and 28. This argument assumes such disclosure is required, and it is not. While it appears that Appellants only erroneously omitted from their brief the WAC section upon which they rely, it is actually the case that there is no such provision of state law. There is no citation because none exists. Appellants infer such a requirement from a parents’ right to participate in the IEP process and the requirement that the IEP identify what forms of assessment are to be used with the student in question, not from any legal authority.

2. The Hearing Officer Correctly Determined That Sufficient Cause Was Established.

The court of appeals in *Denton v. South Kitsap School District*, 10 Wn. App. 69, 72, 516 P.2d 1080 (1973), implied that conduct that would

support a discharge need not be as serious as conduct that would support the revocation of a teaching certificate. *See also Barnes*, 88 Wn.2d at 487. The reasoning behind such a ruling is simple: discharge is a less drastic sanction than revocation of a teaching certificate, and therefore, the level of cause sufficient for discharge is less than the level necessary for revocation. A teacher who has been discharged could still be employed as a teacher by another district; a teacher who has lost his certificate cannot be employed as a teacher by any district. It follows that conduct that would support a ten-day suspension without pay need not be as serious as conduct that would support a discharge. As the cases cited herein establish, Appellants' ongoing refusal to abide by the directives of their supervisor and their gross lack of professionalism in refusing to administer statewide assessments that are required by law to be administered would constitute sufficient cause for discharge. Therefore, a ten-day, unpaid suspension is more than justified.

Appellants take issue with the Hearing Officer's legal conclusion, based on *Denton*, to the effect that conduct that would support a suspension need not be as severe as conduct that would support a discharge. Appellants' Brief, pp. 32-33. However, in so doing, they mischaracterize this conclusion by stating that the Hearing Officer,

“concluded that the proposed ten-day suspensions were not sufficiently serious under the case law to support a finding of probable cause.” *Id.*, at p. 32. This completely mischaracterizes the Hearing Officer’s *Denton* analysis. The District did not argue, nor did the Hearing Officer find, that a district need not find and articulate probable cause or establish sufficient cause for a suspension. Rather, the Hearing Officer agreed with the District that it follows from *Denton* that if the level of cause needed for a discharge is lower than the level of cause needed for a license revocation, then the level of cause needed for a suspension is lower than the level of cause needed for a discharge. Appellants’ argument to the contrary should be rejected.

Appellants then go on in their Brief to take issue with the Hearing Officer’s application of the following eight factor test articulated in *Clarke*, 106 Wn.2d at 115 (citing *Hoagland*, 95 Wn.2d at 429-30):

(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 the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood [***23] that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers . . .

106 Wn.2d at 115 (citing *Hoagland*, 95 Wn.2d at 429-30).

The *Clarke* court used these factors to determine if a teacher's effectiveness was impaired by his classroom deficiencies under the first *Clarke* test. However, as noted by the *Clarke* court, and as determined by the Hearing Officer in this case, not all eight factors will be applicable in every case, and these factors may not apply at all when, as here, the cause for dismissal is analyzed under the second *Clarke* test (i.e., whether or not the teacher's conduct lacked positive educational aspect or legitimate professional purpose). *Id.*

The present case presents the issue of whether or not Appellants breached their promise to provide instruction in accordance with state and federal law and defied the directives of their supervisor to administer a mandatory statewide assessment. Because the issue is whether Appellants refused to perform required duties, and not how they performed their duties, this case is appropriately analyzed under the second *Clarke* test, and the eight *Clarke* factors apply only marginally, if at all.

Appellants do not exactly dispute that the second *Clarke* test applies in this case. Nor do they specifically assign error to the Hearing Officer's application of *Clarke*. Indeed, they concede that not all eight *Clarke* factors apply in every case. Appellants' Brief, p. 33. They do, however, submit their analysis of *Clarke's* eight-factor test, *id.*, at pp. 33-

39, in support of their argument that the Hearing Officer did not accord the “proper value” to the eight factors. *Id.*, at p. 33. Appellants’ *Clarke* analysis invites this Court to weigh the competing evidence submitted at hearing and substitute its judgment for that of the Hearing Officer as to factual determinations. The *Clarke* court itself warned that such review is not appropriate for a reviewing court. 106 Wn.2d at 110. *See also, Pryse*, 30 Wn. App. at 23.

In any event, the Hearing Officer did evaluate the facts under *Clarke*’s eight-factor test, and as noted in the Hearing Officer’s Decision, AR, part L, pp. 8-9, the impact on students and other teachers, the degree of the anticipated adversity, and the extenuating or aggravating circumstances surrounding the conduct (factors two, three, and five) of Appellants’ not administering the WAAS-Portfolio included: (1) disadvantaging the students in their preparation for participating in assessments that are required for high school graduation (and/or recognition of academic performance), (2) excluding students on the basis of disability from the opportunity to have their educational progress measured against grade level expectations, (3) excluding students on the basis of disability from participating at all in the general curriculum, and (4) jeopardizing state and federal funding. The Hearing Officer also

correctly assessed Appellants' refusal to administer the test *before* letters and emails of refusal were submitted by parents as an aggravating factor.

Id.

3. The Hearing Officer's Consideration of Comparator Evidence Was Appropriate and Should Be Affirmed.

Appellants fault the Hearing Officer for considering the discipline imposed on Carl Chew, a teacher who, during the 2007-08 school year, refused on principle, to administer the WASL to his students. This argument is somewhat ironic, given that the Hearing Officer's discussion of Mr. Chew is in a portion of the Decision that was targeted to addressing Appellants' argument at hearing that the "seven tests of just cause" from labor law should apply in this case. Before addressing the "seven tests," the Hearing Officer first noted, "This is a statutory proceeding under RCW 28A.405.310 and that Appellants utilized the statutory appeal process . . . rather than filing a grievance." AR, part L, p. 10. Only after noting that these tests do not directly apply did the Hearing Officer go on to consider the comparator evidence. The District continues to maintain that the "seven tests" for labor law do not apply to statutory appeals under RCW 28A.405.310, and that no comparator evidence was necessary to establish sufficient cause.

In any event, Appellants' argument – that unlike Appellants, Mr. Chew refused on principle, and the parents of his students did not submit refusal letters – ignores the Hearing Officer's factual determination that Appellants' real reason for refusing was also philosophical, and that the parental refusals were obtained only after the fact. Appellants received the exact same punishment as Mr. Chew, for the very same conduct – refusing to test on principle. Absolutely no evidence was submitted at hearing to the effect that Appellants were treated differently from other teachers who refused to administer state-mandated assessments based on their personal assessment of the value or detriment of the assessment.

4. The Hearing Officer's Determination That the Suspension of Appellant Griffith Was Only for Her Refusal to Administer the Assessment Should Be Affirmed.

Appellant Griffith claims it was unfair for the District to discipline her twice for refusing to attend required training. This argument assumes erroneously that her ten-day suspension was for both her refusal to attend the training and her refusal to administer the assessment. This argument fails because the Hearing Officer found as a factual matter that the only cause for the unpaid, ten-day suspension was the failed to administer the assessment. AR, part P, p. 3. The Hearing Officer's finding should not be

disturbed on appeal, because it is based on her assessment of the credibility of the witnesses and is supported by the administrative record.

The length of the suspension itself evidences that the only “cause” for suspension was Appellant Griffith’s refusal to administer the WAAS. Like Appellant Stahl-Quarto in the 2008-09 school year and like Carl Chew the year before, Appellant Griffith received a ten-day suspension. All three teachers had refused to administer required, statewide assessments to their students. The fact that Appellant Griffith got the same length of suspension as Appellant Stahl-Quarto and Mr. Chew shows that the suspension was for the same conduct – to wit, refusal to administer the assessment. Thus, the refusal to administer the WAAS, by itself, warranted the ten-day suspensions of all three teachers.

Also, it is clear from the context of the training reference in the probable cause letter for Appellant Griffith that the purpose of the reference is to defeat any argument by Appellant Griffith that she should be excused from having to administer the WAAS-Portfolio due to a lack of training or support, or on account of being unaware of the data submission deadlines:

On November 24, 2008 and on November 26, 2008 you were directed to attend a training session on administration of the WAAS. You did not attend that training and subsequently received a warning letter for insubordination.

On several occasions you were notified via e-mail from and in conversations with Principal Grinager when WAAS data collection points were due, including crucial data points on both December 12, 2008 and February 13, 2009. Those deadlines were not met. During this time period from November until recently, you have had repeated opportunities to get the required training and support and you have not done so.

AR, part A; D51 (emphasis supplied).

Moreover, the probable cause letter clearly reflects that Appellant Griffith had already been disciplined for her failure to attend training, and the testimony at hearing established that the only discipline imposed for Appellant Griffith's refusal to participate in training was the written warning issued by Principal Grinager on December 1, 2008. D43.

Principal Grinager testified:

Q. Okay. So now if you could turn to D43, do you recognize that document?

A. Yes. I wrote that document.

Q. Okay. And what was the purpose of this document?

A. The purpose of this document – The document is dated December 3. It's to Juli Griffith. It serves that – The document itself served as a written warning with regard to her nonattendance at the all-day WAAS training which was held on December 1, 2008, by Seattle Public School District.

Q. Did you impose any further discipline on Juli Griffith for her refusal to attend training, other than this written warning?

A. Not at this time.

Tr. 51:3-15.

There is no evidence of further discipline by Principal Grinager for Appellant Griffith's refusal to attend training. Principal Grinager also testified she did not have the authority to unilaterally impose additional discipline that would adversely affect Appellant Griffith's pay, and that only the Superintendent and the Board could do so. *Id.* at Tr. 52:6-10.

Superintendent Goodloe-Johnson, the only person with authority to adversely affect Appellant Griffith's contract, testified that the ten-day suspension was only for the "[r]efusal to administer the WAAS." Tr. 241:11-21.

Read together, the testimony of Principal Grinager and the Superintendent conclusively refutes the assumption upon which Appellants' argument as to Appellant Griffith is based – to wit, that the suspension of Appellant Griffith was based on *both* the refusal to administer the WAAS *and* the refusal to attend training. There is absolutely no evidence in the record to contradict the testimony of Superintendent Goodloe-Johnson.

The District agrees that Appellant Griffith could not be disciplined twice (once with a written warning and once with a suspension) for the same refusal to participate in training, and for that reason, it is even more apparent that the ten-day suspension was *not* for the training refusal.

Appellants' reasoning is fundamentally flawed in another respect – Appellant Griffith's refusal to attend training in addition to her refusal to administer the WAAS, warranted discipline *in addition to* the ten-day suspension, not a lesser suspension. Indeed, Appellant Griffith received that additional discipline. Unlike Appellant Stahl-Quarto and Mr. Chew, in addition to a ten-day suspension for her refusal to administer the assessment, Appellant Griffith received a written warning for her refusal to participate in training.⁶ D43. Not only is Appellants' argument logically flawed, but it also completely ignores the comparator evidence: Mr. Chew's ten-day suspension was for his refusal to administer the assessment, and the duration of his suspension was the basis for suspending Appellants for ten days for the same conduct.

5. Appellants' Refusals to Administer State-Mandated Assessments Constituted Insubordination and Sufficient Cause for Discharge

Insubordination can constitute sufficient cause for discharge or other discipline of a district employee. *In re Coates*, 47 Wn.2d 51, 53, 287 P.2d 102 (1955). A teacher is insubordinate if he or she willfully refuses to obey a reasonable regulation governing her conduct. *Simmons, supra* (holding that a teacher's failure to obey the district regulations and

⁶ As Appellants concede, the written warning was not subject to appeal under RCW 28A.405.300 *et. seq.*, as it did not affect Appellant Griffith's contract status.

insubordination in not ceasing the use of unauthorized disciplinary measures constituted sufficient cause for his discharge). *See also, Stastny v. Board of Trustees of Cent. Washington Univ.*, 32 Wn. App. 239, 647 P.2d 496 (1982) (holding that a professor's willful defiance of a reasonable and express denial of permission to be absent from assigned faculty duties constituted insubordination and was sufficient cause for discharge); *Sinnott v. Skagit Valley College*, 49 Wn. App. 878, 746 P.2d 1213 (1987) (continued use of profane language and criticism of other instructors in defiance of repeated direction by his superiors constituted insubordination and was sufficient cause for discharge). That is exactly what happened in this case.

In *Simmons, supra*, the plaintiff appealed his dismissal from employment as a junior high school teacher with Vancouver School District. 41 Wn. App. at 366. The dismissal was based upon Simmons' insubordination and violation of District regulations pertaining to the corporal punishment of students. The court held that the former teacher was insubordinate in failing to obey the school district's regulation pertaining to corporal punishment of students and as such, there was sufficient cause for his discharge under Chapter 28A.58 RCW, which was the statutory precursor to Chapter 28A.405 RCW.

In *Simmons*, the court noted, “‘Insubordination’ has been defined as the willful refusal of a teacher to obey the reasonable rules and regulations of the board of education.” 41 Wn. App. at 373 (citing *Stastny*, 32 Wn. App. at 247). The court held that Simmons’ insubordination constituted a material breach of his employment contract with the District, and that his violation of the regulation was “sufficient cause” to discharge Simmons. 41 Wn. App. at 379. Appellants’ conduct in this case, like the teacher’s conduct in *Simmons*, constitutes gross insubordination.

Appellants attempt to distinguish *Simmons* on the basis that (1) they claim there was no reasonable, articulated directive, (2) there was no referable policy, and (3) “the assertion of parental rights related to the testing of appellants’ students was a critical factor.” Appellants go so far as to argue they were not required to “violate the law” in order to follow their supervisor’s directives. Appellants’ Brief, p. 49. These arguments are contradicted by the law and the record.

While Appellants fault the Hearing Officer for not giving “appropriate weight and a full understanding” to the law, *id.*, at p. 50, it is Appellants who fail to understand the applicable law. As set forth fully above, Appellants would not have been in violation of a single law in

administering the assessment to their students in the fall of 2008, because parental consent to administer statewide assessments is not required. WAC 392-172A-03000(3)(d). Appellants' own expert witness, Mr. Anderson, conceded as much. *See* Tr. 430:16-431:5. Also, not a single parent had affirmatively refused the assessment by the time Appellants were required to commence the testing.

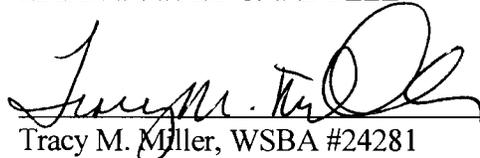
For the first time, in this appeal, Appellants seem to be arguing that there was no requirement or directive to administer the assessment. Granted, Appellants did not agree with the law or their supervisor's requiring them to administer the WAAS-Portfolio, but that does not mean the requirement did not exist or that Appellants were not aware of it.

V. CONCLUSION

For the reasons stated herein, the District respectfully requests that the Superior Court's September 30, 2010, order upholding the Hearing Officer's Decision be affirmed.

SUBMITTED this 25th day of March, 2011.

KARR TUTTLE CAMPBELL



Tracy M. Miller, WSBA #24281

Attorneys for Respondent

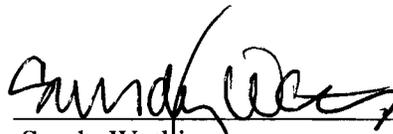
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 25th day of March, 2011, I caused a true and correct copy of the foregoing document, "Brief of Respondent Seattle School District," to be delivered via U.S. Mail, postage prepaid, to the following counsel of record:

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DATED this 25th day of March, 2011.



Sandy Watkins