

NO. 68519-8-I

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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JOHN CUMMINGS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondent.

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**BRIEF OF RESPONDENT SEATTLE SCHOOL DISTRICT**

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## I. INTRODUCTION

Appellant John Cummings was hired as a certificated special education teacher with the expectation that he, like the expectation for all certificated special education teachers, would possess the instructional skill and content knowledge to teach special education students all core academic subjects, including math. When the District learned that Mr. Cummings lacked the instructional skill and content knowledge in math to deliver the District's math curriculum to special education students, the District placed Mr. Cummings on probation pursuant to RCW 28A.405.100(4)(a) and provided Mr. Cummings with the opportunity to remediate his teaching deficiencies.

It is uncontroverted that Mr. Cummings failed to remediate his teaching deficiencies in instructional skill and content knowledge in math during his probationary period and that Mr. Cummings cannot deliver the District's math curriculum to special education students. It is also uncontroverted that the failure to remediate deficiencies during probation constitutes probable cause to non-renew prescribed in 28A.405.100(4)(a).

Rather than challenge the overwhelming evidence at his administrative hearing that he failed to remediate his teaching deficiencies, including Mr. Cummings' admission that he could not deliver the

District's math curriculum to the District's special education students, Mr. Cummings argued that his primary evaluator was biased; that Mr. Cummings requested an accommodation for his ADHD; that Mr. Cummings was improperly teaching general education students; and that the District violated the IDEA by requiring Mr. Cummings to teach the District's mandated math curriculum to the District's special education students.

An independent Hearing Officer rejected each of the above arguments and ruled that Mr. Cummings failed to make suitable progress during probation to remediate his teaching deficiencies and that this failure constituted probable cause to non-renew Mr. Cummings' teaching contract. A King County Superior Court Judge reviewed the decision of the Hearing Officer on appeal and ruled that the record contained substantial evidence to support the Hearing Officer's Findings of Fact that Mr. Cummings failed to remediate his teaching deficiencies during his probationary period and that the Hearing Officer's Conclusions of Law were not clearly erroneous. The District, the Hearing Officer, and the Superior Court reached the right decision. The Findings of Fact of the Hearing Officer and the Superior Court are supported by substantial evidence in the record and the Findings of Fact of the Hearing Officer and

the Superior Court are not clearly erroneous. This Court should affirm the decision of the Superior Court.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Should this Court affirm the Findings of Fact of the Superior Court that Mr. Cummings failed to remediate his teaching deficiencies in instructional skill and content knowledge of math during his 60-day probationary period when Mr. Cummings, Primary Evaluator Keisha Scarlett and Secondary Evaluator Marilyn Day agreed that Mr. Cummings could not deliver the District's math curriculum to the District's special education students?

Should this Court affirm the Findings of Fact of the Superior Court that the failure of Mr. Cummings to make suitable progress to remediate his teaching deficiencies in instructional skill and content knowledge of math during his 60-day probationary period constituted probable cause to non-renew his teaching contract pursuant RCW 28A.405.100(4)(a) and RCW 28A.405.210, when this ruling is not clearly erroneous?

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

### **A. Procedural History**

On May 10, 2010, the Superintendent of the Seattle Public Schools informed Mr. Cummings that his teaching contract for the 2010-2011

school year would be non-renewed for his failure to make suitable progress to remediate his identified teaching deficiencies in 1) instructional skill and 2) content knowledge in math during a 60-day probationary period prescribed by former RCW 28A.405.100(4)(a).<sup>1</sup> CP p. 1641. Mr. Cummings timely appealed the Superintendent's decision to an independent Hearing Officer who, after a lengthy hearing, affirmed Mr. Cummings' non-renewal by written memorandum and opinion dated May 2, 2011. CP pp. 137-202. Mr. Cummings timely appealed the decision of the Hearing Officer to King County Superior Court Judge Bruce Heller who affirmed the decision of the Hearing Officer by written Order dated March 2, 2012. CP pp. 2737-2741.

#### **B. Substantive Facts**

Mr. John Cummings is a special education teacher with Washington State teaching endorsements in Special Education K-12 and General Education History 4-12. CP p. 1334. Special education teachers are expected to have the instructional skill and content knowledge to teach special education students all core subjects, including math. CP pp. 382, 446, 523. See WAC 181-82A-202(1)(k) (teachers endorsed in special education shall teach **all levels**) (emphasis added).

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<sup>1</sup> RCW 28A.405.100 was amended in 2012 and the current language of the statute was not in effect in 2010.

Mr. Cummings affixed his resumé to his employment application to the District and he indicated under the heading of “Experience” that he “taught” “Mathematics for Special Education classes” between October 1998 and June 2004 at Eastlake High School. CP pp. 1646-1647. Mr. Cummings admitted during his testimony before the Hearing Officer that he did not have the teaching experience advertised in his resume.

10 Q This is your resume; is that correct?

11 A Correct.

12 Q Under experience, you indicate that you worked as a special

13 education teacher for Eastlake High School in Sammamish,  
14 Washington; is that correct?

15 A Correct.

16 Q From 1988 to June 2004?

17 A Correct.

18 Q And how many years of teaching special education  
would you

19 consider that to be?

20 A Slightly less than six, right?

21 Q According to your resume, you taught this special  
education,

22 specifically mathematics for special education classes, for  
23 six years; is that correct?

24 A No, it's not correct. During that time, **I taught that for**  
**25 less than a full year.**

1 Q And how would one be able to know that from reading  
that

2 paragraph of your resume?

3 A They would ask me in the interview, hopefully. **So you**

**4 wouldn't be able to tell that from the resume.** (Emphasis  
added)

CP pp. 1293-94.

Mr. Cummings' teaching experience as reported on his resumé was utilized by the District to determine whether Mr. Cummings was highly qualified to teach special education students math under the guidelines of the federally-mandated No Child Left Behind Act. CP pp. 1332, 1643-1644.

From January of 2007 until the end of the 2008-2009 school year, Mr. Cummings co-taught in a blended classroom with general education teachers. Under a blended classroom model, a general education teacher and a special education teacher co-teach core academic subjects to general and special education students in the same classroom. CP pp. 887-889. At the same time, Mr. Cummings also taught resource room classes that contained general and special education students who required remedial work to improve their skills. CP p. 888.

During the spring of 2009, McClure Middle School Principal Sarah Pritchett dissolved the blended model and assigned Mr. Cummings to teach special education math for the 2009-2010 school year. CP p. 451. Principal Pritchett programmed Mr. Cummings to teach special education math in part because Mr. Cummings was "highly qualified" to teach special education math classes under the No Child Left Behind Act Guidelines. CP pp. 451, 465-466. All McClure teachers were required to use the District's math curriculum, CMP2. CP p. 453. Mr. Cummings

received CMP2 training, was familiar with CMP2, and had taught CMP2 in his previous years in the blended model classrooms. CP pp. 453, 467-468.

On January 4, 2010, McClure Assistant Principal Keisha Scarlett completed Mr. Cummings' mid-year review of his teaching performance in his special education classes and rated his teaching performance unsatisfactory in Instructional Skill and Knowledge of Subject Matter. CP pp. 1570-1573. Instructional Skill and Knowledge of Subject Matter are two of eight Evaluation Criteria prescribed by APPENDIX J-1 of the Collective Bargaining Agreement between the District and the Seattle Education Association, Mr. Cummings' Union. CP pp. 1533. Assistant Principal Scarlett explained, "Mr. Cummings didn't have an appropriate level of minimal teacher – or mathematics knowledge to be able to move forward and teach the curriculum...So, no, he did not have the ability to teach the CMP2 curriculum." CP pp. 278-279.

Based upon this unsatisfactory rating, Mr. Cummings was placed on 60-day probation to remediate his deficiencies. CP pp. 1575-1576. Teacher probation is prescribed by former RCW 28A.405.100(4)(a) that stated in pertinent part:

**During the period of probation, the employee may not be transferred from the supervision of the original evaluator. Improvement of performance or probable cause for**

**nonrenewal must occur and be documented by the original evaluator before any consideration of a request for transfer or reassignment as contemplated by either the individual or the school district...**The purpose of the probationary period is to give the employee opportunity to demonstrate improvements in his or her areas of deficiency...The evaluator may authorize one additional certificated employee to evaluate the probationer and to aid the employee in improving his or her areas of deficiency...The probationer may be removed from probation if he or she has demonstrated improvement to the satisfaction of the principal in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her improvement program. **Lack of necessary improvement during the established probationary period as specifically documented in writing with notification to the probationary shall constitute grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210.** (Emphasis added)

A Plan of Improvement (PIP) was drafted for Mr. Cummings with the assistance and agreement from the teachers' union. CP pp. 242-244; 1558-1568. The PIP required production of weekly lesson plans beginning March 1, 2010 (CP p. 1558); implementation of the I Can Learn Math Program (CP p. 1561); work closely with other math teachers (CP p. 1562); use appropriate pedagogical practices for math content (CP p. 1563); and submit all completed Individual Education Plans (IEP's) 48 hours in advance of set meetings (CP p. 1564).

**1. Mr. Cummings' Unsuccessful Probation.**

Assistant Principal Scarlett noted in Mr. Cummings' first progress report:

I. Instructional Skill: . . . You have not demonstrated consistent improvement in the area of lesson planning, development and delivery. I have not received a lesson plan yet and should have a lesson plan during any planning or pre-conference meeting in the future. . . .

IV. Knowledge of Subject Matter: . . . [Y]ou don't know the subject matter that you are assigned to teach. . . . You have not put forth any effort to collaborate with other math teachers or into reviewing district provided planning notes and unit calendars. You do not demonstrate knowledge of the basic progression of units at any grade level.

CP pp. 1583-1584.

Assistant Principal Scarlett summarized Mr. Cummings' March 2 and March 16, 2010 observations (CP pp. 1586-1590 and CP pp. 1592-1597) in her March 26, 2010 Progress Report:

I. Instructional Skill: The first time that I have received a lesson plan from you was on March 16, 2010. Prior to that time, you have never provided a lesson plan for me to reference during observations. . . .

. . . [y]our lessons carve out no time for student's individual thinking, inquiry or problem solving. . . .

III. Knowledge of Subject Matter: . . . you try to teach without basic understanding of concepts being represented. Because, you don't know the mathematical trajectory of concepts or precursory mathematics; you are not able to clearly articulate what your students will know and be able to do as a result of the lesson. . . .

CP pp. 1599-1601.

Assistant Principal Scarlett summarized Mr. Cummings' performance during in her final Progress Report:

III. Instructional Skill: . . . [y]our lessons carve out limited time for student's individual thinking, inquiry or problem-solving. . . .

Basic instruction supports for a mathematics and IEP classroom are not in place. . . .

Your lessons continue to lack differentiation in order to meet the needs of your students' stated IEP goals and academic needs. . . .

III. Knowledge of Subject Matter: Your lack of content knowledge is further exacerbated by the fact that you are unwilling to collaborate with your colleagues or me on your lesson and unit planning. You have not committed to any of the Tuesday planning meeting [sic] . . .

. . . you have yet to demonstrate a basic understanding of, or correct implementation of instructional best practices. . . .

CP pp. 1624-1626.

Assistant Principal Scarlett summarized Mr. Cummings' overall performance in his final evaluation at the close of the probationary period:

Knowledge of Subject Matter: Mr. Cummings has not demonstrated a solid understanding of the most basic content knowledge within CMP2. He has attended CMP2 training in prior years and during this school year; but does not know the scope and sequence of the subject matter. . .

CP pp. 1628-1632.

Assistant Principal Scarlett rated Mr. Cummings' overall performance as unsatisfactory, unchanged from the mid-year review, and recommend non-renewal. CP pp. 298; 1636-1637.

Second Evaluator Marilyn Day confirmed the observations of Assistant Principal Scarlett that Mr. Cummings was not using the District-mandated CMP2 math curriculum as instructed. “I asked Mr. Cummings if he had used CMP at all this year, and he said ‘honestly, basically no.’” CP pp. 2229. Mr. Cummings also admitted that he summarily determined that CMP2 was too difficult for his students without conducting student assessments to determine whether or not this was true.

- Mr. C tells me that he gave the students the CMP pretest on Monday, but didn’t get it corrected.
- Why? Because I was getting ready for today.
- Me: When asked, you summarily dismissed CMP as being too hard for your students. How can you prove this if you don’t even look at the pre-assessments?
- Mr. C: I’ll correct them tonight.
- Me: You cannot do proper planning and modifications if you don’t know where the students are...

CP p. 2238.

Second Evaluator Day summarized Mr. Cummings’ areas of concern after her first two observations:

- a. Mr. Cummings has not been totally straightforward with me in several instances:
  - That he is collaborating with other teachers
  - That other teachers are using his computer lab time and that’s why he isn’t taking the students
  - A true picture of last year’s co-taught class
  - His IEP’s and why they are late

CP pp. 2210-2211. Collaborating with other teachers, taking students to the computer lab to use the “I Can Learn Math” computer program, and completing IEPs 48 hours in advance were required by Mr. Cummings’ PIP. CP pp. 1558-1568.

Second Evaluator Day noted that Mr. Cummings inexplicably ignored the suggestions of Assistant Principal Scarlett that he use the CMP2 Teacher’s Manual despite her observation that this resource should allow him to succeed.

. . . The CMP series teachers’ manuals have everything needed to deliver good lessons including warm-ups, examples, correct processes, suggestions for a variety of learning strategies and accommodations. I would say that even a teacher a bit shaky in math could, if he/she stayed a few days ahead of the students, deliver these lessons satisfactorily.

. . . The primary evaluator says she has repeatedly encouraged Mr. C. to use the CMP teacher’s book -- to have it right in front of him if necessary. The book practically has a script and gives correct examples and answers. The CMP series also includes a section that shows teachers how to make accommodations for special needs students. . . .

CP pp. 2211-2212.

Second Evaluator Day noted in her second Probation Summary, “Although there has been improvement, Mr. Cummings continues to struggle planning CMP instruction for his three different-grade Special Ed Math classes.” CP p. 2218. Second Evaluator Day also confirmed

Assistant Principal Scarlett's observation that Mr. Cummings failed at delivering proper math instruction and tools to his students to solve elementary math problems. ". . . It is not logical that a teacher, being observed frequently and on probation, would deliberately give students the wrong methods or wrong answers." CP pp. 2218.

Second Evaluator Day's final probation summary at the close of the probationary period notes that Mr. Cummings possessed insufficient knowledge of mathematics to deliver competent instruction to his students.

Mr. Cummings has consistently claimed he is not competent to teach CMP math. There has been evident improvement the last three lessons, but I agree that his math skills are minimal. And, because he does not grasp the scope and sequence of CMP content, he is not competent to modify this content.

CP p. 2223.

Second Evaluator Day identified additional areas where Mr. Cummings failed to satisfy the requirements of his PIP during probation. Mr. Cummings failed to take his students to the computer lab during his probationary period despite it being a part of his PIP. "I am mystified (and have told Mr. Cummings so) about these classes and why he hasn't taken students to the computer lab. Mr. Cummings really doesn't have an explanation for why he hasn't taken the students." CP p. 2224. Mr. Cummings failed to participate and/or take advantage of the professional

development required by his PIP. “Mr. Cummings agrees that he has not attended and/or participated in all the trainings, professional development in the PIP.” CP p. 2225. Notwithstanding these probationary failures and her agreement that Mr. Cummings did not possess the aptitude to deliver the District’s mandated math curriculum, Second Evaluator Day recommended that Mr. Cummings be given an additional year to remediate his teaching deficiencies. CP pp. 2226.

Assistant Principal Scarlett, Second Evaluator Day, Human Resources Manager Gloria Morris, Deputy General Counsel Faye Chess-Prentice, and Education Director Ruth Medsker met to discuss whether to make a recommendation to the Superintendent to non-renew Mr. Cummings’ employment contract. Assistant Principal Scarlett, Human Resources Manager Morris, Deputy General Counsel Chess-Prentice, and Education Director Medsker agreed that the evidence of Mr. Cummings’ deficiencies had not been remediated during the probationary period and recommended non-renewal. CP pp. 1636-1637.

On April 26, 2010, Human Resources Manager Morris, Deputy General Counsel Chess-Prentice, Education Director Medsker, Primary Evaluator Scarlett, and Second Evaluator Day met and discussed Mr. Cummings’ probation, and memorialized their discussion and recommendations in a summary that was forwarded to the Superintendent.

CP pp. 518, 1634. The summary noted: "Second evaluator (Marilyn Day) did not agree with AP K. Scarlett's assessments. Did concede that he could not teach subject matter (Math) even though he had a good rapport with students. Second Evaluator's last probation summary is attached." CP p. 1634. Notwithstanding Second Evaluator Day's dissent, the consensus of the attendees was that Mr. Cummings had not demonstrated sufficient improvement during probation and non-renewal was recommended to the Superintendent. CP p. 1634.

On May 6, 2010, the Superintendent met with Education Director Medsker and Human Resources Manager Morris to discuss Mr. Cummings' performance during his probationary period and this discussion was memorialized in a written form called Recommendation for Teacher Non-Renewal. CP pp. 1636-1637. The Superintendent testified that she reviewed all of the evaluations of Primary Evaluator Scarlett and all the evaluations of Second Evaluation Day prior to reaching her decision to non-renew Mr. Cummings. CP pp. 357-358. The Recommendation for Teacher Non-Renewal form contains the following handwritten notes of the Superintendent. "SEA- don't support non-renewal. Second evaluator doesn't support..." The form also contained the notation, "2<sup>nd</sup> Evaluator: Marilyn Day is not in agreement..." After her review of the above information, the Superintendent determined that Mr. Cummings did not

make suitable progress during his probationary period and non-renewed his employment contract. CP pp. 1636-37, 1641.

## **2. ADHD**

Three weeks after Mr. Cummings was placed on probation, he informed the District that he was “diagnosed” with ADHD. CP pp. 1666-1669. Senior Human Resources Analyst Demetrice Lewis responded to Mr. Cummings on February 3, 2010 by asking Mr. Cummings to have a medical provider complete a Request for Medical Information form to determine whether Mr. Cummings could fulfill the essential functions of his special education teaching position. CP pp. 1351, 1651. One of the essential functions of Mr. Cummings’ special education teaching position was identified as requiring:

### **Required Knowledge, Skills and Abilities**

#### **Knowledge of: Subject areas appropriate to assignment;**

CP p. 1656 (emphasis added).

Mr. Cummings failed to respond to Ms. Lewis and therefore she contacted him a second time on February 23, 2010. CP pp. 1356, 1658. On March 8, 2010, Mr. Cummings provided the Request for Medical Information form signed by his doctor. CP pp. 1356, 1671. Dr. Snyder omitted a diagnosis, but claimed that Mr. Cummings had a “disability”, that

the disability was “long term” and that Mr. Cummings could perform all the functions of the position with “accommodations.” CP p. 1671.

Dr. Snyder testified that Mr. Cummings is “not qualified” to teach math. CP p. 400. Dr. Snyder also testified that Mr. Cummings’ diagnosis of ADHD did not contribute to Mr. Cummings’ lack of aptitude in math or his failure to deliver the District’s math curriculum.

2 Q Okay. All right. **Do you have an opinion as to whether or**  
3 **not Mr. Cummings could teach the math curriculum that**  
4 **was**

4 **required by the Seattle Public Schools?**

5 A No.

\*\*\*

15 Q **Let me ask you the question again. Your**  
16 **recommendation for**

16 **accommodations then did not address, specifically, whether**  
17 **or**

17 **not Mr. Cummings needed accommodations in order to**  
18 **teach math**

18 **to middle school students?**

19 A **That's correct. It does not address that directly.**

20 Q Okay. And is it your testimony, in your professional  
21 opinion, that ADHD or the sequelae or symptoms from ADHD  
22 would remove content knowledge from an individual?

23 A No.

24 Q Okay. So if a person could speak and teach German and then  
25 they were, consequently, diagnosed with ADHD, the diagnosis

1 nor the symptoms would remove their ability to speak German  
2 or teach German; is that correct?

\*\*\*

6 THE WITNESS: That's correct. It would not  
7 interfere with his knowledge of German that he had.

8 BY MR. JACKSON:

9 Q Okay. **So if in this case, Mr. Cummings had a sufficient**

**10 content knowledge of math prior to your diagnosis of  
ADHD,  
11 your diagnosis would not remove that content knowledge,  
12 correct?  
13 A That's correct.**

CP pp. 414-415 (emphasis added).

Dr. Snyder testified that Mr. Cummings' specific requests for accommodation had no connection or effect upon his ability to teach math.

10 Q And so if I am correct then, these bullet points that are  
11 contained in Exhibit No. 21, at least in your mind, did not  
12 have anything to do with whether or not Mr. Cummings could  
13 teach math?  
14 A That's correct.

CP p. 416.

The District responded to the medical information provided by Mr. Cummings from Dr. Snyder on March 16, 2010. CP pp. 1649-1650. The District did not grant Mr. Cummings' request for a 504 accommodation in part because the District was already providing Mr. Cummings assistance in each of the areas requested under his PIP. CP pp. 1368, 1649. The District did not provide Mr. Cummings' request for clerical support because the District does not have the financial resources to provide clerical support for 3,300 teachers. CP pp. 1358, 1650. Mr. Cummings was also informed, "You are also welcome to apply for any open positions within the District that you believe would meet your needs." *Id.*, at 1650. Mr. Cummings did not respond or accept the District's invitation to apply

for any additional positions until the second to last day of his due process hearing. CP p. 1369.

Mr. Cummings testified at the due process hearing consistent with his deposition testimony that his inability to teach the District's mandated math curriculum was because he did not have sufficient subject matter knowledge of math and not because of his ADHD diagnosis.

11 Q Okay. I'd ask you to turn to page number 20 of your  
12 deposition. At page number 20 beginning at line 7, you were  
13 asked the following question: Are you of the opinion that if  
14 the District provided you with assistance in organization,  
15 time management, and meeting deadlines, that you would have  
16 been able to deliver the CMP2 math curriculum to your special  
17 ed students? There is Mr. Peck: I'm going to object as  
18 compound and then here's your answer.

\*\*\*

21 BY MR. JACKSON:

22 Q **"My difficulty with the curriculum had a lot more to do**  
23 **with -- had a lot more to do with -- had a lot more to do**  
24 **with other factors besides my disability.**  
25 **Is that correct?**

1 A **Yeah.**

2 Q Was that true when you testified to it at your deposition?

3 A Yes.

4 Q Is that true now?

5 A Yes.

\*\*\*

20 BY MR. JACKSON:

21 Q Let me finish reading then. I will begin at line number 12,  
22 and so I'll reread your answer, and I'll finish to line 20.

23 My difficulty with the curriculum had a lot more to do  
24 with -- had a lot more to do with -- had a lot more to do  
25 with other factors besides my disability. Whether or not I

1 would have been able at that point given, you know, every  
2 accommodation that -- in the world, whether or not I would  
3 have been effective teaching that curriculum, I doubt it.  
4 Because you can't be effective teaching that curriculum to  
5 kids who have learning disabilities, if you use the methods  
6 that they want you to use.

7 Did I read that correctly?

8 A You did.

9 Q On line number -- page number 21. Actually, this is line  
10 number 22, on page number 20. Question: So even if the  
11 District provided you with all of the assistance that you  
12 requested, you are still of the opinion that you would not  
13 have been able to teach CMP2 math curriculum to your classes;  
14 is that correct? Mr. Peck objected as compound. Your  
15 answer --

\*\*\*

19 BY MR. JACKSON:

20 Q This is your answer: **The accommodations that I asked  
for or**

21 **that I supposedly got would have helped me in general be  
less**

22 **dependent on others. Whether or not that would have  
suddenly**

23 **given me the math skills that I didn't possess, obviously,**

24 **not.** Next question: Okay. So you agree that the

25 accommodations would not have given you sufficient math

1 skills that would have allowed you to teach the CMP2  
2 curriculum, correct? Mr. Peck: Objection. I am going to  
3 object as vague and ambiguous and assumes facts not in  
4 evidence.

\*\*\*

9 BY MR. JACKSON:

10 Q Let's see, **The Witness: That would be like a magic pill.**

11 **The math skills that I was expected to have to teach CMP, I  
12 didn't have.**

13 That was your answer at the time; is that correct?

14 A Yeah.

15 Q Is that still your answer?

16 A Yes.

17 **Q So you're testimony before the Hearing Officer here**  
today is  
18 **that you did not have the math skills to teach CMP2 to your**  
19 **students, correct?**  
20 **A I did not have the math skills to deliver the curriculum**  
the  
21 **way it is designed to the students.**

CP pp. 1277-1280.

The closing arguments for the hearing occurred on April 14, 2011. CP FE 16. The District, having received no request for a court reporter for closing argument, did not request one. CP p. 141. Mr. Cummings, for the first time at the April 14, 2011 hearing, requested a court reporter for closing argument. *Id.* The Hearing Officer allowed Mr. Cummings' counsel to call a court reporter, but when that court reporter had not appeared nor responded via telephone, the Hearing Officer began the hearing. *Id.* The District's closing argument was 20 minutes.

Mr. Cummings' closing argument was approximately 25 minutes before a court reporter appeared. *Id.* The Hearing Officer allowed the court reporter to transcribe the remaining portions of closing arguments.

*Id.* The Hearing Officer explained:

If the Hearing Officer erred in not waiting longer for a court [sic] report to call or appear, it is the opinion of the Hearing Officer that **there was no prejudice to Appellant because the portion, not reported, repeated substantially what was set forth in the written argument brief of his counsel.** (Emphasis added)

CP p. 142.

Mr. Cummings did not ask the Hearing Officer to recreate the closing argument of the District pursuant to RAP 9.9. Mr. Cummings did not lodge an objection to any portion of the District's closing argument, nor did he ask the Superior Court to recreate the District's closing argument.

#### IV. ARGUMENT

##### A. Certificated Teachers

Certificated teachers in Washington may be discharged for misconduct under RCW 28A.405.300 or for non-renewed for performance pursuant RCW 28A.405.210. Probable cause is required under either statute. Mr. Cummings' teaching contract was non-renewed for deficiencies in his performance pursuant to RCW 28A.405.210.

RCW 28A.405.210 gives a Superintendent the statutory authority to non-renew a certificated employee's employment contract based upon the existence of probable cause. Probable cause exists to non-renew for performance when "Lack of necessary improvement during the established probationary period, as specifically documented in writing with notification to the probationer shall constitute grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210." RCW 28A.405.100(4)(a).

**B. RCW 28A.405.340 and Superior Court Review**

RCW 28A.405.340 prescribes that the superior court will review a hearing officer's decision without a jury and that review is confined to the verbatim transcript and the evidence admitted at the hearing.<sup>2</sup> The superior court's authority to reverse is limited to six circumstances.

The court ... **may reverse the decision if the substantial rights of the employee may have been prejudiced because the decision was:**

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the board or 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) through (6) (emphasis added). None of Mr. Cummings' claimed assignments of error to the decision of the Hearing Officer or the decision of the Superior Court satisfy the requirements that

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<sup>2</sup> In cases involving allegations of abridgement of constitutional free speech or procedural irregularities absent from the transcript, the superior court may receive additional testimony.

rise to the level of reversible error enunciated in RCW 28A.405.340(1) through (6).

**C. The Hearing Officer's Findings of Fact Are Not Clearly Erroneous.**

Findings of fact are reviewed to determine if they are clearly erroneous. Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986). A factual determination is clearly erroneous if it is not supported by substantial evidence in the record. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). When findings of fact are based upon conflicting evidence, and there is substantial evidence to support the findings, a reviewing court should not substitute its judgment for that of the fact finder. Henery v. Robinson, 67 Wn. App. 277, 289, 834 P.2d 1091 (1992). "Whether a teacher actually engaged in certain conduct or was deficient in his practices or methods clearly is a factual question." Clarke v. Shoreline Sch. Dist. No. 412, at p. 110.

The record before the Hearing Officer and the Superior Court contains overwhelming evidence that Mr. Cummings failed to correct his teaching deficiencies in Instructional Skill and Lack of Content Knowledge in math during his 60-day probationary period. Mr. Cummings testified that he did not possess the math skills to deliver the District's math curriculum to the District's special education students. CP pp. 1277-1280. Primary

Evaluator Assistant Principal Pritchett testified that Mr. Cummings' teaching performance did not improve during probation and that he could not deliver the District's math curriculum to the District's special education students. "My opinion was that Mr. Cummings' performance was not up to the quality of any teacher that I would want to have staffed in my building, so he had not met the conditions of his Plan of Improvement and did not show performance to the level that we need – that anyone would need to be able to satisfactorily teach children." CP p. 304. Second Evaluator Day testified that at the close of the probationary period Mr. Cummings had not remediated his teaching deficiencies and that he could not deliver the District's math curriculum to a minimum level expected of a special education teacher. CP p. 763. Education Director Ruth Medsker and the Superintendent concurred that Mr. Cummings did not make suitable improvement in his content knowledge during probation. CP pp. 383, 430-433.

**D. The Hearing Officer's Conclusions of Law Are Not Clearly Erroneous.**

Issues of law are determined *de novo*. Clarke v. Shoreline Sch. Dist. No. 412, at p. 109. A determination that sufficient cause for a teacher's discharge exists is a legal conclusion. Hoagland v. Mount Vernon Sch. Dist. 320, 95 Wn.2d 424, 428, 623 P.2d 1156 (1981). A conclusion of law should

not be disturbed unless it constitutes an error of law. Clarke v. Shoreline Sch. Dist. No. 412, at p. 110. When applying the applicable law to the facts of the case, the reviewing court should give deference to the factual findings of the hearing officer. Clarke v. Shoreline Sch. Dist. No. 412, *id.*

Here, the Hearing Officer and the Superior Court correctly identified the proper law and the decision of the District should be affirmed when the District's decision to non-renew was made with sufficient cause. "Based on the evidence the Hearing Officer must find that the District proved "sufficient cause" for the non-renewal of Appellant's contract." CP p. 200. Sufficient cause for non-renewal is established by a preponderance of the evidence when the basis given for the non-renewal is more probably true than not. Peacock v. Piper, 81 Wn.2d 731, 504 P.2d 1124 (1973); Gaylord v. Tacoma School District, 85 Wn.2d 348, 350, 535 P.2d 804 (1975); and WPI 21.01.

Reversal is only authorized when the decision is clearly erroneous in light of the evidence presented at the hearing. Clarke v. Shoreline Sch. Dist. No. 412, *id.* at pp. 109-10. Even when there is conflicting evidence in the record, a court should not substitute its judgment for that of the decision maker when there is substantial evidence in the record to support the decision. Henery v. Robinson, 67 Wn. App. 277, 289, 834 P.2d 1091 (1992). Mr. Cummings fails to present any evidence that the decision of the Superior Court is clearly erroneous.

**E. Mr. Cummings Does Not Have a Qualifying “Impairment” that Triggered a Duty to Accommodate under RCW 49.60.**

The Hearing Officer and the Superior Court properly rejected Mr. Cummings’ alleged disability claims because Mr. Cummings’ impairment did not substantially limit his ability to teach math and it therefore did not trigger a duty to accommodate under RCW 49.60. RCW 49.60.180(2) provides in pertinent part that it is an unlawful employment practice to discharge any person from employment “**because of . . . the presence of any . . . disability**” (emphasis added). The statute does not prohibit an employer from discharging an employee **who has a disability**. “Disability” is defined as the presence of an “impairment” that is medically “cognizable or diagnosable.” RCW 49.60.040(7)(a)(i). An employer’s duty to accommodate is not triggered by notice of a disability, but by notice that the disability has a substantially limiting effect upon the employee’s ability to perform his or her job.

**(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:**

**(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job . . .**

RCW 49.60.040(7)(d)(i) (emphasis added).

In Clarke v. Shoreline Sch. Dist. No. 412, Mr. Clarke suffered from a degenerative eye condition that substantially limited his ability to see and to perform an essential function of his teaching position (to maintain a safe learning environment for his students). Shoreline School District's duty to accommodate was not triggered by Clark's diagnosis of a degenerative eye condition, but by the limiting effect that his degenerative condition had upon his ability to maintain a safe environment for his students.

By contrast, Mr. Cummings' diagnosis of ADHD did not create an "impairment" that substantially limited his ability to teach math, an essential function of the teaching position that he held with the District. Consequently, Mr. Cummings' ADHD is not a qualified impairment under RCW 49.60.040(7)(d)(i) under the facts of this case and it therefore does not trigger a duty of the District to accommodate. Thus "[t]he Hearing Officer must agree with counsel for the District that where Appellant has failed to show a qualifying impairment, there is no duty to accommodate." CP p. 196. This is the correct decision, the decision is supported by the law, and neither the Hearing Officer nor the Superior Court committed a clear error of law in reaching this decision based upon the facts of this case.

**F. Mr. Cummings Has No Standing, Right or Independent Cause of Action Under the IDEA and His Claims of IDEA Violations are Irrelevant to His Non-renewal as a Matter of Law.**

Mr. Cummings' claim that District violated the Individuals with Disabilities Education Act (IDEA) by requiring him to teach the District's CMP2 Math Curriculum to special education students is without merit. Likewise, Mr. Cummings' claims that the Hearing Officer erred in refusing the testimony of Patricia Steinburg who is reportedly an expert on special education and was offered to testify regarding the appropriate Washington Administrative Codes, Revised Codes of Washington, and Federal laws pertaining to special education teachers was properly excluded.

The remedies available under the IDEA are "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction, (CA9 Wash. 09-35472) [2011 WL 590297]. See 20 U.S.C. § 1415.

The procedural safeguards include the right of a parent of a child with a disability to access records (20 U.S.C. § 1415(b)(1)); to have notice of a school district's proposal to initiate or change educational placements (20 U.S.C. § 1415(b)(3)); to file a complaint with the state educational

agency (20 U.S.C. § 1415(b)(6)); and to an impartial due process hearing when parents disagree with the educational placement offered by a school district to a special education student (20 U.S.C. § 1415(f)). These procedural safeguards are available only to disabled students and their parents and may not be asserted by a teacher as a private cause of action as advanced here.

The IDEA does not provide a private cause of action to Mr. Cummings as a teacher, he does not have any individual rights under the IDEA, and he cannot assert a violation of the IDEA on behalf of the students. “Simply put, the procedural safeguards articulated in § 1415 were enacted so that parents with disabled children could enforce their child's right to a FAPE” (free appropriate public education). Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 629 (6th Cir. 2010).

In Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction, Lake Washington sought to enjoin the Office of Superintendent from granting 45-day extensions in IDEA hearings. The district court dismissed the action holding that the school district did not have standing under the IDEA to assert the individual rights that belonged only to parents and their children.

In sum, we join our sister circuits in holding that a school district or other local educational agency has no express or implied private right of civil action under the IDEA to litigate any question aside from the issues raised in the complaint filed by the parents on behalf of their child. In this case, the school district lacks statutory standing to challenge the State of Washington's compliance with the IDEA's procedural protections. The district court correctly dismissed its complaint with prejudice.

Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction, (CA9 Wash. 09-35472) [2011 WL 590297]. Lake Washington is in accord with Reid L. v. Illinois State Bd. of Educ., 358 F.3d 511 (7th Cir. 2004) (group of students and teachers lack standing to bring a claim that an action was a violation of the IDEA).

Here, Mr. Cummings has no more right to advance a private cause of action under the IDEA than the Lake Washington School District or the teachers did in Reid above. The IDEA is not the source of a private cause of action for Mr. Cummings and the IDEA cannot formulate the basis for an attack on his non-renewal here.

Even if Mr. Cummings had standing to assert an IDEA claim, and he does not, the Hearing Officer did not have jurisdiction to hear it. No court would have jurisdiction to hear Mr. Cummings' IDEA claim because there is no evidence that he filed an IDEA claim or that he exhausted his administrative remedies to give a state or federal court jurisdiction to hear an IDEA claim. Claimants asserting a cause of action under the IDEA

must first exhaust their administrative remedies. M.T.V. v. DeKalb County School Dist., 446 F.3d 1153, 1158 (11th Cir. 2006). In Washington, such claims must be directed to the Office of the Superintendent of Public Instruction. WAC 392-172A-05085. See 20 U.S.C. § 1415(g). A state or federal court only has jurisdiction to hear an appeal of a state administrative hearing officer's decision and here, where Mr. Cummings neither has standing to bring such a claim nor did he file such a claim, the IDEA cannot be used to invalidate his non-renewal in this case.

The IDEA cannot be the basis for a challenge to Mr. Cummings' non-renewal and therefore Mr. Cummings' arguments that the District's mandate of the CMP2 math curriculum violated the IDEA are specious. The decision of the Hearing Officer and the decision of the Superior Court to affirm the decision that Mr. Cummings did not have standing to assert alleged violations of the IDEA is not clearly erroneous.

Likewise, Mr. Cummings claims that the District violated the IDEA by forcing Mr. Cummings to utilize the District's mandated CMP2 math curriculum is specious. Mr. Cummings, like all certificated teachers, is required to teach the curriculum mandated by the District. "It shall be the responsibility of the teacher to follow the prescribed courses of study of the school..." WAC 180-44-010(i).

**G. Mr. Cummings' Claim that Assistant Principal Scarlett had a Conflict of Interest as Math Coach and Evaluator is Specious.**

There is substantial evidence in the record to support the Hearing Officer's factual determination that Assistant Principal Keisha Scarlett did not have a conflict of interest as Mr. Cummings' math coach and primary evaluator. Mr. Cummings has not advanced any evidence at the due process hearing or hearing on appeal to the Superior Court that a math coach and evaluator cannot discharge both roles effectively. Indeed, RCW 28A.405.100 prohibits a District from transferring a probationer to another evaluator or to another position after a probationary period has commenced. "Improvement of performance or probable cause for non-renewal must occur and be documented by the original evaluator before any consideration of a request for transfer or reassignment is contemplated by either the individual or the school district." RCW 28A.405.100.

The statute provides a safeguard for the potential bias of a primary evaluator by allowing the appointment of a second evaluator to independently review a probationary teacher's progress. "The evaluator may authorize one additional certificated employee to evaluate the probationer and to aid the employee in improving his or her areas of deficiency." *Id.* Here, the primary and secondary evaluators agree that Mr. Cummings failed to

remediate his lack of content knowledge in math during his probationary period.

**H. Mr. Cummings’ Classroom Instruction, Observations, Evaluations, and Non-Renewal are Based Upon Areas He is Endorsed to Teach and Therefore WAC 181-82-110 is Inapplicable.**

Mr. Cummings’ claim that the District’s non-renewal of his employment contract violated WAC 181-82-110 is also without merit. Mr. Cummings testified that the only formal observations of his teaching occurred in special education classes with special education students that he was endorsed to teach.

- 7 Q Now, Ms. Day and Ms. Scarlett when they observed you, they  
8 only observed the special ed classes that you taught; is that  
9 correct?  
10 A The formal observations that were done were just the **special**  
11 **ed classes.**

CP p. 1292 (emphasis added).

The plain reading of WAC 181-82-110 relied upon by Mr. Cummings makes this provision inapplicable to his circumstance. WAC 181-82-110(1) prescribes exceptions for classroom teacher assignments “in areas other than their endorsed areas.” WAC 181-82-110(1)(b) provides in pertinent part that a teacher “shall not be subject to non-renewal . . . based on evaluations of their teaching effectiveness **in the out-of-endorsement assignment**”

(emphasis added). Here Mr. Cummings' non-renewal was based upon teaching deficiencies **in his area of endorsement**, special education.

Teachers endorsed in special education shall teach **all levels**. WAC 181-82A-202(1)(k). The hearing testimony of former Superintendent Goodloe-Johnson, Education Director Medsker, and Human Resources Manager Morris confirm that special education teachers are expected to have the ability to teach special education students K-12 all subjects, including math. CP pp. 382, 446, 523. Thus, Mr. Cummings' endorsement allowed him to teach special education math K-12, he was expected to have the ability to teach special education students K-12, and his non-renewal was based on his inability to deliver the District's math curriculum, CMP2, to 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grade special education math students. Mr. Cummings' non-renewal did not violate WAC 181-82-110, because the code does not apply and it is disingenuous to suggest that the code does.

**I. Mr. Cummings' Has Not Preserved His Evidentiary Claims For Review, and the Alleged Errors, Even if We Assume That They Occurred, Are Harmless Because They Did Not Affect The Decision of The Hearing Officer or The Superior Court.**

Mr. Cummings' claims that the Hearing Officer erred in refusing his proposed Hearing Exhibits 17-20 is without merit. First, Mr. Cummings did not preserve the alleged error for review. The burden to preserve the refusal of evidence is governed by ER 103. The rule provides

in pertinent part that “Error may not be predicated upon a ruling which...excludes evidence unless a substantial right of the party is affected, and... In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” ER 103(a)(2). Here, it is undisputed that Mr. Cummings did not make an offer of proof nor did he articulate any reason why letters of recommendation as old as ten years prior were relevant or not hearsay as ruled by the Hearing Officer. CP pp. 905-907.

It is also clear that Mr. Cummings’ failure to make an offer of proof or otherwise ask that his refused exhibits be made a part of the official record precludes appellate review. See State v. Smith, 130 Wn.2d 215, 922 P.2d 811 (1996) (DUI defendant failed to preserve his right to appeal exculpatory evidence of portable breath test by failing to make an offer of proof to the trial court of admissibility of PBT); Estate of Borden v. State Department of Corrections, 122 Wn. App 227, 95 P.3d 764 (2004), *review denied* 154 Wn.2d 1003, 114 P.3d 1198 (plaintiff failed to preserve review of trial court’s refusal to admit testimony of expert witness when plaintiff failed to make an offer of proof as to the admissibility of the expert’s opinions).

The decision to admit or refuse evidence is reviewed under the abuse of discretion standard. A trial court abuses its discretion if its

decision “is manifestly unreasonable or based upon untenable grounds or reasons.” State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court's decision “is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Here, it cannot be said that the Hearing Officer abused his discretion by refusing to admit ten year old letters of recommendation that were hearsay and irrelevant to whether or not Mr. Cummings performed satisfactorily during his probationary period.

Even if the Hearing Officer committed error in refusing the exhibits, the error was harmless. Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The Hearing Officer ruled that the exhibits were inadmissible hearsay and that even if the exhibits were not hearsay, they were irrelevant because they were from as much as ten years before the relevant school year. The refusal of these exhibits did not affect the outcome of the hearing in anyway and therefore if the decision was in error, the error is harmless.

**J. Mr. Cummings Waived Any Objection to The District's Closing.**

Mr. Cummings waived any argument to what he now claims were improper argument during the hearing by his failure to raise an objection to the argument when the argument was made. It is well-settled law that a party waives any objection to improper argument when that party fails to raise an objection at the time when there is an opportunity to correct it. State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987). The rule is based upon the principle that in an adversary system, the party claiming error must actively object to the error and give the tribunal an opportunity to correct the error before a final decision is reached. In the absence of an objection, the tribunal should not reverse a decision based upon a claim of improper argument unless the argument was so flagrant that it could not have been cured by an instruction to disregard it. State v. Clafin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984).

Here, Mr. Cummings did not object to the District's argument, but made the tactical decision to wait until after the Hearing Officer issued a written opinion to raise the issue. A party may not make the tactical decision to remain silent in the face of what he claims is obvious error and then raise an objection to the remarks only after receiving an adverse decision in the case. State v. Huson, 73 Wn.2d 660, 664, 440 P.2d 192

(1968). Mr. Cummings, having remained silent, failing to object, and never asking to recreate the closing argument, has waived this issue for appeal.

## V. CONCLUSION

The Findings of Fact of the Superior Court are supported by substantial evidence in the record before this Court. The Conclusions of Law of the Superior Court are not clearly erroneous. Mr. Cummings, by his own admission, cannot satisfy the expectations of all special education teachers to teach special education students all core academic subjects because Mr. Cummings cannot teach math. This was the basis for his non-renewal. This was the right decision and it should be affirmed.

For these and all the above reasons, the District asks the Court to affirm the decision of the Superior Court.

RESPECTUFLY SUBMITTED this 29<sup>th</sup> day of October, 2012.



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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on October 29, 2012, I served the foregoing Brief of Respondent to the Court and to the parties to this action as follows:

Office of the Clerk Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101-4170	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery
Kevin A. Peck The Peck Law Firm, PLLC 1423 Western Avenue Seattle, WA 98101-2021	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery

  
JANICE FLAHERTY