SUPERINTENDENT OF PUBLIC INSTRUCTION

Chris Reykdal Old Capitol Building · PO BOX 47200 · Olympia, WA 98504-7200 · http://www.k12.wa.us

RE: Jason Len
OSPI Case Number: D08-12-087
Document: Suspension

Regarding your request for information about the above-named educator; attached is a true and correct copy of the document on file with the State of Washington, Office of Superintendent of Public Instruction, Office of Professional Practices. These records are considered certified by the Office of Superintendent of Public Instruction.

Certain information may have been redacted pursuant to Washington state laws. While those laws require that most records be disclosed on request, they also state that certain information should not be disclosed.

The following information has been withheld: **None**

If you have any questions or need additional information regarding the information that was redacted, if any, please contact:

OSPI Public Records Office
P.O. Box 47200
Olympia, WA 98504-7200
Phone: (360) 725-6372
Email: PublicRecordsRequest@k12.wa.us

You may appeal the decision to withhold or redact any information by writing to the Superintendent of Public Instruction, OSPI P.O. Box 47200, Olympia, WA 98504-7200.

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

IN THE MATTER OF:

JASON LEN
CERT. NO. 364652H

TEACHER CERTIFICATION
CAUSE NO. 2011-TCD-0002

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

STATEMENT OF THE CASE

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

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

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

EVIDENCE RELIED UPON

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

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

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

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

The following exhibits were admitted into evidence:

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

ISSUES

1. Whether OSPI's decision to suspend the Appellant's teaching certification for 12 months should be upheld; and

2. Whether the conditions imposed by OSPI on reinstatement of that teaching certification are proper.

First Prehearing Order of January 3, 2012.

FINDINGS OF FACT

Background

1. The Appellant earned a bachelor's degree from the University of Washington in approximately 1995. He earned a master's degree in education from Seattle Pacific University in

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1998. The Appellant obtained his initial teaching certification in Washington State in September 1998. He is endorsed to teach science, physics and math. His current certificate will expire in June 2013. Testimony of Appellant; J-6.

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

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

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

Findings Regarding Appellant's Interactions with Students

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

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

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

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8. The Appellant took these boys out for dozens of meals, sometimes in groups and sometimes one-on-one. He gave them rides in his personal vehicle dozens of times. He took them on outings to local parks (including Alki Beach in Seattle) and malls, either in groups or one-on-one. He spent extended periods of time at some of the boys' homes, usually socializing and watching as groups of the boys played video games. He often stayed at their homes doing this until the small hours of the morning.

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

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

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

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

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

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

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parents. He spent some time with Students E and F while they were in Hawaii. Student E telephoned his mother and asked if he could stay on in Hawaii with the Appellant after Student F and his family had left. The Appellant had invited him to do this. Student E's mother said no.

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

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

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

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

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

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

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

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

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

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

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

25. In March 2008, the I.S. principal, Peter Bang-Knudsen, initiated an investigation concerning the Appellant's relationships with students. On the date of his first interview of the

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Appellant, March 13, 2008, he gave the Appellant directives about his future interactions with students. S-4; S-5. Those directives included the following:

> 1. You are NOT to discuss this matter with current or former IS parents or students. If someone mentions this to you, you will need to be ready to say that you have been asked not to discuss this matter.
> . . .
> 6. You are not to hang out with students as if he [sic] is a peer at any location after school hours. During school hours, you should be acting in you [sic] professional teaching role with students only.
>
> 7. You should limit your interactions with students to those of any normal professional teacher/ student relationship.

S-4.

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

> . . .
> 2. You are directed to refrain from visiting the homes of students at any time, except with an explicit invitation of students' parents and only then with prior confirmation and authorization by your building principal. Even with such prior authorization, you are directed to terminate any such visits no later than what is reasonably necessary to finish the purpose of the invitation and in no event later than midnight except in cases of emergency for which reason you are given explicit parental permission, and as to which emergency you provide prompt and full disclosure to your principal of the incident.
> . . .
> 4. You are directed to refrain from any social or other contact with District students away from school, except as noted in item 2 above. If you unexpectedly encounter students away from school, you are directed to promptly separate yourself from the situation in a polite and professional manner.
>
> 5. You are to maintain a professional demeanor and distance with students at all times in every setting. You are not to engage in activities such as students typically engage in with their peers, i.e. your [sic] are not to act like you are an age peer of students such as playing video games with students, and you are not to meet students outside school for social activities of any type, or otherwise "hang out" with students.
>
> 6. You are directed to refrain from having any telephone, email, or other communication with District students outside the normal requirements of teacher-student communication regarding academic matters or approved District activities.

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

. . .

S-22, pp. 5 - 6.

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

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

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

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

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

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

> **Reinstatement** will require: (1) successful completion [sic] a psychological examination, from psychologist mutually agreed upon by OPP and Jason Len, which validates Jason Len's ability to have unsupervised access to children; (2) successful completion of any and all treatment recommended as a result of said psychological evaluation; (3) Jason Len will provide OPP with evidence of his successful completion of or continued compliance in his treatment program; (4) successful completion of a mutually agreed upon course, or training, for issues of appropriate/inappropriate relationships with students and; (5) if requested, Jason Len will sign consent forms authorizing OPP to have access to all records pertaining to his treatment and to discuss any and all treatment undertaken with the providers administering treatment. The cost of conformance to all reinstatement requirements will be the responsibility of Jason Len.
>
> **AND/OR** Reinstatement shall (also) require submission of a new application, including Character and Fitness Supplement, provided by OPP and having Jason Len's fingerprints be checked by both the Federal Bureau of Investigation (FBI) and the Washington State Patrol (WSP). Reinstatement shall be also contingent upon Jason Len's fingerprint background check returning with no criminal convictions that are listed in WAC 181-86-013, RCW 28A.410.090, and/or any felony convictions[.]

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

Credibility Findings on Specific Incidents

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

34. Regarding the math team party and overnight at the Appellant's home in Spring 2007, the Appellant stated during the investigation and testified as follows: The event was originally planned to take place at the home of Student A, but that plan fell through, so the Appellant offered his home. The event was not pre-planned as a sleep-over; the idea for sleeping over came up after the party began. The eight to nine boys who slept over telephoned their parents for permission. The Appellant has a lot of camping equipment and provided sleeping bags for them. While the Appellant characterized the gathering as a preparation for the math competition the next morning,

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

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he acknowledged that only 30 minutes were spent on that preparation. Testimony of Appellant; S-13, pp. 3 – 5.

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

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

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

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

39. Regarding sharing a bed with Student H on the Oregon road trip in July 2007, the principal wrote the following contemporaneous notes following his first interview of the Appellant on March 13, 2008: "When asked if he ever shared a bed with a student, he said that sometimes he shared a bed with [Student H], but that they both had separate sleeping bags." S-5, p. 2; *see also* S-10, p. 5; S-22, p. 2.

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

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

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

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

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

45. The Appellant attempted to justify his uninvited involvement with the girls on several bases: First, he had been a teacher of theirs in middle school, so it was his obligation to help them with social skills. Second, one of the girls swore and used a vulgar finger gesture toward the boys as the girls were leaving campus, so he was forced to intervene as a teacher. J-10, p. 2. However, the swearing and vulgarity occurred after the girls had left school and were in a vehicle, which passed the boys walking on the street. Testimony of Student I. It did not occur on school

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grounds. Finally, the Appellant testified he offered the girls a ride because the dance was ending and it would be unsafe for them to wait outside the school. However, Student L testified the dance was not even near its end at the time, and that is why she and the other two girls were so frustrated. Student L's testimony is found more credible than the Appellant's regarding the timing. Even if the dance had been ending, the Appellant had no reason to believe the girls were stranded at school and in need of his protection. They all had parents they could call. The Appellant's justifications for his conduct are weak and unpersuasive.

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

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

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

49. The Appellant testified that Student I telephoned him about his (Student I's) senior project, because the project concerned photography and the Appellant is knowledgeable about photography. However, Student I testified that after the Appellant left I.S., when Student I was a *junior,* they went out for meals and met at other students' homes. This is before his senior year, when a senior project would typically be done. Student I said these meetings continued during

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

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his senior year, but to a lesser degree. Student I mentioned nothing about telephone calls with the Appellant, or about seeking advice on his senior project. The Appellant's testimony that his post-directives contact with Student I was limited to telephone calls about his senior project is found to be untruthful. The Appellant is found to have testified untruthfully about his compliance with the directives.

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

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

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

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

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

54. Lee Holt has taught at I.S. for eight years. She allows students to call her by her first name. She testified as follows. It has never been part of the I.S. culture to act as a personal mentor to students. Mentoring by teachers is about academics or career paths, and occurs at school, such as during the after-school tutorial period. If a student came to her with personal problems, she would direct them to the school counselors. It has never been part of the I.S. culture for teachers to give rides to students, except for school-related activities and only with

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school approval. The only exception is when a teacher is also a parent of an I.S. student, and gives rides to their child's friends in their role as a parent. It is not part of the I.S. culture for teachers to have students stay overnight at their home, again with the exception of teachers who are also parents of I.S. students who invite their own friends for a sleep-over. It is not part of the I.S. culture for teachers to have students in their hotel rooms, share a bed with a student, go to a student's home without an invitation from a parent, take students out for meals, vacation with students, share a tent with them, buy them gifts, or hang out socially at their homes. Ms. Holt expects all teachers to know that such activities are inappropriate. She explained that since 2006 or 2007, the School District has not allowed money to change hands between a teacher and student, even for a field trip. All financial transactions with students are to be handled by office staff, not by teachers. Teachers are not peers of students, but persons in authority. The same personal boundaries apply between teachers and students during the summer as during the school year. Testimony of Holt.

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

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

57. Teacher Brad Moore was not called as a witness at the hearing. However, OPP transcribed an interview it took with him. S-14. Mr. Moore taught at I.S. for 13 years, beginning 1997. He agreed with all witnesses that I.S. had a unique, communal culture. However, the teacher-student interactions outside of school activities that he cited were much more limited than the Appellant's: Teachers would attend student sports events at other high schools (as discussed above); students would stop at his home to pick up equipment for use in school fundraisers; and he and others would gather at a student's home to go to a school fundraiser. The two interactions he had with students that came closest to some of the Appellant's conduct were the following:

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First, when there were freshman having trouble adjusting to high school, he would sometimes tell them when he would be at a local mall, and if they came he would play games with them there (cards, dominos, chess, etc.) Mr. Moore stated he deliberately met them in a public place for these activities, rather than at anyone's home. Second, Mr. Moore answered "yes" to the question whether it was acceptable for teachers to buy meals and gifts for students. There were no follow-up questions to this, and no context was given for the question. Mr. Moore was not available for clarification because he was not called as a witness. Teachers who did testify at the hearing distinguished between teachers coordinating meals on a field trip versus buying meals to socialize with students outside of school. They also distinguished between purchasing small gifts for an entire class versus singling out one student. Regarding "hanging out" with students one-on-one, Mr. Moore stated: "I don't know about hanging out. There was never overt one on one." S-14.

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

59. The former students who testified at the hearing did not support the Appellant's assertion that his conduct was part of the I.S. culture. The following testimony, given by students who were closest to the Appellant, is found credible: Student F testified that no other I.S. teacher gave him rides, hung out with him, took him on a road trip, give him gifts, took him out for meals, met him on a vacation, or stayed overnight with him. He heard of students going to the home of one other teacher once or twice, but he does not know the purpose of their visit. Student K testified he had no other relationship with a teacher outside of school. Student E testified he had no meals out with other teachers, spent no personal time with other teachers, never went to another teacher's home (except the Ellis cabin during Focus Week), and did not have any other teacher's cell phone number (except during Focus Weeks). Student E further testified that no other teacher came to his home, slept in a student's room, or bought him gifts. Student E told OPP that teachers spending time with their students was not seen as odd at the I.S. S-18, p. 5. However, he did not specify to OPP whether he meant spending time together *at school* or outside of school. In fact, he testified he spent time with no teacher other than the Appellant outside of school. Testimony of Student E. On the other hand, Student D testified that one other teacher, Jessica Scott, met small groups of students for coffee during the summer after her first year of teaching. Testimony of Student D.

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

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

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

Student and Parent Reactions to the Appellant's Conduct

63. Six students testified that the Appellant's conduct did not make them uncomfortable and/or that his teaching certificate should not be suspended. Testimony of Students C, E, F, H, I and K. Students E, H and K went further, stating the Appellant had a beneficial effect on them as people. S-16, p. 16; Testimony of Students E and K.

64. However, even among the students who spent the most time socializing with the Appellant, five of them acknowledged his conduct was odd, or appeared to be so. Student G told the principal he thought the Appellant's relationship with him and other boys was "weird" at first, and he later felt uncomfortable with it again: "I was weirded out by the time he spent the night" at Student K's house with him and others. S-6, p. 3. Student K told the principal "It seems weird that my friends [Students G, H and I] always want to hang out with Mr. Len. No matter where we are or what we're doing, they always want to call Mr. Len and invite him along." S-10, p. 7. Student H had the following exchange with the OPP investigator: "Q: Did you ever think it was

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odd that Mr. Len would hang out with you and your friends like that?" "A: No, well, kinda of [sic]. I thought he would have his own friends by now. We always had a good time so why wouldn't someone what [sic] to hang out with us?" S-16, p. 10. Student H acknowledged that the Appellant's conduct made the mothers of Students E and K uncomfortable. S-16, p. 16. Student F told OPP that at first he thought it was "odd" that the Appellant hung out with them, but as time went by he did not think so. S-17, p. 5. Student E, who was the closest to the Appellant, told OPP the following: "I can see how people who do not know the circumstances could see it as inappropriate. When you think about it that way, this investigation actually makes sense." S-18, p. 5. "I know that this must look bad on paper, but it was not like that." S-18, p. 6. "Most people would consider it 'odd' since socializing with a professor outside of school would be out of the norm. If people could hear the types of conversations we had I do not believe they would consider it to be unusual." S-18, p. 8.

65. Four students had distinctly negative reactions to the Appellant's conduct. Student OO felt the Appellant's invitation for a math team party and sleep-over was odd. He saw the Appellant's mention of movies and video games as loading the event with incentives for them to attend. He refused the party invitation on his own, due to these feelings, without consulting his parents. Testimony of Student OO. Students L, M and N -- the girls involved in the Tolo dance incident -- reacted negatively to what they viewed as the Appellant's uninvited insertion of himself into their personal lives. They rejected his invitation for a ride to a restaurant on their own, not because of a parental directive. Testimony of Students L and N. Students L and M told the principal that the Appellant's conduct was "weird". S-8, p. 6.[5]

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

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

68. The Mother of Student K was extremely shocked when she found the Appellant had spent the night in her son's bedroom without her knowledge. She interpreted his behavior as "grooming". S-10, p. 5; Testimony of Mother of Student K. Both she and her husband testified they never gave the Appellant permission to give rides to their son, yet the Appellant did so. She asked her son not to spend time with the Appellant but he did not obey. He kept meeting with the Appellant because his friends did. In the incident at Wilburton Park, she attempted to follow the

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

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

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Appellant's van but lost him. After the Wilburton Park incident and the incident where the Appellant spent the night in her home (both in Summer 2007), she no longer asked her son to stop seeing the Appellant, but actually forbade him from seeing the Appellant. Nevertheless, Student K disobeyed her. Testimony of Mother of Student K.

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

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

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

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

73. The Mother of Students E and G always felt badly for not establishing ground rules with her sons from the beginning about the situation. She discussed her concerns with them, saying the Appellant might be a great guy but could have bad intentions. She asked them to tell her if anything of that nature occurred. However, she was not sure they would. So she looked for signs of stress in them, but did not see such signs. She also faulted herself for not telling the Appellant early on that he must communicate with her, rather than the boys, about his activities with them. She did say no to Student G about two invitations the Appellant extended to him: to spend Thanksgiving at the Appellant's house alone with him, and to stay on in Hawaii and vacation with him.

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

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Lindsay Brown's Testimony

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

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

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in a suspension or revocation hearing lies with OSPI. WAC 181-86-170(2). OSPI "must prove by clear and convincing evidence that the certificate holder is not of good moral character or personal fitness or has committed an act of unprofessional conduct." *Id*.

3. Clear and convincing evidence requires more than a mere preponderance of the evidence. *Nguyen v. Dept. of Health, Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001), *cert. denied,* 535 U.S. 904, 122 S.Ct. 1203 (2002). The evidence must show that the ultimate fact at issue is "highly probable." *In Re Welfare of C.B.*, 134 Wn. App. 336, 346, 139 P.3d 119 (2006).

Hearing *De Novo*

4. The Appellant argues that this tribunal is limited to reviewing the evidence relied upon by OPP in reaching its Final Order. *See* Appellant's Closing Brief, at pp. 23 – 25, and arguments made orally during the hearing. This conflicts with the Administrative Procedure Act (APA), RCW 34.05.449, 34.05.452 and 34.05.461. Those statues provide that the ALJ shall hear testimony from witnesses, including cross-examination and rebuttal testimony, shall decide on objections and the admission of evidence, and shall issue findings of fact and conclusions of law. "Findings

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of fact shall be based exclusively on *the evidence of record in the adjudicative proceeding* and on matters officially noticed in that proceeding." RCW 34.05.461(4) (italics added). This means a *de novo* hearing, with findings of fact based on the record of evidence taken in the *adjudicative proceeding,* not the OPP proceeding. The evidence before OPP may be offered as exhibits in the adjudicative proceeding before the ALJ, but that hearing is by no means limited to such exhibits.

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

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

Hearsay Evidence and the Clear and Convincing Standard of Proof

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

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

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

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

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

Standards for Suspending a Teaching Certificate

9. RCW 28A.410.090(1)(a) authorizes OSPI to suspend a professional educator certificate "based upon . . . the complaint of any school district superintendent, . . . for immorality, violation of written contract, unprofessional conduct, intemperance, or crime against the law of the state."

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

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

WAC 181-86-070(2).

11. Acts of unprofessional conduct include the following:

> Any performance of professional practice in flagrant disregard or clear abandonment of generally recognized professional standards in the course of any of the following professional practices is an act of unprofessional conduct:
>
> (1) Assessment, treatment, instruction, or supervision of students.
> (2) Employment or evaluation of personnel.
> (3) Management of moneys or property.

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WAC 181-87-060.

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

> As a general rule, the provisions of this chapter shall not be applicable to the private conduct of an education practitioner except where the education practitioner's role as a private person is not clearly distinguishable from the role as an education practitioner and the fulfillment of professional obligations.

WAC 181-87-020.

13. "Student" is defined in the regulations as follows:

> As used in this chapter, the term "student" means the following:
> 1. Any student who is under the supervision, direction, or control of the education practitioner.
> 2. Any student enrolled in any school or school district served by the education practitioner.
> 3. Any student enrolled in any school or school district while attending a school related activity at which the education practitioner is performing professional duties.
> 4. Any former student who is under eighteen years of age and who has been under the supervision, direction, or control of the education practitioner. Former student, for the purpose of this section, includes but is not limited to drop outs, graduates, and students who transfer to other districts or schools.

WAC 181-87-040.

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

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

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

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

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

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

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

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

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

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

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

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

Appropriate Level of Discipline

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

> Prior to issuing any disciplinary order under this chapter the superintendent of public instruction or designee shall consider, at a minimum, the following factors to determine the appropriate level and range of discipline:
>
> (1) The seriousness of the act(s) and the actual or potential harm to persons or property;
> (2) The person's criminal history including the seriousness and amount of activity;
> (3) The age and maturity level of participant(s) at the time of the activity;
> (4) The proximity or remoteness of time in which the acts occurred;
> (5) Any activity that demonstrates a disregard for health, safety or welfare;
> (6) Any activity that demonstrates a behavioral problem;
> (7) Any activity that demonstrates a lack of fitness;
> (8) Any information submitted regarding discipline imposed by any governmental or private entity as a result of acts or omissions;
> (9) Any information submitted that demonstrates aggravating or mitigating circumstances;
> (10) Any information submitted to support character and fitness; and
> (11) Any other relevant information submitted.

WAC 181-86-080.

26. *Factor (1) – Seriousness of the acts, and actual or potential harm to persons or property*. The Appellant's acts were serious. He modeled for students violation of rules, and drew them into violating rules along with him. He showed extreme favoritism to certain students. He gave significant financial favors to some students. He interfered with relationships between parents and students and usurped the parental decision-making role. He flagrantly violated personal boundaries between teachers and students. He caused actual harm by creating anxiety and guilt on the part of parents, and conflicts between parents and children. He created potential harm to the School District by exposing the District to the risk of litigation for his conduct. This factor weighs against the Appellant.

27. *Factor (2) – Criminal history*. The Appellant has no criminal history. This factor weighs in favor of the Appellant.

28. *Factor (3) – Age and maturity level of participants*. The Appellant was in his mid-30s at the time in question. The students he was involved with were sophomores to seniors in high school. This is an age difference of two decades. The Appellant was an experienced teacher, not a novice, having taught full-time for eight years at the time the events in question began in 2006. This factor weighs against the Appellant.

29. *Factor (4) – Proximity or remoteness of time of the events*. The events in question occurred between 2006 and 2008, which is four to six years ago. This is not remote in time. This factor weighs slightly against the Appellant.

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30. *Factor (5) – Whether conduct demonstrates a disregard for health, safety or welfare*. The Appellant's conduct demonstrates a disregard for the welfare of students, parents, and the parent-child relationship, for the reasons discussed under factor (1), above. His fast driving with students in his vehicle in the Wilburton Park incident demonstrates a disregard for their safety. This factor weighs against the Appellant.

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

32. *Factor (7) – Whether conduct demonstrates a lack of fitness*. The Appellant's conduct demonstrates a lack of fitness to teach children, for the reasons discussed under factors (1), (5) and (6), above. This factor weighs against the Appellant.

33. *Factor (8) – Discipline imposed by any governmental or private entity*. The Appellant had one prior instance of discipline: a letter of reprimand in February 2008. However, the conduct for which he was reprimanded in February 2008 is dissimilar from the conduct at issue here. The District chose not to discipline the Appellant for the conduct at issue here. It believed he was capable of correcting his conduct once removed from the students with whom he had developed close relationships. The District therefore transferred him to another school rather than disciplining him. This factor weighs in the Appellant's favor.

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

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

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

37. *Factor (11) – Any other relevant information submitted*. The potential effect on a teacher's employment prospects from OPP discipline is not one of the factors listed in WAC 181-86-080. The Appellant argues it should come within the provision of WAC 181-86-080(11) for "[a]ny other relevant information submitted." This provision is not for any and all information submitted; it is restricted to "relevant" information. The factors in WAC 181-86-080 all focus on the teacher's conduct and background. There is no mention in any of the statutes or regulations on teacher discipline of a teacher's career prospects as a relevant consideration. Nor is this factor considered in any of the 15 OPP orders submitted by the Appellant (*see* A-7) or the additional OPP order cited in the Appellant's Closing Brief at p. 20. Without some basis in statute, regulation, OPP

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orders, or case law for finding this to be "relevant information" (WAC 181-86-080(11)), there is no basis for expanding the type of matters to be considered in determining teacher discipline. If it were a relevant factor, it would have been considered in *all* OPP cases, not just this one. For these reasons, the testimony of Lindsay Brown, and the related exhibits A-3 and A-4, are found not relevant to this proceeding. They are not considered in deciding on the Appellant's discipline.

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

/ / / /

Conditions for Reinstatement of Certificate

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

ORDER

1. The Appellant's Washington State teaching certificate no. 363652H is suspended for twelve (12) months, as ordered in OSPI's Final Order of Suspension of November 14, 2011.

2. In order to obtain reinstatement of his Washington State teaching certificate, the Appellant must comply with the conditions for reinstatement set forth the in OSPI's Final Order of Suspension of November 14, 2011.

Dated at Seattle, Washington on December 11, 2012.

Signed: Matthew W. Wacker for Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

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APPEAL RIGHTS

This is a final agency decision subject to a petition for reconsideration filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the ALJ at the address at OAH. The petition will be considered and disposed of by the ALJ. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The Petition for Judicial Review of this decision must be filed with the court and served on OSPI, the Office of the Attorney General, all parties of record, and OAH within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

In accordance with WAC 181-86-150(3), the decision of the ALJ shall be sent by certified mail to the Appellant's last known address and if the decision is to reprimand, suspend, or revoke, the Appellant shall be notified that such order takes effect upon signing of the final order and that no stay of reprimand, suspension, or revocation shall exist until the Appellant files an appeal in a timely manner pursuant to WAC 181-86-155.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

Jason Len
c/o James A. Gasper, Attorney at Law
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via US Mail and Certified Mail

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

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

IN THE MATTER OF:
JASON LEN
CERT. NO. 364652H

TEACHER CERTIFICATION
CAUSE NO. 2011-TCD-0002

ORDER CORRECTING TEACHER CERTIFICATION NUMBER

The Amended Findings of Fact, Conclusions of Law, and Order ("Amended decision") was issued in the above-captioned case on December 18, 2012. On December 21, 2012, the Office of Administrative Hearings received the Office of Superintendent of Public Instruction's (OSPI's) Motion to Correct Clerical Error and Brief in Support Thereof ("Motion"). The Motion stated that the Teacher Certification number in the Amended decision contained a typographical error in one numeral. Appellant Jason Len does not oppose OSPI's motion.

A review of the file in this case yields the following information. OSPI's Final Order of Suspension contained the Appellant's correct teacher certification no. 364652H. The Appellant's appeal listed this number incorrectly, changing the third digit to a "3". This error was perpetuated throughout the proceedings and appears in the Amended decision as well. OSPI discovered the error and moved for correction during the 10-day period for reconsideration of the Amended decision, so that this tribunal still has jurisdiction to correct the error.

The Appellant is represented James Gasper, attorney at law. OSPI is represented by Dierk Meierbachtol and Aileen Miller, Assistant Attorneys General.

Based upon the statements of the parties and the pleadings and documents on file herein, it is hereby ORDERED:

The Amended decision issued December 18, 2012 is corrected so that the Teacher Certification number in the caption and footer of the decision reads: 364652H.

Dated at Seattle, Washington on January 7, 2013.

Signed Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

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

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