



SUPERINTENDENT OF PUBLIC INSTRUCTION

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

RE: Larry Richardson
OSPI Case Number: D06-02-017
Document: Revocation

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:

Public employees – Address; Phone; Email; SSN; Driver’s License - The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency. – RCW 42.56.250(3).

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

LARRY RICHARDSON

CERTIFICATION NO. 228137F

TEACHER CERTIFICATION
CAUSE NO. 2009-TCD-0001

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

A hearing was held on this matter before Administrative Law Judge (ALJ) Johnette Sullivan on November 9, 10, 13, and 16, 2009, at Yakima, Washington. The Appellant, Larry Richardson, appeared and was represented by Tyler Hinckley, attorney at law, of Velikanje Halverson P.C. The Office of Superintendent of Public Instruction (OSPI) appeared through Charlie Schreck, its Director of Office of Professional Practices (OPP), and was represented by Dierk Meierbachtol, assistant attorney general (AAG).

Testimony was taken under oath or affirmation from the following witnesses: Larry Richardson (Appellant), Charlie Schreck (OPP Director), Helen Capetillo (Adams Elementary School [Adams] para-educator), David Padilla (Adams teacher), Michael Koulentes (former Adams Principal), Rick Doehle (former Yakima School District [District] Assistant Superintendent for Human Resources), Julio Cesar Sanchez (former Adams 21st Century Coordinator), John "Jack" Irion (District Deputy Superintendent), Cheryl La Flamme (Union Gap School District art teacher), Jane Watson (former Adams teacher and Yakima Education Association building representative), Eddie Lee Brown (former Washington Middle School teacher and coach), Mary Wickstrom (former Adams special education teacher), Kimball Klinefelter (Adams special education teacher), and Jane Kucera Thompson, Ph.D (clinical neuropsychologist).

The Final Order of Revocation, and Appeal of Final Order of Revocation and Request for Formal Hearing are part of the court file and admitted for jurisdictional purposes as C1 and C2, respectively.

The following documentary evidence was admitted: Appellant's Exhibits 51-57, and 59-60 (Appellant withdrew Exhibit 58 as a duplicate of OSPI's Exhibit 20); and, OSPI's Exhibits 1, 2, 3, 14, 17-22, and 24. OSPI did not offer Exhibits 4-13, 15, 16, 23, 25, or 26, and those exhibits are not part of the evidentiary record.

The record closed November 16, 2009. The due date for the written decision in this matter is 90 days after the close of the record, pursuant to the Administrative Procedure Act,

Revised Code of Washington (RCW) 34.05.461(8)(a). The 90-day count falls on Sunday, February 14, 2010, so the due date is the next business day, Monday, February 15, 2010.

PROCEDURAL BACKGROUND

On February 17, 2006, the District Superintendent sent a letter to OPP, alleging acts of unprofessional conduct on the part of Appellant. Exhibit 2. On June 3, 2009, OPP issued a Final Order of Revocation against the Appellant's teaching certificate. Exhibit C1.

The Appellant appealed the Final Order of Revocation by letter to OSPI dated June 25, 2009, and received by OSPI on June 29, 2009. Exhibit C2. The matter was assigned to the Office of Administrative Hearings (OAH) to assign an ALJ to conduct an administrative hearing and issue a decision.

OAH mailed the parties a Notice of Prehearing Conference and Notice of Hearing, which scheduled a prehearing conference for July 16, 2009, and a hearing for August 6, 2009. At the first prehearing conference, the parties agreed to reschedule the hearing to August 17-21, 2009. Appellant requested a second continuance which was granted for good cause over the objection of OSPI. The parties agreed to new dates for hearing, November 9-16, 2009.

ISSUE

Whether clear and convincing evidence supports OSPI's determination that Appellant Larry Richardson demonstrated a lack of good moral character and personal fitness and/or committed acts of unprofessional conduct in violation of Washington law, warranting a revocation of his teaching certificate.

FINDINGS OF FACT

1. The Appellant holds a Bachelor and a Masters Degree, and Washington Education Certificate No. 228137F, which was issued on June 9, 1978. He began his career as a special education teacher. He taught in District elementary and middle schools. He later became a physical education teacher to general education and special education students. He was employed by the District for most of his adult career, from 1978 until 2006. He is currently a substitute teacher for the Union Gap School District.

2. Appellant suffered major motor or grand mal epileptic seizures as a child. He underwent a craniotomy (brain surgery) to remove a tumor as a young boy (removal of left parietal meningioma), during which a metal plate was inserted. He has taken anticonvulsant medications since the surgery.

3. In addition to teaching, Appellant sometimes worked as an assistant coach. He and other elementary and middle school teachers assisted the coaches with after-school

sports activities. Appellant chose not to share with co-workers information about his history of treatment for a seizure disorder. He was known to have earned his black belt in a martial art. There was nothing about Appellant's service as an assistant coach to cause coaches or other assistant coaches to question his fitness to coach, such as stumbling, tripping, losing his balance, or problems with his gait, or difficulty or inability using his hands, arms, or legs.

4. The overall performance of a teacher is not evaluated over a school year or other long-term period. By contract, a teacher's performance is observed once or twice per school year for a period of at least 30 minutes. Usually, experienced teachers are observed just once per year. If poor performance is observed outside of the designated observation, it is addressed only in the context of the discipline policy, subject to grievance if the teacher disagrees.

5. The principal or other supervisor provides advance notice to the teacher of the date and time selected for the observation of classroom teaching performance. The supervisor completes a one page form to record the observations. Through 2004, Appellant's teaching performance during these observation periods consistently satisfied his supervisors.

6. Principal Koulentes was assigned to Adams in the 2004-05 school year. Appellant taught physical education (P.E.) at Adams. As Appellant's supervisor, Principal Koulentes arranged to observe Appellant's classroom performance twice, on November 4, 2004, and April 18, 2005. Principal Koulentes' observation comments were positive.

7. Appellant felt frustrated because he believed Principal Koulentes had not taken action to discipline students who continued to misbehave in P.E. class. Appellant believed Principal Koulentes did not support him.

The November 18, 2005 incident

8. Principal Koulentes selected November 18, 2005, as the next date for Appellant's classroom performance observation, and notified Appellant.

9. Principal Koulentes arrived early for the observation period. He was surprised to see Appellant wearing a bandana folded around his head. Principal Koulentes believed the bandana was unprofessional attire, with colors too similar to "gang" colors.

10. Principal Koulentes' manner of speech at hearing, compared to Appellant's manner, is of considerably louder volume. Entering the gym that morning, Principal Koulentes said in a loud voice that something was inappropriate and to "take that off" or words to that effect. Appellant did not immediately realize the Principal was speaking to him. The Principal said something about a hat. Appellant touched the bandana he was wearing around his head.

11. The Appellant did not appreciate the Principal's loud tone of voice or the brevity of his command. The Principal directed Appellant to step aside into the Appellant's office to permit them to speak privately, but Appellant refused.

12. The Principal felt disrespected by Appellant's refusal to comply, particularly in the presence of students.

13. A verbal argument arose between Principal Koulentes and Appellant. Each claims the other was the aggressor. Each claims the other was physically aggressive. Students who observed their encounter, now probably in the 8th grade, were not called as witnesses by either party. No adult witnessed their interaction.

14. The District reprimanded Appellant for physically aggressive interaction with Principal Koulentes on November 18, 2005. Appellant filed a grievance on November 21, 2005. After investigation, the District determined the evidence did not substantiate that Appellant physically contacted the Principal. It determined the interaction was verbal, but still denied the grievance. Appellant did not further appeal the reprimand.

15. The District also initiated disciplinary proceedings against Principal Koulentes related to his behavior during the November 18, 2005, verbal interaction with Appellant.

16. Principal Koulentes was not aware of Appellant's medical history, or that since undergoing brain surgery as a child, Appellant routinely protected his head with his hands and arms. If Appellant raised his hands or arms in a manner which felt threatening to Principal Koulentes, the action was probably a protective reflex in reaction to the heated verbal argument and Appellant's sensitivity to their close physical proximity. The clear and convincing evidence does not support a finding that Appellant intended to hit or strike Principal Koulentes.

17. Principal Koulentes gave a statement to OPP in 2008, but that statement was not offered into evidence. It is unknown if there are any discrepancies between the Principal's earlier statement and his testimony at hearing.

18. Appellant gave a statement in November 2005 when he grieved the reprimand, which was admitted into evidence. That statement is substantially similar to the initial description of the events given by Appellant at hearing. However, at hearing Appellant offered an explanation which added significantly to the November 2005 statement.

19. Appellant initially described himself as the one who remained calm, and the Principal as the one who was out of control, yelling, and shouting. Appellant refused to meet privately in the office because he felt physically threatened by the Principal, who was holding a clipboard. The Principal left the gym at least twice, in Appellant's recollection. Appellant returned his attention to the students, until the Principal's final return when the Principal

continued to shout and then physically charged at the Appellant. As the Principal neared, the Appellant decided to turn directly toward the Principal and face him eye-to-eye to explain he was tired of being treated in this manner. Under further questioning, Appellant admitted that he himself had spoken loudly and raised his own voice when speaking to the Principal, his supervisor. Appellant explained that he remembered thinking there were cooks working in the kitchen across the hallway, and he decided to raise his voice to Principal Koulentes in hope of being heard by the cooks. Appellant explained he hoped to attract other adults to come and observe how the Principal was behaving and to come to Appellant's aid.

20. Appellant also explained the reason he refused to remove the bandana was because he did not want to be embarrassed by nappy hair, which he considered unprofessional. Appellant said he wanted to wait until he could step away and groom himself. He explained he could not immediately leave the gym to go to his truck in the parking lot to rake his hair, because the students would be unsupervised during his absence. If Appellant had removed the bandana as his supervisor had instructed, the confrontation would have not occurred.

21. Appellant admits that it is not appropriate for educators to raise their voices at one another in a heated argument in the presence of students.

The January 27, 2006 incident

22. Appellant's classroom was the gym. On January 27, 2006, the planned P.E. activity was volleyball. The last class of the day was Mr. Padilla's fifth grade class, which usually ends at the 3:15 p.m. bell. Usually, the students did not return to Mr. Padilla's classroom, but on this day, Mr. Padilla had not finished on time and needed the students to return to his classroom. He planned to go to the gym and escort them back to the classroom before the bell.

23. Students in this class had previously misbehaved, and Appellant subjectively believed he could not rely on Principal Koulentes for discipline. When the students again misbehaved, Appellant decided to discipline by holding students over for detention. He intended to follow the administration's instruction to not let students "get away with anything."

24. Mr. Padilla arrived early to escort his students back to his classroom, and learned from Appellant of the misbehavior and the planned detention. The students were seated in two groups along the base lines on the gym floor. Appellant had begun dismantling and storing the volleyball equipment. Mr. Padilla reminded Appellant some of the students needed to catch the bus, and persuaded Appellant to consider some other punishment on some other day. Appellant allowed the students to leave with Mr. Padilla.

25. Appellant conducted the volleyball class in one-half of the gym, the half near the equipment storage room. The other half of the gym was not in use, except at the far end, where the after-school program was being set up, near the kitchen area.

26. Appellant continued to take down the volleyball equipment to return the net, support poles, and beach volleyballs to the equipment room. Mr. Padilla began to gather his fifth grade students, and observed a small boy enter the gym. The boy, I.M., was a kindergarten student who had arrived early for the after-school program.

27. A para-educator, Ms. Capetillo, and at least one other adult had been setting up tables and preparing for the after-school program. I.M. called out to Ms. Capetillo to announce he was early, but he did not walk directly across the gym floor toward the after-school program.

28. I.M. began to play with a beach ball used in the volleyball game. He kicked the beach ball. Appellant told the boy not to kick the beach ball, and asked the boy to hand him the beach ball. Appellant held out his hand, palm side up, when he made the request. Appellant's custom is to teach students that balls and other objects are always to be handed to him, not thrown.

29. I.M. disobeyed Appellant and either threw or kicked the beach ball toward Appellant. Appellant reflexively protected his head by reaching up with his arms and hands. The beach ball did not hit Appellant's head. Ms. Capetillo described how Appellant caught the ball, then intentionally and with great force threw the ball at I.M., hitting I.M. in the back of the head. Ms. Capetillo's description of the force exerted by Appellant is somewhat inconsistent with her description of I.M.'s total lack of reaction to being hit. Ms. Capetillo did not observe I.M. look back, turn around, change his pace, begin to run, or otherwise react in any way to being hit by the ball.

30. Appellant began to run after I.M. Appellant reached out to try to grab I.M., and I.M. stumbled. Appellant tried a second time to grab I.M. and picked up I.M. by the neck. Ms. Capetillo was stunned to see Appellant gripping I.M. by the neck. She saw Appellant stand and shake I.M. for several seconds while I.M.'s legs dangled in mid-air. She described Appellant as being upset. She was shocked and did not react until after she heard Mr. Padilla's voice.

31. Mr. Padilla's view was from behind the Appellant. He was unable to see Appellant's face or arms or hands as Appellant picked up I.M. Mr. Padilla saw Appellant stand up, and knew Appellant's arms were extended, but could not see that Appellant's hands were gripped around I.M.'s neck. Mr. Padilla watched for several seconds. He was stunned and shocked to realize Appellant's upper body was moving in a shaking motion. Mr. Padilla reacted by shouting in a loud voice, "Larry", or "Larry, Stop", and Appellant released I.M. Mr. Padilla described Appellant as being upset.

32. Ms. Capetillo described how the boy's legs had been kicking, and that I.M.'s body was in a position more parallel than perpendicular to the floor as he fell to the floor. She recalls that the top of I.M.'s body, his shoulder and head area, hit the floor before his feet. She recalls I.M.'s head hit the gym floor hard and created a loud sound. Mr. Padilla knew the boy's body fell to the floor because he heard the loud sound produced by the impact of I.M.'s head on the gym floor. Mr. Padilla heard gasps from the fifth grade students. These descriptions of the loud sound created by the impact of I.M.'s head on the gym floor are consistent with a sound loud enough to cause another employee to turn around and look for the source of the sound. See Finding of Fact 34 below. Appellant's contention that upon release I.M. stood briefly on the floor, only to then stumble or fall down on the floor, with his head being the last part of his body to touch the gym floor, is not credible.

33. Ms. Capetillo and Mr. Padilla each ran toward Appellant and I.M. Appellant remained standing nearby as Ms. Capetillo attended to the boy at Mr. Padilla's suggestion, she took I.M. to the office. Mr. Padilla was stunned as well as embarrassed for Appellant and did not know what to say. He recalls he said nothing and that Appellant said nothing. Mr. Padilla turned away and focused on his fifth grade class, because he could observe students' emotional responses. His goal was to protect his class and remove them from the gym quickly.

34. Another employee with the after-school program had turned to look in response to hearing a loud noise. He saw Ms. Capetillo and Mr. Padilla moving toward Appellant and a small boy who was on the gym floor. He saw Mr. Padilla briefly put his arms around Appellant's upper body, telling Appellant to calm down or a few words to that effect. This employee found a camera and went to the office area where he took pictures of I.M.'s bruised neck and the bump on I.M.'s head.

35. During his July 2009 neuropsychological evaluation, and at hearing, Appellant said he chased after I.M. to prevent injury to the student. He denies that he was upset or angry at the boy. Appellant said he was concerned I.M. would run into the volleyball net or trip on the floor where the poles insert. However, on the day of the incident and four days later, Appellant twice explained his actions to a District deputy superintendent and did not mention he was concerned about gym equipment posing a danger for injury or being a tripping hazard. Appellant reported in 2005 thinking that I.M. should not get away with being disobedient, and should also learn how to properly handle the ball. The other three adults present in the gym recall no safety concerns for themselves, or other students, or I.M. regarding potential injury or tripping hazards due to volleyball equipment. None recall any nets or poles or other hazards posed by gym equipment in the area where they saw Appellant and I.M. interact. The Appellant's contention that he was not upset with I.M. and that his primary motive in chasing after I.M. was to prevent I.M. from tripping or being injured on gym equipment is not credible.

36. Appellant admits that his hands were gripped around I.M.'s neck, but denies an initial awareness of that fact. Appellant explains he lost his balance when he first reached for

I.M., and picked up I.M. to avoid collision. As he straightened to stand, he explains his head was turned in one direction while his arms were outstretched in the opposite direction. Appellant claims he was not aware he had grabbed I.M. by the neck until after he regained his balance and then looked at I.M. Appellant explains it was only in that moment when he looked in the direction of his hands that he realized what part of I.M.'s anatomy he was holding. Appellant reports he felt scared at the sight of his hands around a student's neck.

37. Appellant denies that he intentionally shook I.M. If Appellant's arms or upper body shook, he explains the movement was in reaction to his loss of balance, or to the sight of his hands around the boy's neck. At the time of the event, Appellant told the District deputy superintendent that Appellant was thinking about an automobile accident in which he had been involved on the eve of the New Year. He was thinking about what he had learned in First Aid about the need to protect heads and necks from injury. The District deputy superintendent understood Appellant was referring to need to protect himself and I.M.

38. Appellant estimates there was a one foot distance between the boy's feet and the gym floor. He has no explanation for why he released the boy mid-air. He knows his actions were unprofessional.

39. Appellant contends the incident with I.M. was an accident; however, his explanation of the events following the moment he grabbed I.M.'s neck are not credible. If Appellant lost his balance, it was only momentarily. In the act of lifting up I.M. by the neck, it is not credible that Appellant could have thought his fingers were gripping any other part of I.M.'s anatomy. Even if Appellant was not looking at I.M., the moment his fingers closed beneath I.M.'s head and around I.M.'s neck, it is not credible that Appellant was not aware of that fact. The Appellant was standing upright for several seconds and could have lowered I.M. down to the gym floor, but did not do so.

40. It is not proven by clear and convincing evidence that Appellant intended to grab I.M. by the neck. However, the clear and convincing evidence does prove Appellant knowingly maintained his grip around I.M.'s neck as Appellant stood and lifted up I.M.'s body a distance of one foot above the gym floor, and that Appellant knowingly held I.M. suspended mid-air for several seconds while shaking I.M., until Mr. Padilla shouted for Appellant to stop. Even then Appellant did not lower I.M.'s body to the gym floor, but let the boy's body fall to the gym floor. The Appellant's actions displayed a reckless disregard for I.M.'s safety or well being.

41. Appellant asserts that injuries to I.M. observed immediately following this incident might not have been caused by Appellant's actions. There is no evidence regarding the condition of I.M.'s anatomy prior to this incident; however, it is significant that the injuries observed immediately following the event are entirely consistent with Appellant's actions. By clear and convincing evidence, it has been shown that Appellant's actions caused a bump to raise on I.M.'s head, and red marks to appear around the boy's neck.

42. Appellant suggests that other adults also bear responsibility. I.M. was not in Appellant's class and Appellant had no direct responsibility to supervise I.M. During Appellant's 2009 neuropsychological evaluation, it was noted that Appellant was suddenly required to supervise and make a snap decision about a child who was not supposed to be in his area and was not supposed to be his responsibility, because another adult failed to supervise the child adequately.

43. Except in an emergency or when administering first aid, none of Appellant's colleagues could conceive of any circumstance in which they would ever pick up a child or place hands around a child's neck. Appellant agrees with the opinion of his colleagues, that it was unprofessional to pick up and release I.M. as Appellant did in January 2006.

Other allegations of temper or physical threats

44. Appellant's former co-workers, familiar with his demeanor and behavior in school settings or school functions, described him with adjectives like kind, soft spoken, positive, respectful, and patient. These adjectives were consistent with Appellant's demeanor during the hearing.

45. Appellant's current and former colleagues have not seen anything in his behavior to suggest physical violence, except for Principal Koulentes and Ms. Capetillo. Even Ms. Capetillo described Appellant with adjectives similar to those of her co-workers, but for her observations of an incident involving her own son in P.E. class, and the incident with I.M.

46. Ms. Capetillo's son was a student in Appellant's P.E. class. She recalls an occasion when she entered the gym, realized her son's class was in P.E., and stopped to observe for about one minute. She saw her son standing inside a circle of students who were throwing balls at him. She understood her son was being punished for some bad behavior, but she thought the punishment was humiliating and had potential for injury. However, she did not speak to Appellant or interrupt to stop the action.

47. Ms. Capetillo did complain the same day to Principal Koulentes, but never heard back from him regarding action taken as a result of her complaint.

48. OPP's decision to revoke Appellant's teaching certificate is based in part on finding that the incident with Ms. Capetillo's son was an example of Appellant's display of temper or physical aggression toward students. The District expects school principals to document, investigate, and recommend discipline in response to complaints of temper or physical aggression toward students. Principal Koulentes knew the District's policy and likely would have applied the policy if a teacher displayed temper or physical aggression toward a student. Since Principal Koulentes did not apply the policy to Appellant, it is likely that Principal Koulentes did not believe Appellant's actions warranted action at the time.

49. Principal Koulentes and Ms. Capetillo recall the gym class incident was sometime in 2005, but could not recall the month. Appellant asserted was not able to reply to the specifics of this allegations without reference to a date. Appellant denied any event as described by Ms. Capetillo occurred in his gym class, and Appellant also denied that Principal Koulentes spoke to him about such an event. Appellant disputes Principal Koulentes' memory of Appellant's admission that punishment consisting of throwing balls was meted out to Ms. Capetillo's son during gym class. However, at hearing Appellant described a specific day involving a specific gym class, the specific disobedient act of Ms. Capetillo's son (throwing balls at the heads of other students), and the exact number (three) and gender (female) of students who stood along a line and threw spongy balls at the son, while all other students were seated along the floor base lines. The Appellant's ability to recall in detail a memory of a single dodge ball class conducted at least four years ago is somewhat inconsistent with the claim that the Principal did not express concerns to Appellant about the very class which Appellant so clearly recalls.

50. Although Appellant's lack of recall is not credible, the evidence of the nature of the punishment itself is unclear. OPP has not proven Appellant personally threw balls at Ms. Capetillo's son. OPP has not proven that Appellant instructed students to throw balls at the son, as a form of punishment. OPP has not proven that Appellant punished Ms. Capetillo's son by looking the other way and failing to intervene when other students happened to throw balls at Ms. Capetillo's son.

Substitute Teacher Application

51. Appellant was immediately placed on paid administrative leave pending investigation of the incident with I.M. He received notice in February 2006 that the Yakima School District believed it had probable cause for discharge, based on the incident with I.M. as well as the November 2005 confrontation with Principal Koulentes. The notice informed Appellant of his right to appeal. Appellant did appeal.

52. On April 6, 2006, the Yakima County Prosecuting Attorney filed criminal charges against Appellant, accusing him of Second Degree Assault of I.M.

53. On April 26, 2006, with the advice and assistance of his attorney, Appellant and the Yakima School District entered into a Resignation, Settlement and Release Agreement, for the purpose of resolving any and all issues arising out of or related to the termination of employment of Appellant with the Yakima School District. Appellant voluntarily resigned effective April 1, 2006. The Agreement was a compromise settlement made without either party making any admission against interest.

54. On August 1, 2006, the Prosecuting Attorney moved for dismissal of the charges without prejudice, for the reason "victim unavailable." A judge granted the motion and the criminal charges were dismissed without prejudice. Appellant did not have a trial before a judge or jury. Appellant knew the case was dismissed because the victim was unavailable.

55. In September 2006, Appellant completed an application for employment with the Wapato School District. He certified that all the information he provided in the application was true and correct. The application contains an Employment History section. Appellant checked the box, "No", that he had not ever been dismissed, discharged, or non-renewed, or separated employment in order to avoid discipline or discharge. Somewhat inconsistently, he then added the following handwritten note:

Resigned at the advise (sic) of my lawyer. Judge found me innocent. She dismissed the case.

Exhibit 22, page 9 of 9.

56. Appellant explained that to his thinking, he had not signed the Resignation agreement to avoid discipline or discharge. He had grieved the discipline and termination. The specifics of the negotiations between the Appellant and the District, and the advice given by Appellant's lawyer, are not known.

57. Appellant is not an attorney, has no legal training, and is not familiar with the legal system. Appellant did not understand the meaning of dismissal "without prejudice". He did not seek advice from his attorney before completing the application form. Appellant does understand the meaning of words he himself uses. See Finding of Fact No. 78. Appellant understood dismissal meant the criminal matter was "over and done with". He knew that in court "you win or you don't" and he understood "it was over." The clear and convincing evidence is that Appellant wanted the Wapato School District officials to believe he had won the criminal case and that a judge had cleared him of any wrongdoing involving I.M.

Factors OPP considered in determining disciplinary sanction

58. OPP staff considered the eleven factors listed in WAC 181-86-080, to determine the appropriate level and range of discipline:

Factor 1. The incident involving I.M. was determined by OPP to be serious with potential for physical, emotional and mental harm to I.M.. However, other than the observations of school staff immediately following the January 2006 incident, OPP has no other knowledge of actual or potential harm to I.M.

Factor 2. Appellant's criminal history contains no convictions. The charge of Second Degree Assault of a Child (I.M) was dismissed because the witness was unavailable.

Factor 3. Appellant and the adult witnesses and participants each have substantial experience as educators, and each were mature adults, many over 50 years of age.

In comparison, I.M. was small in size and 5 or 6 years of age, and the other student witnesses and participants were probably not more than 12 years in age.

Factor 4. The events in November 2005 and January 2006 occurred in close proximity in time to the filing of a complaint against Appellant in February 2006 by the District.

Factor 5. Appellant's verbal interaction with Principal Koulentes and the incident with I.M. demonstrated disregard for the health, safety, and welfare of I.M. and of the students in the P.E. class.

Factor 6. Appellant's actions with I.M. and with Principal Koulentes demonstrated a behavioral problem, even considering that Principal Koulentes was also disciplined.

Factor 7. Appellant's actions demonstrated a lack of fitness, but the actions were already considered in Factor 6 above.

Factor 8. OPP was not aware of any other discipline imposed against Appellant.

Factor 9. OPP considered the act of holding the child's neck and the shaking of a young child to be aggravating factors. It considered as mitigating factors the many years Appellant was a successful teacher, and the good opinion of his character witnesses. An assistant superintendent with OPP favored a lower sanction than license revocation.

Factor 10. No other information to support character and fitness were considered, beyond the mitigating statements that support Appellant in Factor 9 above.

Factor 11. Other relevant information included the Appellant's statements on his employment application with Wapato School District, which OPP considered to be materially false.

Neurological history

59. Appellant did not inform OPP of his full medical history, and it was not a factor OPP considered when it determined that the disciplinary sanction should be revocation.

60. Appellant's last seizure was over ten years ago. His electroencephalogram (EEG) results were abnormal in the left parietal region in 1973 and 1978; however, in 2005, his EEG test was interpreted by his neurologist as normal, with no focal, diffuse, or generalized abnormalities seen. The neurologist had no plans to change the type or level of prescription medications since the treatment has proven successful and permitted Appellant to remain seizure-free.

61. The neurologist who treated Appellant since childhood retired. In March 2007, Appellant met with a new neurologist and reported events when he heard a sound and was aware of everything around him, but he was unable to respond verbally. These events had increased in frequency. The neurologist wondered if Appellant was experiencing auras, which might have increased due to the stress of the loss of his teaching job with the District. The examination of Appellant was otherwise normal, but for a difference in light touch sensation over the right side of Appellant's body compared to the left side, and decreased vibratory sensation on the right.

62. At an office visit in March 2009, the neurologist remarked on Appellant's own "sense of clumsiness" and felt the sense might date back to the original meningioma surgery. However, the neurologist did not observe any problems with Appellant's gait or evidence of clumsiness in the arms. Appellant continued to be seizure-free.

Psychological Evaluation

63. In May 2006, shortly after he resigned from the District, Appellant met with L. Paul Schneider, Ph.D., a clinical psychologist, for a psychological evaluation related to the pending criminal charges regarding the incident with I.M. Dr. Schneider administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), on which Appellant scored within normal limits on all scales, except the Paranoia Scale. Dr. Schneider opined that elevation would be considered normal and appropriate to the Appellant's situation.

64. Appellant told Dr. Schneider that when walking along a floor Appellant will trip on something, and look back and there is nothing there, which puzzled Appellant. Dr. Schneider found it interesting that Appellant "seemed to have difficulty grasping certain things and there was a demeanor about him that didn't feel normal." He found Appellant "spacy" at times, and wondered if Appellant had cognitive difficulties. Dr. Schneider posed these questions:

The big question that jumps out in my mind is could it be possible that this impulsive act that he did, which is apparently so out of character for him, has a direct connection to the brain tumor, surgery, epilepsy, and epilepsy medications that have been a part of his life for decades? Could there be functional limitations that are ongoing that can be measured by a neuropsychological assessment that could account for this apparent bump in his functioning? Could it be that some change in his treatment regimen for his epilepsy could limit or negate the possibility of any further future incidents of this type? Would he qualify under the Americans with Disabilities Act (ADA) as this being a medical condition that warrants treatment rather than punishment?"

Exhibit No. 55.

65. Dr. Schneider could not determine whether Appellant had any functional limitations and impacts from the seizure disorder or its treatment. He recommended a neuropsychological assessment by Dr. Jane Kucera Thompson, Ph.D., a clinical neuropsychologist.

Neuropsychological Evaluation

66. On July 13 and 16, 2009, Appellant was evaluated by neuropsychologist Jane Kucera Thompson, Ph.D. She understood he was referred by his neurologist and his lawyer with the request to answer the question of whether he was fit to continue teaching.

67. Dr. Kucera Thompson's field of expertise includes study, research, internships, and fellowships on patients presenting problems of closed head and traumatic brain injury, strokes, and seizure disorders. However, this referral was the first of its kind as she is accustomed to referrals from Labor & Industries for patients seeking plans and treatment for rehabilitation.

68. Dr. Kucera Thompson's observations of Appellant's behavior during the evaluation process were consistent with his behavior during several days of hearing. Appellant's grooming was good, his gait was normal. His affect was flat, although he smiled occasionally. In general, he appeared to be a very mild-mannered person. His speech and language were remarkable for a very soft voice, making him hard to hear at times. He had notable problems pronouncing words, and he made errors in what he said compared to what he intended (like thaurus / thesaurus, rememery / remember). He also was remarkable for verbalizing his way through all tasks, including subvocalizing while he was reading, testing, or describing events during his testimony.

69. Dr. Kucera Thompson administered over 26 tests to Appellant, and interpreted results in multiple categories: intellectual skills; attention and concentration; basic motor control; basic perceptual functioning; visual reasoning skills; speech / language; executive functions; memory; academic skills; social / emotional. Most tests produced objective measures. The personality tests suggested personality profiles, patterns, or endorsements.

70. Intellectual Skills. Appellant's intelligence tested at the lower end of the average range. Because of cultural differences, African-American individuals typically score lower on standardized tests of intelligence than the normative population, which tends to be primarily Caucasian. Dr. Kucera Thompson opined that Appellant's scores were unexpected given that he has completed 18 years of education.

71. Attention and Concentration. Appellant's auditory attention span tested borderline, and visual attention span was low average. Further issues with diminished attention span were seen when a test involving attention span, working memory, and

sequencing was performed by Appellant, producing low average results. Appellant revealed slowness of information processing speed.

72. Basic Motor Control. Appellant's performance of a finger-to-nose oscillation pattern and problems closing in on the target finger was reminiscent of very mild ataxia. Appellant's higher-order balance was assessed. He showed a deficit when deprived of visual input. Appellant's manual motor skills were assessed. Appellant reported arthritis in both hands, and he had some difficulty with the tests. Grip strength in the right hand was low average and was severely impaired with the left hand. Appellant's fine motor speed was in the superior range with the right hand, and the very superior range with the left hand. His fine motor dexterity under visual guidance tested average with both hands.

73. Basic Perceptual Functioning. Appellant's performance was abnormal for both hands for assessment of graphesthesia (sense to recognize numbers written on fingertips). Appellant's constructional drawings were positive for mild construction dyspraxia (his drawings showed a paucity of detail and mistaken placement of details, with performance in the low average range). He showed intact judgment for line orientations with performance in the high average range.

74. Visual Reasoning Skills. Appellant's visual testing showed strengths in visual perception and abstract reasoning, but weaknesses in visual attention, visual analysis, and constructional skills.

75. Speech / Language. A brief aphasia test given Appellant was positive for construction dyspraxia, central dysarthria, and dysnomia (Appellant called a triangle shape a diamond, rectangle, and pyramid before he finally arrived at the word triangle; had difficulty performing mental arithmetic, but was able to perform simple arithmetic accurately on paper). However, this statement is contradicted at the end of the same paragraph, when Dr. Kucera Thompson reports mental arithmetic is a relative strength seen in Appellant, on which he tested high average. Appellant's verbal fluency when given a semantic (category) cue was average, but fluency given a phonemic (letter) cue was low average. Dr. Kucera Thompson noted categorical fluency relates most closely to left temporal lobe functioning, while letter fluency is more strongly related to frontal lobe functioning. Appellant tested average for fund of information and fund of vocabulary. These two tests are considered to be "hold" tests, relatively impervious to the effects of brain injury or other brain disease. They are thought to be reliable indicators of long-term learning and memory, as well as premorbid intelligence. Thus, Appellant's scores on these tests support the contention that he has always been of average intelligence. Appellant's abstract verbal reasoning and verbal social reasoning tested in the low average range.

76. Executive Functions. Appellant was tested on response inhibition, multitasking and divided attention, forming and maintaining mental response sets, cognitive flexibility,

categorical reasoning, and abstract problem solving. His scores on two tests may tend to underestimate his true abilities because behavioral issues affected his test performance (complained about his bifocals; paused to apologize after every error). While Appellant obtained lower scores on some tests of executive functions, most of these were due to problems with speed of performance rather than accuracy. Appellant did not present as an individual with an abnormal or dysexecutive syndrome.

77. Memory. Appellant was tested for both visuographic learning and memory, and auditory verbal learning and memory. He demonstrated 85.7 percent retention for the information he had learned, which was in the average range of performance, although he showed poor consolidation of visuographic information into memory over time. He showed intact consolidation for pure memory, a superior rate of retention. Appellant showed excellent consolidation of discrete auditory information into long-term memory. He showed intact learning and memory for auditory-verbal information, despite his initial feeling that he would not be able to learn and remember a list of words.

78. Academic Skills. During the assessment of academic skills using selected subtests from the Woodcock-Johnson-III Tests of Achievement, Appellant appeared to have difficulty comprehending and understanding test instructions. Dr. Kucera Thompson decided to give Appellant the Understanding Directions subtest. When compared to other individuals who have completed 18 years of education, Appellant's performance placed him in the severely impaired range (< 1st percentile). His performance was equivalent to that of a child who is about eight years old or in the second grade. Appellant had tremendous difficulty understanding directions that contained multiple steps, if/ then phrases, and lengthy clauses. Compared to other people with Masters degrees, Appellant's spelling tested in the low average range (21st percentile) or equivalent to a 12.9 grade level, his single-word decoding was in the low average range (17th percentile) and equivalent to a 9.8 grade level, and reading comprehension tested in the average range (29th percentile) and equivalent to an 11.3 grade level. Appellant's strongest performance in academic skills was in written math, testing in the average range (39th percentile) at the 12.9 grade level. Appellant's scores suggested to Dr. Kucera Thompson that his reading decoding and comprehension have always been areas of weakness. However, she was of the opinion that Appellant understands words which he, himself, chooses or selects to use.

79. Dr. Kucera Thompson had read the Resignation agreement, including terms which paid salary and benefits to Appellant through August 31, 2006, that Appellant relied on the advice of his attorney, that the terms had been completely read and explained to Appellant by his attorney, and he acknowledged at the time he fully understood and voluntarily accepted the terms. Her examination of the agreement revealed its readability was very poor (scoring 17.9 out of a scale of 100 on a reading ease index). She rated the agreement at grade level 12.0. Nevertheless, she ended the Academic Skills section with this sentence:

Reading skills at this level would also raise the question of whether Mr. Richardson was able to adequately read and comprehend the legal agreement that he was forced to sign resigning his job, since his reading levels are below the level of difficulty presented by that document.

Exhibit 57, page 12. Even if the agreement had poor readability, Appellant's reading comprehension tested at an 11.3 grade level, and he also had the advice of his lawyer to review and explain the agreement. There is no evidence that Appellant was forced to sign the agreement. Dr. Kucera Thompson's statement quoted above is not based on fact and indicates somewhat less than full objectivity.

80. Social/Emotional. Dr. Kucera Thompson determined Appellant does not have a true personality disorder, although the two personality profiles she administered in 2009 (the MMPI-2, and the Millon Clinical Multiaxial Inventory-III [MCMI-III]), produced results different than Dr. Schneider's MMPI-2 test in 2006. Relevant to the issue of disciplinary sanctions, Dr. Kucera Thompson interpreted Appellant's overall personality profile to suggest:

- a) that he tends to be a person who may be uninsightful and may deny or rationalize problems;
- b) that he views himself as normal, responsible, and without faults;
- c) that his anger is normally controlled and not openly expressed;
- d) that he tends to become resentful towards those who do not show him enough support;
- e) that he may carry deep resentments about the way he has been treated;
- f) that he may have his anger provoked when he feels that others are not supporting him sufficiently; and,
- g) that he may feel others misunderstand him and do not appreciate him, thus he tries to erect defenses against anticipated ridicule or contempt.

81. The personality tests revealed no significant elevations on the personality scales that are typically connected with violent, cruel, or angry outbursts directed at others. Dr. Kucera Thompson interpreted Appellant's pattern of endorsements to suggest that he is more likely to withdraw from conflict rather than be involved in instigating or perpetuating conflict. Such a pattern is inconsistent with the decision Appellant said he made during the 2005 interaction with Principal Koulentes, to turn and confront a charging Principal Koulentes and face him eye-to-eye. Such a decision may be more consistent with the 2006 personality test results with Dr. Schneider, which except for the Paranoia scale determined that Appellant's patterns were within normal range on all scales.

82. Diagnostic Impressions. Dr. Kucera Thompson diagnosed Appellant with a Cognitive Disorder due to Meningioma with Craniotomy Surgery and Seizure Disorder (294.9), and a Depressive Disorder Not Otherwise Specified (NOS) (311).

83. Summary. Dr. Kucera Thompson concluded that Appellant presents with cognitive strengths in a number of areas, including visual perception and integration, abstract visual reasoning, pure visual recognition memory, language skills of semantic fluency, vocabulary, fund of information development, mental arithmetic, executive functions, auditory-verbal learning and memory, fine motor speed and dexterity, and motor patterning. She concluded that Appellant's areas of weakness included diminished fingertip sensation, confrontation naming, phonemic fluency, processing speed, attention to visual detail, visuoconstructional skills, visuographic learning and memory, both auditory and visual attention spans, abstract verbal reasoning, verbal social reasoning, grip strength, higher-order balance, and motor skills such as accurate reaching and finger movement patterns.

84. Appellant's anti-seizure medications are currently Depakote and Dilantin. Dr. Kucera Thompson opined that some of Appellant's difficulties with accurately reaching toward a target may be related to long-term use of Depakote. High levels of Depakote can lead to diminished concentration and decision-making speech (although the levels of blood concentrations of Depakote at the time of this evaluation were not known). Dilantin can cause difficulties with balance, with categorical decision-making, increased reaction time, problems with visual learning and recall, and diminished visual scanning under distraction. Individuals taking Dilantin have been shown to have diminished scores on a test of response inhibition and on a trailmaking test involving multitasking and divided attention. Dr. Kucera Thompson opined that "it is entirely possible that many of the weaknesses seen in Mr Richardson's testing profile could be caused by or exacerbated by the medications he must take to control his seizures." Exhibit 57, page 15.

85. Dr. Kucera Thompson was of the opinion that the test results suggested it is plausible that Appellant lost his balance when he reached for I.M., since his balance is poor especially when his vision is directed someplace other than keeping him upright. Appellant's difficulties with accurately reaching towards a target make it possible he might have reached for some other part of I.M.'s anatomy but his hands landed on the child's neck instead. She also expected I.M.'s disrespect, disobedience, and throwing or kicking the ball would stress Appellant. She considered that Appellant's slow rate of information processing and decision-making, and the need to instantaneously evaluate I.M.'s behavior and safety would have added another major stressor. These factors alone may not have caused Appellant to snap and become angry enough to chase and injure a child. However, Dr. Kucera Thompson thought these factors working together with Appellant's bad balance, problems localizing objects in space, slightly ataxic reaching, poor visual processing, and poor attention to visual details, could overload Appellant, who was already stressed, to create the situation seen in the incident with I.M.

86. Dr. Kucera Thompson described the incident with I.M. as extremely unfortunate, but opined that it did not appear to be a habitual behavior pattern for Mr. Richardson. She found no personality testing that indicated any personality issue for Appellant that would lead

to violent outbursts against somebody else. She concluded the injury to I.M. to be an isolated incident that was unlikely to be repeated. This assessment is questionable and given less weight because it is inconsistent with Dr. Kucera Thompson's recommendations.

87. Recommendations. Dr. Kucera Thompson made five recommendations.

a) Appellant would qualify for accommodations under the Americans with Disabilities Act (ADA), to avoid total system overload due to Appellant's numerous cognitive issues. She advised a paraprofessional or teacher's aide be provided to Appellant to be responsible for student behavior and safety. Appellant could focus on teaching and demonstrating skills and monitoring student progress and acquisition of skills.

b) Appellant might do better teaching special education, as opposed to physical education. Dr. Kucera Thompson believed a special education class setting would be less stress on Appellant's relatively weak balance and motor skills and require less need to protect his head. She believed there would be less chance Appellant would become alarmed or angry if projectiles were aimed at him.

c) Appellant might benefit from a course of anger management therapy to help him learn how to defuse feelings of tension before they erupt into verbal or physical outbursts aimed at another person. Appellant presents as an individual who tends to bottle up his feelings and keep them inside, which pattern sometimes can lead to anger outbursts.

d) School personnel working with Appellant should be aware Appellant has difficulty comprehending verbal language. They should keep their instructions, comments, criticisms, and directions short, simple, and clear. She thought it possible that Principal Koulentes' demands were not being communicated clearly and plainly enough that Appellant could fully understand what was being asked, which may have contributed to confrontations between them.

e) Ideally, documents which Appellant is asked to sign should be written at ninth-grade reading level or lower.

88. Dr. Kucera Thompson's recommendations are puzzling because they are inconsistent with her report and lack a factual basis:

a) Each of the first three Recommendations (a, b, and c, above) identify a concern or limitation relevant to expressions of anger by Appellant. These recommendations are puzzling because they are inconsistent with Dr. Kucera Thompson's description of the event with I.M. as an isolated one unlikely to be repeated, and that she found no

personality issue for Appellant that would lead to violent outbursts against somebody else. Also, she opined he profiled as someone not likely to initiate conflict.

b) The factual basis for the second Recommendation (b, above), to return to teaching special education, is not known. There is no evidence that Dr. Kucera Thompson has any knowledge or expertise regarding the working conditions expected of special education teachers, the instructional and behavioral needs of special education students, or of the special education classroom or resource room environment.

c) Regarding the fourth Recommendation (d, above), the factual basis is unclear. If Appellant has difficulty communicating with colleagues, he did not describe those difficulties at hearing and none of his colleagues reported a communication problem. He was embarrassed to communicate to Principal Koulentes the reasons Appellant did not want to immediately remove the bandana. However, Appellant clearly understood that Principal Koulentes wanted Appellant to remove the bandana and to move their conversation to the privacy of Appellant's office. The evidence does not support a finding that the confrontation could have been avoided if only Appellant had not misunderstood these two requests.

d) The last Recommendation (e, above) describing Appellant's ideal reading level as ninth-grade or lower is somewhat surprising, even considering Appellant's test for single-word decoding (equivalent to 9.8 grade level), and his difficulty understanding directions. Considering Appellant earned a Masters Degree, his spelling tested equivalent to a 12.9 grade level, and his reading comprehension tested equivalent to an 11.3 grade level, Dr. Kucera Thompson may have been overly cautious in her recommendation.

CONCLUSIONS OF LAW

Jurisdiction

1. The Washington Professional Education Standards Board has the authority to develop regulations determining eligibility for, and certification of, personnel employed in the common schools of Washington pursuant to Revised Code of Washington (RCW) 28A.410.010. OSPI administers these regulations, with the power to issue, suspend, and revoke education certificates. RCW 28A.410.010. OSPI has granted jurisdiction to OAH to hear appeals of actions to suspend education certificates. Washington Administrative Code (WAC) 180-86-170.

2. Pursuant to RCW 28A.410.090, OSPI may revoke or suspend any professional educator certificate it grants "based upon a . . . complaint of any school district superintendent . . . for immorality, violation of written contract, unprofessional conduct, intemperance, or crime against the law of the State."

Burden of Proof

3. The burden of proof in a suspension or revocation hearing lies with OSPI. WAC 181-86-170 and -075. OSPI "must prove through 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.*

4. Clear and convincing evidence requires more than a mere preponderance of the evidence. *Nguyen v. State Dep't of Health Med. Qyal. Assurance Comm'n*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001).

Unprofessional Conduct

5. The falsification or deliberate misrepresentation of a material fact by a teacher may be an act of unprofessional conduct. WAC 181-87-050 provides in part:

Any falsification or deliberate misrepresentation, including omission, of a material fact by an education practitioner concerning any of the following is an act of unprofessional conduct:

- (1) Statement of professional qualifications.
- (2) Application or recommendation for professional employment, promotion, certification, or an endorsement.

6. A statement that a judge found one innocent demonstrates a lack of understanding of the criminal justice system. If the State fails to prove the crime beyond a reasonable doubt, the individual charged with the crime is found not guilty. A verdict of not guilty is not equivalent to being found innocent. To determine what Appellant meant when he wrote that a judge found him innocent, it is appropriate to consider whether Appellant's own description is consistent with the ordinary meaning of the term. The term "innocent" is defined in *Webster's Seventh New Collegiate Dictionary* (1972) as "free from guilt or sin, especially through lack of knowledge of evil; blameless; harmless in effect or intention; candid; free from legal guilt or fault." *Bartlett's Roget's Thesaurus* (1996) lists words of similar meaning. Under "declare innocent", *Bartlett's* lists to find not guilty, clear, acquit, exonerate. "Acquit" lists innocent, cleared, in the clear, unpunished, let off, let off the hook, released.

7. It is also appropriate to consider the entire selection of words used by the Appellant when he completed the Employment History section of the employment application. It is reasonable to expect that any combination of words on an employment application which references lawyers, judges, resignation, and a case being dismissed, would be the proverbial red flag to a potential employer.

8. The dismissal of the criminal charges did mean Appellant was free from legal guilt or fault. His understanding that he won is consistent with being in the clear, unpunished, let off the hook. Therefore, it is concluded that OPP has not met its burden. It has not proved by clear and convincing evidence that the Appellant falsified or deliberately misrepresented a material fact on his application for professional employment with the Wapato School District.

9. Pursuant to WAC 181-87-060:

Any performance of professional practice in flagrant disregard or clear abandonment of generally recognized professional standards in the course of certain specified 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.

10. The terms "flagrant disregard" and "clear abandonment" are not defined by the regulations. According to *Hunter v. UW*, 101 Wn. App. 283, 290-291 (2000), "If a term is not statutorily defined, the term is given its ordinary or common law meaning." In determining the ordinary meaning of a word or a term, a court may use a dictionary. *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994).

11. Flagrant is defined by *Webster's* as "extremely or purposefully conspicuous; glaring; notorious; shocking. "Disregard" is defined in the same dictionary as "to pay no attention to; to treat as unworthy of regard or notice." "Abandon" means "to forsake, desert."

12. OSPI did not prove its allegation that Appellant had a history (pre-January 2006) of display of temper and physical aggression toward both students and staff. OSPI did not prove that Appellant's behavior during November 18, 2005 incident with Principal Koulentes, while highly improper, met the "flagrant disregard" or "clear abandonment" standards of the regulations. The allegation of punishment or physical aggression toward Ms. Capetillo's son during a 2005 P.E. class were not proved by OSPI.

13. OSPI did prove by clear and convincing evidence that in the course of instruction or supervision by Appellant, a kindergarten student, I.M., suffered injury at the hands of Appellant in January 2006, within sight and hearing of other elementary students, teachers or other colleagues. Appellant knowingly maintained his hands in a grip around I.M.'s neck and shook I.M. for several seconds, and knowingly released his grip and allowed I.M.'s body to fall to the ground, causing injury to I.M., in flagrant disregard and clear abandonment of generally recognized professional standards.

Good Moral Character and Personal Fitness

14. The definition of good moral character and personal fitness is set forth in WAC 181-86-013:

As used in this chapter, the terms "good moral character and personal fitness" means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:

- (1) No conviction of any felony crime . . .
- (2) No conviction of any crime within the last ten years . . .
- (3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

15. WAC 181-86-014 provides the requirement of good moral character and personal fitness is an ongoing one:

The good moral character and personal fitness requirement of applicants for certification under the laws of the state of Washington is a continuing requirement for holding a professional educational certificate under regulations of the professional educator standards board.

16. The Appellant argued pre- and post-hearing that he has not been diagnosed with a personality disorder or behavioral disorder. To the extent he argues that WAC 181-86-014 requires proof of a medically diagnosed personality disorder or behavioral disorder in order to find a behavioral problem under the rule, Appellant provided no legal authority to support his position. It is concluded the regulation does not require that an educator have a medical diagnosis of a personality disorder or of a behavioral disorder in order to find the educator has a behavioral problem which within the meaning of the rule.

17. The term "behavioral problem" is not defined by the regulations. The *Webster's* definition of "behavior" is "the manner of conducting oneself, to behave with manners." "Problem" is defined as "a doubtful or difficult matter requiring a solution, or raising inquiry or doubt dealing with human conduct or social relationships, difficult to deal with."

18. The January 2006 incident involving I.M. is clear and convincing evidence that Appellant has a behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting. In reaching this conclusion, weight was given to the evidence of Appellant's repeated pattern of changing his

explanations over time to rationalize his actions or avoid responsibility. His conduct toward I.M. and his changing explanations are indeed behaviors which are hard to understand.

19. The evidence of the November 18, 2005 incident between Appellant and Principal Koulentes alone does not meet the clear and convincing standard and is not evidence of a behavioral problem within the meaning of the regulation. However, when Appellant's reactions to that situation are considered together with the I.M. incident, there is clear and convincing evidence that Appellant demonstrated a behavioral problem of overreacting defensively and aggressively to perceived challenges from others.

20. The evidence that Appellant tended to blame others and changed his explanations over time, are together evidence of lack of good moral character and lack of personal fitness to teach. They demonstrate a behavioral problem which endangers student educational welfare. Being untruthful and engaging in deceptiveness are not behaviors left at the classroom door. These same qualities also endanger others' physical safety, as shown in Appellant's aggressive actions in the situations involving Principal Koulentes and I.M.

Grounds for Suspension or Revocation

21. The grounds for issuance of a suspension order by OSPI relevant to these facts are set forth in WAC 181-86-070(2) and (3):

(2) 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.

(3) The certificate holder lacks personal fitness but the superintendent of public instruction has determined the deficiency is correctable through remedial action 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 which states condition precedent to resuming professional practice and which also may state certain conditions subsequent to resuming practice.

22. The grounds for issuance of a revocation order by OSPI relevant to these facts are set forth in WAC 181-86-075(2):

The certificate holder has not committed a felony crime under WAC 181-86-013(1) but the superintendent of public instruction has determined the certificate holder has committed an act of unprofessional conduct or lacks good moral character or personal fitness and revocation is appropriate.

23. The imposition of a sanction/disciplinary order requires consideration of eleven factors, in order to determine the appropriate level and range of discipline prior to issuance of the discipline:

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.

Factors Considered in Determining Disciplinary Sanction of Appellant

24. The evidence supports consideration of these factors:

Factor 1. The incident involving I.M. was very serious with actual physical harm to I.M., potential for emotional and mental harm to I.M. and potential for physical, emotional, and mental harm to other students and colleagues. However, the duration of any bruising or other harm suffered by I.M. is unknown. There is only slight evidence of

emotional reaction to the incident with I.M. by the fifth grade class present in the gym, and no evidence of actual harm.

Factor 2. Appellant's criminal history contains no convictions. The charge of Second Degree Assault of a Child (I.M) was dismissed because the witness was unavailable.

Factor 3. Appellant and the adult colleagues each have substantial experience as educators, and each were mature adults. In comparison, I.M. was small in size and 5 or 6 years of age, and the fifth grade students present were probably not more than 12 years in age.

Factor 4. The November 2005 and January 2006 events were close in proximity in time to the filing of the complaint by the District in February 2006 against Appellant, but nearly three years before OPP's issuance of the Final Order of Revocation, and four years before the writing of this order.

Factor 5. The incident with I.M. demonstrated Appellant's disregard for the health, safety, and welfare of I.M. and of the fifth grade students, as well as of the adults present.

Factor 6. Appellant's actions with I.M. and Principal Koulentes demonstrated a behavioral problem. That Appellant tended to blame others, and changed his explanations over time, together also demonstrate a behavioral problem.

Factor 7. Appellant's actions also demonstrated a lack of fitness, but the same actions were already considered in Factor 6 above.

Factor 8. The District disciplined Appellant regarding the November 18, 2005, interaction with Principal Koulentes, which Appellant initially grieved. The District denied the grievance and Appellant did not further appeal.

Factor 9. The aggravating factors include: the touching of a student here involved the child's neck and the shaking of the child; the failure to lower the student's body down to the gym floor; the act of releasing the student in a manner which let the boy's body fall hard on the gym floor; Appellant's repeated pattern of changing his story or explanation of events. The mitigating factors include: the many years Appellant was a successful teacher; the good opinion of his character witnesses; that an assistant superintendent with OPP favored a lower sanction than license revocation; that another school district (Union Gap) has seen fit to hire Appellant as a substitute teacher.

Factor 10. No other information to support character and fitness was considered, beyond the mitigating statements of support for Appellant in Factor 9 above.

Factor 11. Other relevant information includes: the Appellant has a Cognitive Disorder due to Meningioma with Craniotomy Surgery and Seizure Disorder, and a Depressive Disorder Not Otherwise Specified (NOS); that many of the weaknesses seen in Appellant's testing profile could be caused by or exacerbated by the medications he must take to control his seizures.

25. When a teacher like Appellant has committed acts of unprofessional conduct and lacks good moral character, there are two determinations which must be made in deciding whether suspension of certification is the proper sanction. First, it must be determined that suspension will probably deter subsequent unprofessional or other conduct by Appellant which evidences lack of good moral character or personal fitness. Second, it must be determined that 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. WAC 181-86-070(2).

26. OSPI recommended revocation as the proper sanction, but it has not proved all the factual allegations listed in its Final Order. The allegations not proved were the less egregious of its allegations. If its recommendation is rejected, OSPI urged that Appellant's certification be suspended for three years. If a suspension is ordered, Appellant asks that the sanction be applied retroactively. The Appellant offers no legal authority for this position and it is concluded that if the appropriate level of sanction is determined to be suspension, the sanction will be effective with entry of the order.

27. In *Patterson v. Public Instruction*, 76 Wn.App. 666, 887 P.2d 411, 416 (1994), the appellate court considered the appeal of an 18-month suspension, based on findings that a teacher failed to list prior employment on an application for professional employment, and removed his own job application file without authorization. *Patterson* held that falsification of an application for professional employment constituted unprofessional conduct. The falsification of the application, as well as the removal of the job application file without authorization, were both evidence of lack of personal fitness for teaching and the 18-month suspension was affirmed. The Appellant's conduct in this case was of a significantly more serious nature and therefore warrants greater sanction than in *Patterson*. Appellant's conduct involved serious physical aggression in one instance, and was done in the presence of students in two instances. Neither of these factors was present in *Patterson*.

Suspension as deterrent

28. The Appellant's actions in November 2005 and January 2006 were seemingly out of character and not consistent with his prior behavior as a teacher. Appellant's actions were certainly inconsistent with his appearance, manner, and behavior at hearing. Educators, medical professionals, OSPI, and the undersigned have attempted to explain the inconceivable: how an experienced, seemingly mild mannered, kind, soft-spoken teacher

could wrap his fingers around the neck of a kindergarten student, lift and hold the student's body in mid-air while shaking the student, then release his grip and let the student fall to the floor, causing injury to the student. Appellant's behavior was not explained by the fact he has a seizure disorder, as it was controlled by medication. Appellant's behavior was not explained by other medical diagnosis. He does not have a personality disorder or behavioral disorder. Appellant was diagnosed with a cognitive disorder and with depression, but neither diagnosis explained his behavior. A comparison of the 2006 and 2009 assessments of Appellant's personality profile showed his personality profile, patterns, and endorsements have changed, but not for the better. In May 2006, nearer in time to these events, he tested within normal ranges on all personality scales except for the Paranoia scale (which was understandable given his recent resignation and the still-pending criminal charges). By 2009, however, Appellant tested outside normal ranges on most of the personality scales although he was determined not to have a true personality disorder.

29. To Appellant, the incident with I.M. was described as an accident, and he continued to blame others whom he believed should have been responsible to supervise I.M. His statements about both the incident with Principal Koulentes and the incident with I.M. have changed over time. The neuropsychologist recommended that Appellant would benefit from anger management therapy. However, four years have passed since the complaint was filed, and Appellant does not acknowledge having any anger issues.

30. The evidence does not explain how an experienced teacher behaved as Appellant behaved in November 2005 and January 2006. It is not necessary or proper to speculate about the reasons why Appellant behaved as he did. It is sufficient to consider the behaviors and then determine whether a suspension would serve to probably deter repetition if Appellant returned to teaching in the future. The evidence does not support a conclusion that Appellant would be deterred from repeating unprofessional conduct through anger management therapy. The evidence does not support a conclusion that a suspension would probably deter Appellant from subsequent acts of unprofessional or other conduct which evidences lack of good moral character or personal fitness.

State interests adequately served by suspension

31. The neuropsychological assessment was thorough, but did not provide a satisfying answer to the question of whether Appellant is fit to continue teaching. Appellant's two diagnosed conditions were not shown to have significantly contributed to his actions at issue here. The issue here is not whether Appellant's future employers must provide reasonable accommodations under the ADA. The issue is his fitness to teach. The recommendations that Appellant not work alone with students, and that another employee be present in Appellant's classroom to be responsible for the students' behavior and safety, raise serious doubt about Appellant's ability to teach. The ability to be responsible for students' behavior and safety is a key expectation of education professionals.

32. The evidence did not establish that Appellant was willing to participate in anger management therapy. The evidence did not establish that Appellant has adequate insight into the behaviors at issue here.

33. The Appellant's long history of successful teaching is not discounted. However, the weight one would ordinarily give to that factor is significantly diminished by the very serious and shocking nature of the incident with I.M., and the potentially serious nature of the incident with Principal Koulentes.

34. The evidence does not support a determination that 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. WAC 181-86-070(2).

Revocation

35. The Appellant has committed acts of unprofessional conduct and lacks good moral character or personal fitness. It has not been determined that a suspension as applied to Appellant will probably deter subsequent unprofessional or other conduct which evidences lack of good moral character or personal fitness by him. The interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons are not believed to be adequately served by a suspension. Revocation is appropriate. WAC 181-86-075(2).

Order

Larry Richardson's Certification No. 228137F is revoked.

Dated at Yakima, Washington on January 26, 2010.



Jonnette Sullivan
Administrative Law Judge
Office of Administrative Hearings

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 her 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.

Please note: in the event this decision is to reprimand, suspend or revoke, pursuant to WAC 180-86-150, this order takes effect upon the signing of this final order. No stay of reprimand, suspension or revocation shall exist until such time as the Appellant files an appeal in a timely manner pursuant to WAC 180-86-155.

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. B Thomas

Via Certified Mail

Larry Richardson


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Janice E. Shave, ALJ, OAH/OSPI Caseload Coordinator