

Supreme Ct. No. _____

Ct. App. No. 75406-8-I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

Christal Fields, an individual,

Appellant/Petitioner,

v.

State of Washington Department of Early Learning,

Respondent.

PETITION FOR REVIEW

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STATE OF WASHINGTON
2017 SEP 20 PM 4:05

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER AND OPINION BELOW1

II. ISSUES PRESENTED FOR REVIEW2

III. STATEMENT OF THE CASE.....2

 A. Ms. Fields’ individual circumstances are rendered irrelevant by DEL’s lifetime ban and demonstrate the constitutional violation warranting review.2

IV. ARGUMENT5

 A. This Court should accept review because lifetime bans from state-licensed employment are an issue of first impression in Washington and present a significant question of law under the federal and state constitutions, and Pennsylvania has already found them unconstitutional.5

 B. Both procedural and substantive due process are violated by DEL’s automatic, lifetime disqualification. There is no rational relationship between child safety now and an attempted robbery committed thirty years ago and DEL’s ban prevents consideration of individualized circumstances and reduced risk through rehabilitation. This case presents a significant question of law because there is little guidance for agencies and lower courts for how to evaluate the constitutionality of DEL’s 50-crime lifetime ban or similar lists.7

 C. Automatic lifetime disqualification from working in childcare is an issue of substantial public importance because it militates against Washington’s firm public policy in support of rehabilitation and reentry into society.12

 D. This petition also presents an issue of substantial public importance because lifetime bans disproportionately affect women and persons of color without achieving a rational benefit to the public.13

E. This Court should determine whether Washington’s constitution provides a basis for due process and equal protection claims in this context.14

V. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Amunrud v. Bd. of Appeals, 158 Wn. 2d 208 (2006)	5, 10
Barry v. Barchi, 443 U.S. 55 (1979).....	5
Butchers' Union Slaughter–House & Live–Stock Landing Co. v. Crescent City Live–Stock Landing & Slaughter–House Co., 111 U.S. 746 (1884).....	9
Cornwell v. California Bd. of Barbering & Cosmetology, 962 F. Supp. 1260 (S.D. Cal. 1997).....	5, 9
Dittman v. California, 191 F.3d 1020 (9th Cir.1999)	5
Fed. Deposit Ins. Corp. v. Henderson, 940 F.2d 465 (9th Cir. 1991)	10
Grant Cty. Fire Prof. Dist., No. 5 v. City of Moses Lake, 150 Wn.2d 791 (2004).....	14
Hanson v. Hutt, 83 Wn.2d 195 (1973).....	15
In re Kindschi, 52 Wn.2d 8 (1958).....	8
Madison v. State, 161 Wn.2d 85 (2007).....	14, 15
Mathews v. Eldridge, 424 U.S. 319 (1976).....	10
Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n, 144 Wn. 2d 516 (2001).....	5
Peake v. Com., No. 216 M.D. 2015, 2015 WL 9488235 (Pa. Commw. Ct. Dec. 30, 2015).....	6
State ex rel. Faulk v. CSG Job Ctr., 117 Wn. 2d 493 (1991).....	9

State v. Bartholomew, 101 Wn.2d 631 (1984).....	14
State v. Gunwall, 106 Wn.2d 54 (1986).....	14
Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz., 24 F.3d 56 (9th Cir. 1994)	7, 9, 10
Statutes	
RCW 9.96A.010.....	13, 15
Rules	
RAP 13.4(b)(3-4).....	5

I. IDENTITY OF PETITIONER AND OPINION BELOW

Petitioner Christal Fields is an African-American woman who was convicted of attempted robbery nearly 30 years ago, has subsequently engaged in significant rehabilitation including graduating from the drug court program a decade ago, and has been successfully employed in the field of caregiving for elders and children for a decade. Despite having the support of her employer, the state Department of Early Learning (DEL) disqualified her from work in that field because her 1988 offense is on DEL's lifetime-ban list of disqualifying crimes. Having a conviction on that list is an automatic lifetime bar to working in childcare, and the process allows no individualized consideration of the nature of the offense, the amount of time elapsed since it, or subsequent rehabilitation and work experience reducing any risk to vulnerable persons. Pursuant to RAP 13.4(b)(3) and (4), she asks this Court to accept review of the August 21, 2017 unpublished opinion of the Court of Appeals which affirmed the revocation of her license.

Significant questions of constitutional law and issues of public importance are presented by this case. The constitutionality of lists of crimes like DEL's – a long list of convictions triggering an automatic lifetime ban from entire fields of employment – is a question of first impression in Washington, but the Pennsylvania Supreme Court has recently ruled that they violate Pennsylvania's constitution. The issue of whether the federal or Washington's Constitution also protects against

such lifetime bans is a significant question of constitutional law that should be resolved by this Court to provide guidance to DEL and agencies like it, and to grant Ms. Fields the relief the Constitution requires.

II. ISSUES PRESENTED FOR REVIEW

- A. **This Court accepts review if a case presents a significant question of law under the constitution of Washington or the United States. The constitutionality of lifetime bans on employment based on criminal history, without any consideration of individual circumstances, is a question of first impression under both constitutions. Should this Court accept review?**
- B. **This Court accepts review if the petition involves an issue of substantial public interest. DEL's lifetime ban for certain offenses without consideration of individual circumstances has no rational relationship to child safety, and disproportionately affects women and people of color. Should this Court accept review?**

III. STATEMENT OF THE CASE

- A. **Ms. Fields' individual circumstances are rendered irrelevant by DEL's lifetime ban and demonstrate the constitutional violation warranting review.**

Ms. Fields grew up in a dysfunctional family home. By the age of 14, she was living with her father and a succession of her father's sexual partners. (CP 66.) Drug abuse was rampant in the house. *Id.* At age 16, she found herself homeless, and turned to a series of male partners who gave Ms. Fields drugs and demanded she prostitute herself. *Id.* For years, she was lost to that world: she has a string of prostitution and drug arrests, with an occasional misdemeanor assault or property crime. *Id.* In one

isolated instance in 1988, she participated in an attempted robbery for which she has fully paid her debt to society.

King County's drug court program turned her life around. (CP 66.) She has been clean and sober since 2006, and maintains her sobriety and drug-free life by regular participation in NA. *Id.* She is successfully raising her 17-year-old son and assisting in the care of her grandson. *Id.* She has been gainfully employed—first as the caregiver for an elderly adult, and then in childcare—since 2006. *Id.*

She is committed to giving back to the community. As a series of letters from places she has worked and volunteered at demonstrate, she's deeply involved in working to make others' lives better. (CP 111–124.) She is a Narcotics Anonymous sponsor. (CP 66.) She is a counselor for chronically homeless persons. (CP 116.) And, as a letter from the Seattle Police notes, her work as a volunteer motivational speaker for the Department's Drug Market Initiatives program has helped the Department work to control drug trafficking. (CP 119.)

Ms. Fields loves working with children and has thrown herself into every possible training necessary to do her job well and safely. (CP 125–130.) She is well-liked and successful. (CP 111–124.) For example, Ms. Fields worked as a counselor in a harm-reduction facility for chronically homeless persons suffering from mental health issues, physical disabilities, and chronic chemical dependency. Her employer there said that she “ranks at the top in reference to sound ethics, professionalism, and de-escalation techniques.” (CP 116.) She is supported by her employer, a

Washington State-licensed childcare center. (CP 112-114.) Before DEL revoked her license, Ms. Fields worked successfully in childcare. *Id.*

Despite this ample evidence of rehabilitation and low current risk, DEL barred Ms. Fields for life from working in childcare based solely on the 1988 attempted-robbery conviction. The license disqualification process for certain prior offenses allows no consideration whatsoever of her individual circumstances; if the fact of conviction is not contested, the disqualification is automatic. Although the Legislature did not mandate that any crime be a ban to licensure, RCW 43.215.215(2), DEL adopted rules regarding child care licensure which include an expansive list of disqualifying offenses in WAC 170-06-0120. Fifty crimes, including all degrees of robbery and attempted robbery, carry a lifetime ban. *Id.* However, many crimes that carry a five-year ban directly target children and harm their welfare, while many crimes listed as a permanent ban do not. Under this list, a mob boss convicted of leading organized crime is free to work in child care after five years.

Ms. Fields challenged the lifetime exclusion from all employment licensed by DEL by exhausting her administrative remedies and timely sought review in King County Superior Court, which affirmed DEL's actions, rejecting her claim that the disqualification rule violated due process. On August 21, 2017, Division One of the Court of Appeals affirmed in an unpublished opinion. Ms. Fields timely petitions this Court for review.

IV. ARGUMENT

Two of the authorized grounds for review, a “significant question of law under the Constitution of the State of Washington or of the United States,” and “an issue of substantial public interest that should be determined by the Supreme Court,” support a grant of review here. RAP 13.4(b)(3-4).

- A. This Court should accept review because lifetime bans from state-licensed employment are an issue of first impression in Washington and present a significant question of law under the federal and state constitutions, and Pennsylvania has already found them unconstitutional.**

This Court reviews the constitutionality of a rule or the application of a rule de novo. *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 215, 143 P.3d 571, 574 (2006). Ms. Fields raises due process challenges, requiring her to demonstrate a constitutionally protected liberty interest. There can be no question that the right to pursue a chosen occupation is a constitutionally protected liberty and property interest. E.g., *Barry v. Barchi*, 443 U.S. 55, 64 n. 11 (1979) (licenses issued to horse trainers were protected by due process and equal protection); *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 519, 29 P.3d 689 (2001) (due process requires proof by clear and convincing evidence in a medical disciplinary proceeding); *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir.1999) (the pursuit of a profession or occupation is a protected liberty interest that extends across a broad range of lawful occupations); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F.Supp. 1260, 1271 (S.D. Cal.1997) (“[t]he right to hold specific private

employment and to follow a chosen profession free from unreasonable governmental interference comes within the “liberty” and “property” concepts” of the federal constitution).

Washington appears to have never evaluated the constitutionality of a lifetime ban from state-licensed employment based on prior criminal history in any context. But the Pennsylvania Supreme Court has squarely addressed the issue. In *Peake v. Com.*, No. 216 M.D. 2015, 2015 WL 9488235 (Pa. Commw. Ct. Dec. 30, 2015), the court held that a Pennsylvania regulation substantively identical to Washington’s was unconstitutional: *Peake* involved a lengthy list of crimes (including robbery and attempted robbery) that either prohibited working as a care provider for life or for ten years from the date of conviction. Applying Pennsylvania’s analogous constitutional protections, the court found that the regulation violated substantive due process.

The Court of Appeals in Ms. Fields’ case distinguished *Peake* only because the Pennsylvania constitution requires that constitutional challenges be analyzed “more closely” under the rational basis test than due process challenges under the United States Constitution. *Peake*, 132 A.3d at 518. But the Pennsylvania court still applied rational-basis review. This Court should follow Pennsylvania’s lead, based either on the federal constitution or the state constitution.

- B. Both procedural and substantive due process are violated by DEL's automatic, lifetime disqualification. There is no rational relationship between child safety now and an attempted robbery committed thirty years ago and DEL's ban prevents consideration of individualized circumstances and reduced risk through rehabilitation. This case presents a significant question of law because there is little guidance for agencies and lower courts for how to evaluate the constitutionality of DEL's 50-crime lifetime ban or similar lists.**

DEL's 50-crime list does not bear a rational relationship to public safety. For substantive due process claims, rational relationship scrutiny in the context of a public safety regulation like this one requires that DEL's rule must bear a "substantial relation to the public health, safety, morals, or general welfare." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9th Cir. 1994). But beyond this broad principle, few cases are analogous to DEL's ban, and none address it squarely. DEL includes 50 crimes on its lifetime-ban list. Some—like rape of a child—have a facial connection to child welfare. Others—like Ms. Fields' attempted robbery—do not.

DEL has not included every crime in Washington on its lifetime-ban list. Instead, some other crimes are on DEL's five-year ban list, and yet others that appear to have a clear connection to safety, like DUI, do not appear at all. DEL conceded that including certain crimes would be arbitrary. But the rationality of the crimes included remains in doubt: DEL has included bail jumping and patronizing a prostitute on its either lifetime or five-year-ban lists. There are no guidelines in this court's jurisprudence or any other establishing which crimes—if any—can be included in a lifetime ban list. There is also no guidance for whether a lifetime ban,

imposed for a crime with no relationship to the purpose of the ban and with no possibility of redemption, is constitutional.

The Court of Appeals relied on a range of factually inapposite cases in deciding that DEL's rule is rationally related to protecting children. (Opinion at 6-16.) For example, the court relied heavily on *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958)(Opinion at 12.) But in *Kindschi*, a physician objected to a medical disciplinary board's finding that tax evasion was a crime of moral turpitude and subsequent disciplinary proceeding. The *Kindschi* court held that the disciplinary board properly relied on the Attorney General's opinion that, as a matter of law, tax evasion is a crime of moral turpitude.

Kindschi is inapposite. It did not involve the question presented here: whether it is constitutional for an agency to use a long list of crimes to impose a lifetime ban on employment in certain fields, without regard to individual circumstances. Although the *Kindschi* court did note in dicta that it found a rational relationship between tax evasion and medicine, *Kindschi* did not establish a test for how other crime-occupation relationships should be considered.

The existing cases provide no tests or guidance for the constitutionality of lifetime bans. Both DEL's rule—with its scattershot inclusion of some crimes but not others, with no clear basis for doing so—and the Court of Appeals' decision in this matter reflects that lack of guidance. The court found that DEL's rule is rationally related to protecting children. But the court concluded only that “a rational

connection exists between a violent crime conviction and the safety of children in childcare” without any explanation, and relied on tautology in place of analysis. (Opinion at 14.)

Federal jurisprudence, although not squarely on point to this case, demonstrates that DEL’s lifetime ban violates substantive due process. The state may, in the exercise of the police power, regulate businesses in order to promote the public welfare without offending substantive due process. *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn. 2d 493, 503, 816 P.2d 725 (1991). But the police power is not infinite; it is limited to regulations that genuinely protect health and safety. *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 754–55, 4 S.Ct. 65228 L.Ed. 585 (1884).

Invoking safety is not a talisman to allow unlimited state regulation. For example, in *Cornwell*, 962 F. Supp. at 1260, the court denied a motion to dismiss a claim that California’s cosmetology regulations were unconstitutional, even though they contained health and safety training, because the 1600 required hours of training did not rationally achieve the safety objective. By contrast, courts have upheld state regulations when there is a demonstrable rationale for the specific regulations and its purported purpose. For example, in *Wedges/Ledges*, the 9th Circuit approved a temporary ban on a particular kind of arcade game because as many as 60 of the machines had been modified to allow illegal gambling and the municipality needed time to come up with safeguards to

protect against future illegality. *Wedges/Ledges*, 24 F.3d at 65. Similarly, in *Henderson*, the court found the denial of a banking permit did not violate substantive due process because the particular bank was in poor financial health and had not successfully implemented required management reforms. *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991).

Unlike *Wedges/Ledges* and *Henderson*—where specific facts demonstrated a clear connection between the specific prohibition and the harm prevented—the required rational basis is lacking here. DEL’s list of crimes—most completely unrelated to children—lacks a rational connection to a person convicted not ever being able to safely work in childcare. On an as-applied level, the rational relationship to public safety is lacking, when Ms. Fields has a 30-year-old attempted robbery conviction followed by clear evidence of rehabilitation and a lifetime ban on working with children.

DEL’s lifetime disqualification also deprives individuals like Ms. Fields of their procedural due process rights guaranteed by the state and federal constitutions. Procedural due process requires that individuals receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Further, the opportunity to be heard must be “at a meaningful time and in a meaningful manner” appropriate to the case, and cannot be a mere formality. *Amunrud*, 158 Wn.2d at 216-17. Here, Ms. Fields had no meaningful hearing because she never had a

chance to address the central question of importance: whether her 1988 robbery conviction means she cannot safely work in childcare despite the evidence demonstrating the reduced risk based on rehabilitation, passage of time, and aptitude for that work.

Mathews provides the three-factor test employed to determine the constitutionality of a hearing. The factors to be considered are (1) the nature of the potentially affected individual interest at stake; (2) the risk of erroneous deprivation of that interest through the challenged procedures, and probable value of additional procedural safeguards; and (3) the government's interest, including the potential burden of additional procedures. *City of Bellevue v. Lee*, 166 Wn. 2d 581, 585 (2009). And indeed, when applied, the *Mathews* factors argue in favor of affording Ms. Fields an opportunity for the hearing she requests.

The interest affected is Ms. Fields' constitutionally protected liberty and property interest in pursuing her chosen profession, and the risk of erroneous deprivation here is extreme. Without the ability to do any more than contest the mere existence of the attempted robbery conviction, Ms. Fields is left without any avenue to demonstrate her qualifications and dedication to working in childcare and the lack of any safety risk. The constitutional deficiency in DEL's lifetime ban process demonstrates the significance of the legal question here and merits this court's review, without which the severe harm resulting from the agency's unconstitutional actions will be left unchecked by the judiciary.

C. Automatic lifetime disqualification from working in childcare is an issue of substantial public importance because it militates against Washington's firm public policy in support of rehabilitation and reentry into society.

Washington has thousands of former felons. Many are on the road to rehabilitation or are already there. Our legislature has recognized that one of the cornerstones of rehabilitation is meaningful employment. But ever-growing laundry-lists of crimes that preclude access to licensure mean that many Washingtonians are simply barred from putting their criminal histories behind them, even when they have served and complied with their sentences.

Christal Fields has gone above and beyond in demonstrating her own rehabilitation. She was convicted of attempted robbery in 1988—almost thirty years ago—during a period of time when she was a homeless domestic violence victim addicted to drugs. Her crime involved grabbing a woman's purse and trying unsuccessfully to run away with it.

Since her conviction, she has paid her debt to society, done prison time and has now completely turned her life around. And yet she cannot get a job doing what she loves and is demonstrably good at, including being demonstrably not a threat to child safety. DEL has chosen to implement a lifetime ban on anyone with a conviction on a list of 50 crimes—no matter how long ago, no matter the circumstances, no matter how life has turned out for the applicant and, importantly, no matter how unrelated to the welfare of children the crime is. Some of these crimes, like rape of a child, bear a relationship to child welfare. But many, like

Ms. Fields' 30-year-old attempted robbery in the second-degree conviction, do not.

The lifetime ban instituted by DEL is also contrary to Washington's stated re-entry goals:

The legislature declares that it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship.

RCW 9.96A.010. Instead of contributing to her rehabilitation, the list of lifetime-ban crimes that excludes Ms. Fields from pursuing an occupation categorically prevents her from obtaining the exact employment that the state of Washington considers to be an "essential ingredient" to rehabilitation.

D. This petition also presents an issue of substantial public importance because lifetime bans disproportionately affect women and persons of color without achieving a rational benefit to the public.

Between 1990 and 2016 alone, Washington entered 16,325 robbery sentences.¹ People of color are disproportionately impacted.² The disproportionality is so pronounced that the EEOC has warned that denying employment to persons with criminal convictions

¹ <http://wa-state-ofm.us/crimestatsonline/index.cfm>.

² EEOC Enforcement Guidance No. 915. 002 on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012).

may constitute an equal-protection violation. *Id.* Further, childcare workers are predominantly women. For women, especially without advanced degrees, losing access to childcare jobs deprives them of significant employment opportunities. In addition to the due process violations at issue here, the harmful effects of perpetuating race and gender discrimination through the lifetime ban list warrants a grant of review.

E. This Court should determine whether Washington's constitution provides a basis for due process and equal protection claims in this context.

This Court should determine whether the application of DEL's 50-crime list in this case, with individualized consideration barred, violates either article 1, section 3 (due process) or article 1, section 12 (equal protection) of the Washington Constitution. In evaluating the scope of protection, the Court should consider the six *Gunwall* factors. *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007).³ These factors argue strongly in favor of a finding that there is a constitutional violation here.

³ The *Gunwall* factors are: (1) the textual language of the state constitution; (2) textual differences between parallel provisions of the state and federal constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) state or local concerns. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). This Court has already determined that article 1, section 12 provides greater protection than the Equal Protection Clause. *Grant Cty. Fire Prof. Dist., No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 805, 83 P.3d 419 (2004). It has also in some cases ruled that due process under the state constitution can require more than the federal constitution. *See, e.g., State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). Accordingly, the Court need only determine

For example, Washington has declared that it is the State's policy to "encourage and assist the rehabilitation of felons" and acknowledged that employment is an "essential ingredient" of that rehabilitation. RCW 9.96A.010 (Factors 3 and 4). And this Court has previously found that disparate impacts on the basis of protected classifications are subject to heightened scrutiny, even where a fundamental right is not at issue. See, e.g., *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1973) (Factor 4 for equal protection).

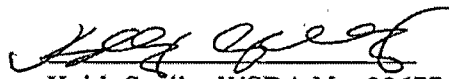
Likewise, the other *Gunwall* factors favor Ms. Fields. The state and federal constitutions differ in their language and scope for equal protection. Regulating childcare providers is a local, not national concern. This Court's guidance on the application of the state constitution in this context is sorely needed, for the reasons explained above.

V. CONCLUSION

DEL has used a list of crimes to impose a lifetime ban on Ms. Fields' work in the childcare field, without regard to individual circumstances or the rationality of the crimes triggering a lifetime ban. DEL's rule has a massive impact on Christal Fields and others like her, and this Court should accept review to establish and clarify the substantive and procedural due process requirements for lifetime bans, as well as the state constitutional implications of the case.

the scope of protection, but can do so using the *Gunwall* factors. *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007) .

RESPECTFULLY SUBMITTED this 20th day of September 2017.

A handwritten signature in black ink, appearing to read "Keith Scully", written over a horizontal line.

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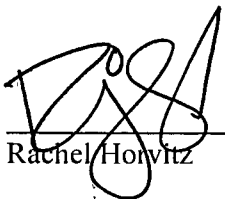
Christal Fields

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I caused the foregoing
to be served via Messenger to:

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I declare under penalty of perjury that the foregoing is true and
correct.



Rachel Horvitz

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Supreme Ct. No. _____

Ct. App. No. 75406-8-I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

Christal Fields, an individual,

Appellant/Petitioner,

v.

State of Washington Department of Early Learning,

Respondent.

APPENDIX

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2017 SEP 20 PM 4: 05

TABLE OF CONTENTS

Appendix Page No.	Description
001 – 019	The Court of Appeals of the State of Washington, Seattle Opinion August 21, 2017
020 – 021	United States Constitution Amendment XIV
022	Washington State Constitution Section 3 and 12
023	WAC 170-06-0010
024	WAC 170-06-0040
025 – 026	WAC 170-06-0050
027 – 028	WAC 170-06-0070
029	WAC 170-06-0090
030 – 032	WAC 170-06-0120

RICHARD D. JOHNSON,
Court Administrator/Clerk

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August 21, 2017

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CASE #: 75406-8-I

Christal Fields, Appellant vs. State of Washington Department of Early Learning, Respondent

King County, Cause No. 15-2-26451-6.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"...For these reasons we affirm the decision of the office of administrative hearings and the superior court."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Honorable Judith Ramseyer

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTAL FIELDS,)	
)	No. 75406-8-1
Appellant,)	
)	DIVISION ONE
v.)	
)	
STATE OF WASHINGTON)	UNPUBLISHED OPINION
DEPARTMENT OF EARLY)	
LEARNING,)	
)	
Respondent.)	FILED: August 21, 2017
_____)	

LEACH, J. — Christal Fields appeals the superior court's summary judgment dismissal of her constitutional challenge to a Department of Early Learning (DEL) rule imposing on any person convicted of certain crimes a lifetime ban on working in a childcare facility.¹ She contends that this ban disqualifying her as a childcare worker violates her substantive and procedural due process rights. Because the rule has a rational relationship to a legitimate legislative purpose, the protection of children, and DEL provided an adequate review process, we affirm.

Background

Fields grew up in a dysfunctional home environment with rampant drug abuse. At the age of 16, she became homeless and turned to prostitution and

¹ WAC 170-06-0070(1), -0120(1).

No. 75406-8-I / 2

drugs. In 1988, Fields attempted to snatch a purse to help pay for her drug habit. She pleaded guilty to attempted second degree robbery.²

Fields continued to lead a troubled life until 2006 when she turned her life around by successfully completing a drug program. She has been clean and sober ever since. For two years she resided in group housing. During this time, she was promoted to resident manager because of her responsibility and commitment to working with others. Many support letters from employers and coworkers since then attest to Fields's character.

On February 6, 2013, Fields submitted a portable background check to DEL. Based on the information Fields provided, DEL cleared Fields to work at a childcare facility. She worked in that childcare facility for six months after she received her background clearance. Fields loves working with children and has taken advantage of every available training opportunity to improve her skills.

A local news report on childcare centers brought Fields's undisclosed criminal history to DEL's attention. DEL later sent Fields a letter disqualifying her from unsupervised contact with childcare children. This disqualification prevented Fields from being on the premises of a licensed facility during the hours it is licensed to provide childcare.³

² The superior court in this case recognized that the second degree attempted robbery "barely met perhaps the statutory elements of robbery in the second degree at the time."

³ WAC 170-06-0040(5).

No. 75406-8-1 / 3

Fields appealed DEL's action. Citing her conviction for attempted second degree robbery, DEL moved to dismiss her appeal on summary judgment. Fields contested the summary judgment. She claimed that the lifetime ban was unconstitutional facially and as applied to her circumstances. The administrative law judge (ALJ) had no authority to decide and thus did not consider these constitutional issues. He found that Fields's robbery conviction disqualified her.

WAC 170-06-0120 imposes a lifetime ban on persons working in childcare if they were convicted of any of 50 listed crimes, including second degree robbery. Because Fields did not dispute her conviction, this rule precludes her from working in her chosen field.

Fields moved for an internal appeal. The reviewing judge affirmed the ALJ's determination that constitutional challenges had to be brought in the superior court.

Fields next sought review in the superior court. She asserted that WAC 170-06-0120 violated her constitutional due process protections because it deprived her of the opportunity to explain the conviction and submit evidence of her rehabilitation, character references, and other information showing her qualifications to continue in her chosen profession. The superior court held that despite potential compelling facts in Fields's favor, the rule did not violate Fields's due process rights because a rational relationship existed between a legitimate

state interest and the rule.

Fields appeals.

Analysis

The Washington Administrative Procedure Act (WAPA)⁴ governs judicial review of agency actions.⁵ The validity of an administrative agency rule presents a question of law, which this court reviews de novo.⁶ A court presumes the validity of a duly adopted rule. Thus, the party challenging a rule has a heavy

⁴ Ch. 34.05 RCW.

⁵ RCW 34.05.570(3) provides,

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

⁶ Kabbae v. Dep't of Soc. & Health Servs., 144 Wn. App. 432, 439, 192 P.3d 903 (2008).

burden of proving the rule's unconstitutionality. Because constitutional issues fall outside the realm of agency expertise, this court does not defer to an agency's application of constitutional principles.⁷ An individual is entitled to relief if this court determines that "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied."⁸

Both the United States Constitution and the Washington Constitution provide that no person may be deprived of life, liberty, or property without due process of law.⁹ While they use nearly identical language to provide these rights, our Supreme Court has held that interpretation of the federal due process clause does not control our analysis of the state due process clause.¹⁰ Whether the state due process clause provides greater protection than the federal due process clause depends on the particular context in which a litigant asserts a due process violation.¹¹

Fields makes no claim that the state due process clause provides broader protection than the federal due process clause in the context of her circumstances and has not offered a Gunwall¹² analysis advocating such a

⁷ Crescent Convalescent Ctr. v. Dep't of Soc. & Health Servs., 87 Wn. App. 353, 357, 942 P.2d 981 (1997).

⁸ RCW 34.05.570(3)(a).

⁹ U.S. CONST. amend. V, XIV, § 1; WASH. CONST. art. I, § 3.

¹⁰ Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 710-11, 257 P.3d 570 (2011).

¹¹ E.S., 171 Wn.2d at 710-11.

¹² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

position. In the absence of a Gunwall analysis, "we cannot consider an argument that the Washington Constitution provides greater protection than its federal counterpart."¹³ Therefore, we analyze Fields's claims under only the federal due process clause.

The due process clause of the Fourteenth Amendment confers both procedural and substantive due process rights. A substantive challenge involves an individual's right to be free from arbitrary action of the government.¹⁴ A procedural challenge questions whether the government has given an individual enough notice and the chance to be heard.

We first consider Fields's substantive due process claims. To prevail on a substantive due process claim, Fields must identify a property or liberty interest and show that state action arbitrarily and capriciously deprived her of that right.¹⁵ The level of review a court applies to a substantive due process challenge depends on the nature of the right involved.¹⁶

¹³ Centimark Corp. v. Dep't of Labor & Indus., 129 Wn. App. 368, 375, 119 P.3d 865 (2005).

¹⁴ County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

¹⁵ Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006).

¹⁶ Amunrud, 158 Wn.2d at 219.

The right to pursue an occupation or profession is a protected liberty interest.¹⁷ Thus, Fields has established a liberty interest and that DEL's challenged rule deprived her of that interest. Because the right to pursue a particular occupation is not a fundamental right, courts use a rational basis test to review state actions affecting it.¹⁸ This means that Fields must show that no rational relationship exists between the DEL rule and a legitimate state interest.¹⁹

A party may make either a facial or an as applied challenge to state action. To prevail on a facial challenge, a party must show that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied."²⁰ To prevail on an as applied challenge, an individual must prove that an otherwise valid statute is unconstitutional as applied to that individual.²¹

¹⁷ See Barry v. Barchi, 443 U.S. 55, 64 n.11, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (licenses issued to horse trainers were protected by due process and equal protection); Conn v. Gabbert, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) ("Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment"); Dittman v. California, 191 F.3d 1020, 1029 (9th Cir. 1999) (pursuit of a profession or occupation is a protected liberty interest that extends across a broad range of lawful occupations).

¹⁸ Amunrud, 158 Wn.2d at 222.

¹⁹ Amunrud, 158 Wn.2d at 222.

²⁰ City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

²¹ Moore, 151 Wn.2d at 668-69.

Fields has failed to show that no rational basis exists for the challenged DEL rule or, alternatively, that as applied to her particular circumstances no rational basis exists.

The legislature created DEL in 2006²² to “safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care.”²³ DEL administers childcare and early learning programs and adopts minimum licensing requirements.²⁴ Division Three of this court has upheld DEL’s rulemaking authority.²⁵

DEL adopted rules governing the licensing of childcare in Washington. WAC 170-06-0070(1) states that an “[i]ndividual who has a background containing any of the permanent convictions on the director’s list, WAC 170-067-0120(1), will be permanently disqualified from providing licensed child care, caring for children or having unsupervised access to children receiving early learning services.” “Disqualified” means that “DEL has determined that a person’s background information prevents that person from being licensed or certified by DEL or from being authorized by DEL to care for or have

²² LAWS OF 2006, ch. 265, § 101; see ch. 43.215 RCW.

²³ RCW 43.215.005(4)(c).

²⁴ RCW 43.215.020(2)(d).

²⁵ Stewart v. Dep’t of Soc. & Health Servs., 162 Wn. App. 266, 272, 252 P.3d 920 (2011).

unsupervised access to children receiving early learning services.”²⁶ An attempted second degree robbery conviction permanently disqualifies a person.²⁷

At oral argument, DEL claimed that a federal statute requires the bans contained in its rule as a condition of receiving federal monies. States that receive funds from the federal government for childcare services must establish requirements for and conduct criminal background checks of childcare staff members.²⁸ But the controlling federal statute identifies only nine crimes that make a childcare staff member ineligible for employment. Robbery is not one of those crimes. But this statute does permit states to disqualify individuals for other crimes. 42 U.S.C. § 9858f(h)(1) provides,

Nothing in this section shall be construed to prevent a State from disqualifying individuals as child care staff members based on their conviction for crimes not specifically listed in this section that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children.

(Emphasis added.) Thus, federal law allows DEL to include other crimes if they bear on the individual’s fitness to provide care. Support for DEL’s decision to include second degree robbery in the 50 enumerated crimes can be found in RCW 43.43.830(7) which states,

²⁶ WAC 170-06-0020.

²⁷ WAC 170-06-0050(1)(c) (“Convictions whose titles are preceded with the word ‘attempted’ are given the same weight as those titles without the word ‘attempted.’”).

²⁸ 42 U.S.C. § 9858f(a)(1).

“Crime against children or other persons” means a conviction of any of the following offenses: Aggravated murder; first or second degree murder; first or second degree kidnapping; first, second, or third degree assault; first, second, or third degree assault of a child; first, second, or third degree rape; first, second, or third degree rape of a child; first or second degree robbery; first degree arson; first degree burglary; first or second degree manslaughter; first or second degree extortion; indecent liberties; incest; vehicular homicide; first degree promoting prostitution; communication with a minor; unlawful imprisonment; simple assault; sexual exploitation of minors; first or second degree criminal mistreatment; endangerment with a controlled substance; child abuse or neglect as defined in RCW 26.44.020; first or second degree custodial interference; first or second degree custodial sexual misconduct; malicious harassment; first, second, or third degree child molestation; first or second degree sexual misconduct with a minor; commercial sexual abuse of a minor; child abandonment; promoting pornography; selling or distributing erotic material to a minor; custodial assault; violation of child abuse restraining order; child buying or selling; prostitution; felony indecent exposure; criminal abandonment; or any of these crimes as they may be renamed in the future.

(Emphasis added.)

A statute is facially unconstitutional only when no set of circumstances exists where the statute would be valid.²⁹ When a statute, or as here, a rule, has “a plainly legitimate sweep,” a facial challenge necessarily fails.³⁰ Under the plainly legitimate sweep standard, a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute’s plainly

²⁹ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

³⁰ Wash. State Grange, 552 U.S. at 449 (quoting Washington v. Glucksberg, 521 U.S. 702, 739-40 & n.7, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (Stevens, J., concurring)).

legitimate sweep. In other words, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. "Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'"³¹

Fields asks us to follow a Pennsylvania case, Peake v. Pennsylvania.³² In Peake, a Pennsylvania court found unconstitutional a provision imposing a lifetime ban for individuals convicted of certain listed offenses from working in care of older adults. The court stated, "Irrebuttable presumptions often run afoul of due process protections because they infringe upon protected interests 'by utilizing presumptions that the existence of one fact [is] statutorily conclusive of the truth of another fact.'"³³ But Peake applied the Pennsylvania Constitution, not the United States Constitution. The court noted, "Due process challenges under the Pennsylvania Constitution are analyzed 'more closely' under the rational basis test than due process challenges under the United State Constitution."³⁴

³¹ Wash. State Grange, 552 U.S. at 450 (quoting Sabri v. United States, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)).

³² 132 A.3d 506 (2015).

³³ Peake, 132 A.3d at 519 (alteration in original) (quoting In the Interest of J.B., 107 A.3d 1, 14 (2014)).

³⁴ Peake, 132 A.3d at 518.

Thus, we do not find that analysis appropriate here. Particularly because, as previously noted, Fields makes no claim that the Washington Constitution, like Pennsylvania's, provides greater protection than does the Fourteenth Amendment of the United States Constitution.³⁵

DEL cites to the United States Supreme Court's decision in Weinberger v. Salfi³⁶ as support for its rule's irrebuttable presumption. There, the Supreme Court upheld a Social Security regulation prohibiting anyone married within nine months of a Social Security recipient's death from receiving survivor benefits.³⁷ But Weinberger addressed a benefit conferred by statute and not, as here, a constitutionally protected liberty interest.

In Re Kindschi³⁸ provides more helpful guidance. There, a medical disciplinary board suspended a physician from medical practice for eight months after the medical disciplinary board found him guilty of unprofessional conduct.³⁹ The legislature established this board and gave it broad powers to discipline medical professionals for unprofessional conduct.⁴⁰ The physician had pleaded

³⁵ In re Pers. Restraint of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) ("Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment."); Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn.2d 418, 422, 511 P.2d 1002 (1973).

³⁶ 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

³⁷ Weinberger, 422 U.S. at 767-85.

³⁸ 52 Wn.2d 8, 319 P.2d 824 (1958).

³⁹ Kindschi, 52 Wn.2d at 9.

⁴⁰ Kindschi, 52 Wn.2d at 9.

guilty to tax evasion.⁴¹ The statutory definition of "unprofessional conduct" included conviction in any court for an offense involving moral turpitude.⁴²

Initially, the medical board gave Kindschi notice that it would hold a hearing. That notice told Kindschi that his conviction for tax evasion involved moral turpitude and thus constituted unprofessional conduct. Kindschi admitted that he pleaded guilty to tax evasion but denied that his behavior involved moral turpitude or unprofessional conduct.⁴³ At the start of the hearing, the board chair told Kindschi that the attorney general had opined that tax evasion involved moral turpitude. This settled the question for the board, which foreclosed Kindschi from presenting any evidence about the circumstances of his conviction.⁴⁴ Like Fields, Kindschi sought to introduce evidence that would explain the particular circumstances behind his crime.

Kindschi sought judicial review. Our Supreme Court affirmed the board,⁴⁵ reasoning that the daily practice of medicine concerned life and death consequences for the general public who had the right to expect the highest degree of trustworthiness from the medical profession. The court found a rational connection existed between the fraud involved in tax evasion and the

⁴¹ Kindschi, 52 Wn.2d at 13.

⁴² Kindschi, 52 Wn.2d at 9.

⁴³ Kindschi, 52 Wn.2d at 10.

⁴⁴ Kindschi, 52 Wn.2d at 10.

⁴⁵ Kindschi, 52 Wn.2d at 13.

fitness of one to practice medicine.⁴⁶ Similarly, here, a rational connection exists between a violent crime conviction and the safety of children in childcare.

In regulating childcare licensing, Washington State recognizes the paramount interest to protect children and that “[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance . . . is paramount over the right of any person to provide care.”⁴⁷

Fields argues that even if we were to find the rule satisfied due process, it does not do so as applied to her. An “as applied” constitutional challenge to a statute differs from a facial constitutional attack. A facial challenge asserts that a statute is unconstitutional based solely on the text of the challenged provision. An as applied challenge makes no claim that a statute is unconstitutional as written, but that when applied to an individual under circumstances particular to the individual, the provision violates that individual’s constitutional right.

Fields challenges the merits of a rule that includes the crime with which she was convicted without providing her an opportunity to explain her circumstances. A “challenge, however meritorious, which is directed to the wisdom of the statute will not justify a court in finding it unconstitutional.”⁴⁸

⁴⁶ Kindschi, 52 Wn.2d at 12.

⁴⁷ Hardee v. Dep’t of Soc. & Health Servs., 172 Wn.2d 1, 12, 256 P.3d 339 (2011) (alterations in original) (quoting RCW 43.215.005(4)(c)).

⁴⁸ State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980) (citing Wash. State Sch. Dirs. Ass’n v. Dep’t of Labor & Indus., 82 Wn.2d 367, 378, 510 P.2d 818 (1973)).

We must consider other factors besides Fields's private interest in childcare work in our due process analysis.⁴⁹ The State has an important interest in protecting the safety of small children in state licensed childcare facilities.⁵⁰ Fields's liberty interest in childcare work is subordinate to this interest.⁵¹ Requiring an opportunity for a fact-finding hearing for each applicant convicted of a violent crime against a child or other person could result in costly investigations, more hearings, more litigation about injured children, and increased monitoring of licensees.⁵² Fields has failed to meet her heavy burden of establishing beyond question the absence of a rational relationship between the application of the challenged rule to her and the State's interest in protecting small children receiving childcare.

Fields also challenges the procedural fairness of the rule. Procedural due process imposes a limit on governmental action that deprives a person of "liberty" or "property interests" within the meaning of a constitution's due process clause.⁵³ To prevail on a procedural due process challenge, an individual must show that one has been denied the opportunity to be heard "at a meaningful time

⁴⁹ Islam v. Dep't of Early Learning, 157 Wn. App. 600, 612-13, 238 P.3d 74 (2010).

⁵⁰ Islam, 157 Wn. App. at 613.

⁵¹ Islam, 157 Wn. App. at 613.

⁵² Islam, 157 Wn. App. at 611.

⁵³ Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

and in a meaningful manner.”⁵⁴ The United States Supreme Court established that a court must consider three distinct factors to determine whether a review process passes constitutional muster: (1) the private interest affected, (2) the risk that the procedures will erroneously deprive a party of that interest and (3) the government’s interest, including the potential burden of additional procedures.⁵⁵

Specifically, Fields claims DEL denied her a meaningful opportunity to have her position heard. But Fields, as a disqualified person, requested and received an administrative hearing and reconsideration of the decision at the hearing. Moreover, the WAPA provided her a forum in the superior court to argue her position on the constitutionality of the rule.⁵⁶ She has been provided with a sufficient opportunity to be heard.

Fields’s complaint about the lack of an opportunity to present mitigating circumstances about her conviction and her subsequent rehabilitation goes to the substance of DEL’s rule, which we have addressed as a substantive due process claim.

⁵⁴ Mathews, 424 U.S. at 335 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)).

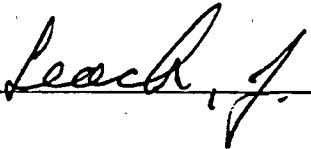
⁵⁵ City of Bellevue v. Lee, 166 Wn.2d 581, 585-86, 210 P.3d 1011 (2009) (citing Mathews, 424 U.S. at 335).

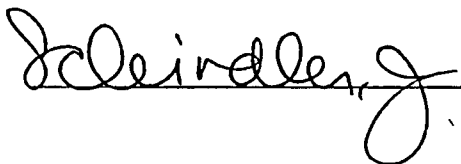
⁵⁶ Amunrud, 158 Wn.2d at 217.

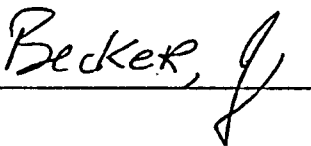
Conclusion

A rational relationship exists between DEL's rule banning individuals convicted of certain violent crimes against children and other persons from ever providing childcare in a state licensed facility and the State's interest in protecting the safety of children receiving care in those facilities. This rational relationship exists in the application of the rule to Fields. Also, Fields received a fair hearing on the issue of her disqualification. For these reasons we affirm the decisions of the office of administrative hearings and the superior court.

WE CONCUR:







United States Constitution

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Washington State Constitution

**ARTICLE I
Declaration of Rights**

SECTION 3 Personal Rights.

No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 12 Special Privileges and Immunities Prohibited.

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WAC 170-06-0010

Purpose and scope.

- (1) The purpose of this chapter is to establish rules for background checks conducted by the department of early learning (DEL or department).
- (2) The department conducts background checks on subject individuals who are authorized to care for or have unsupervised access to children receiving early learning services.
- (3) The department conducts background checks to reduce the risk of harm to children from subject individuals who have been convicted of certain crimes or who pose a risk to children.
- (4) The department's rules and state law require the evaluation of background information to determine the character, suitability, or competence of persons who will care for or have unsupervised access to children receiving early learning services.
- (5) If any provision of this chapter conflicts with any provision in any chapter containing a substantive rule relating to background checks and qualifications of persons who are authorized to care for or have unsupervised access to children receiving early learning services, the provisions in this chapter shall govern.
- (6) These rules implement chapters 43.215 and 43.43 RCW, including DEL responsibilities in RCW 43.215.200, 43.215.205, 43.215.215 through 43.215.218, 43.43.830, and 43.43.832.
- (7) Effective date: These rules are initially effective July 3, 2006, and apply prospectively. Effective July 1, 2012, these rules are amended to allow for increased and continued portability of background check clearances for subject individuals who are authorized to care for or have unsupervised access to children receiving early learning services.

WAC 170-06-0040

Background clearance requirements.

- (1) Effective July 1, 2012, all new subject individuals applying for a first-time background check must complete the background check application process through DEL to include:
 - (a) Completion of the required fingerprint process; and
 - (b) Payment of all required fees as provided in WAC 170-06-0044.
- (2) All other subject individuals who have been qualified by the department to have unsupervised access to children in care, prior to July 1, 2012, must submit a new background check application no later than July 1, 2013. The subject person must:
 - (a) Submit the new background check application through DEL;
 - (b) Submit payment of all required fees as provided in WAC 170-06-0044;
 - (c) Complete the required fingerprint process if the subject individual has lived in Washington state for fewer than three consecutive years prior to July 1, 2013;
 - (d) Complete the required fingerprint process if the subject individual lives or has lived outside of Washington state since he previous background check was completed.
- (3) Each subject individual completing the DEL background check process must disclose:
 - (a) Whether he or she has been convicted of any crime;
 - (b) Whether he or she has any pending criminal charges; and
 - (c) Whether there is any negative actions, to which he or she has been subject, as defined by WAC 170-06-0020.
- (4) A subject individual must not have unsupervised access to children in care unless he or she has obtained DEL authorization under this chapter.
- (5) A subject individual who has been disqualified by DEL must not be present on the premises when early learning services are provided to children.

WAC 170-06-0050

Department action following completion of background inquiry.

As part of the background check process the department will conduct a character, suitability or competence assessment as follows:

- (1) Compare the background information with the DEL director's list, WAC 170-06-0120, to determine whether the subject individual must be disqualified under WAC 170-06-0070 (1) and (2). In doing this comparison, the department will use the following rules:
 - (a) A pending charge for a crime or a deferred prosecution is given the same weight as a conviction.
 - (b) If the conviction has been renamed it is given the same weight as the previous named conviction. For example, larceny is now called theft.
 - (c) Convictions whose titles are preceded with the word "attempted" are given the same weight as those titles without the word "attempted."
 - (d) The term "conviction" has the same meaning as the term "conviction record" as defined in RCW 10.97.030 and may include convictions or dispositions for crimes committed as either an adult or a juvenile. It may also include convictions or dispositions for offenses for which the person received a deferred or suspended sentence, unless the record has been expunged according to law.
 - (e) Convictions and pending charges from other states or jurisdictions will be treated the same as a crime or pending charge in Washington state. If the elements of the crime from the foreign jurisdiction are not identical or not substantially similar to its Washington equivalent or if the foreign statute is broader than the Washington definition of the particular crime, the defendant's conduct, as evidenced by the indictment or information, will be analyzed to determine whether the conduct would have violated the comparable Washington statute.
 - (f) The crime will not be considered a conviction for the purposes of the department when the conviction has been the subject of an expungement, pardon, annulment, certification of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, or the conviction has been the subject of a pardon, annulment, or other

equivalent procedure based on a finding of innocence.

- (2) Evaluate any negative action information to determine whether the subject individual has any negative actions requiring disqualification under WAC 170-06-0070(3).
- (3) Evaluate any negative action information and any other pertinent background information, including nondisqualifying criminal convictions, to determine whether disqualification is warranted under WAC 170-06-0070 (4), (5) or (7).
- (4) Except for the protected contents of the FBI record of arrest and prosecution (RAP) sheet and subject to federal regulation, the department may discuss the results of the criminal history and background check information with the authorized personnel of the early learning service provider.

WAC 170-06-0070

Disqualification.

Background information that will disqualify a subject individual.

- (1) A subject individual who has a background containing any of the permanent convictions on the director's list, WAC 170-06-0120(1), will be permanently disqualified from providing licensed child care, caring for children or having unsupervised access to children receiving early learning services.
- (2) A subject individual who has a background containing any of the nonpermanent convictions on the director's list, WAC 170-06-0120(2), will be disqualified from providing licensed child care, caring for children or having unsupervised access to children receiving early learning services for five years after the conviction date.
- (3) A subject individual will be disqualified when their background contains a negative action, as defined in WAC 170-06-0020 that relates to:
 - (a) An act, finding, determination, decision, or the commission of abuse or neglect of a child as defined in chapters 26.44 RCW and 388-15 WAC.
 - (b) An act, finding, determination, decision, or commission of abuse or neglect or financial exploitation of a vulnerable adult as defined in chapter 74.34 RCW.

Background information that may disqualify a subject individual.

- (4) A subject individual may be disqualified for other negative action(s), as defined in WAC 170-06-0020 which reasonably relate to his or her character, suitability, or competence to care for or have unsupervised access to children receiving early learning services.
- (5) A subject individual may be disqualified from caring for or having unsupervised access to children if the individual is the subject of a pending child protective services (CPS) investigation.
- (6) A subject individual who has a "founded" finding for child abuse or neglect will not be authorized to care for or have unsupervised access to children during the administrative hearing and appeals process.

- (7) The department may also disqualify a subject individual if that person has other nonconviction background information that renders him or her unsuitable to care for or have unsupervised access to children receiving early learning services. Among the factors the department may consider are:
- (a) The subject individual attempts to obtain a license, certification, or authorization by deceitful means, such as making false statements or omitting material information on an application.
 - (b) The subject individual used illegal drugs or misused or abused prescription drugs or alcohol that either affected their ability to perform their job duties while on the premises when children were present or presented a risk of harm to any child receiving early learning services.
 - (c) The subject individual attempted, committed, permitted, or assisted in an illegal act on the premises. For purposes of this subsection, a subject individual attempted, committed, permitted, or assisted in an illegal act if he or she knew or reasonably should have known that the illegal act occurred or would occur.
 - (d) Subject to federal and state law, the subject individual lacks sufficient physical or mental health to meet the needs of children receiving early learning services.
 - (e) The subject individual had a license or certification for the care of children or vulnerable adults terminated, revoked, suspended or denied.

WAC 170-06-0090

Administrative hearing to contest disqualification.

- (1) A subject individual may request an administrative hearing to contest the department's disqualification decision under WAC 170-06-0070.
- (2) The licensee or prospective employer cannot contest the department's decision on behalf of any other person, including a prospective employee.
- (3) The administrative hearing will take place before an administrative law judge employed by the office of administrative hearings, pursuant to chapter 34.05 RCW, and chapter 170-03 WAC.

WAC 170-06-0120

Director's list.

- (1) A subject individual's conviction for any crimes listed in column (a) in the table below will permanently disqualify him or her from authorization to care for or have unsupervised access to children receiving early learning services.

- (2) A subject individual's conviction for any crime listed in column (b) in the table below will disqualify him or her from authorization to care for or have unsupervised access to children receiving early learning services for a period of five years from the date of conviction.

(a) Crimes that permanently disqualify a subject individual	(b) Crimes that disqualify a subject individual for five years from date of conviction
Abandonment of a child	Abandonment of a dependent person not against child
Arson	Assault 3 not domestic violence
Assault 1	Assault 4/simple assault
Assault 2	Burglary
Assault 3 domestic violence	Coercion
Assault of a child	Custodial assault
Bail jumping	Custodial sexual misconduct
	Extortion 2
Child buying or selling	Forgery
Child molestation	Harassment
Commercial sexual abuse of a minor	
Communication with a minor for immoral purposes	Identity theft
Controlled substance homicide	Leading organized crime
Criminal mistreatment	Malicious explosion 3
Custodial interference	Malicious mischief

(a) Crimes that permanently disqualify a subject individual	(b) Crimes that disqualify a subject individual for five years from date of conviction
Dealing in depictions of minor engaged in sexually explicit conduct	Malicious placement of an explosive 2
Domestic violence (felonies only)	Malicious placement of an explosive 3
Drive-by shooting	Malicious placement of imitation device 1
Extortion 1	Patronizing a prostitute
Harassment domestic violence	Possess explosive device
Homicide by abuse	Promoting pornography
Homicide by watercraft	Promoting prostitution 1
Incendiary devices (possess, manufacture, dispose)	Promoting prostitution 2
Incest	Promoting suicide attempt
Indecent exposure/public indecency (felonies only)	Prostitution
Indecent liberties	Reckless endangerment
Kidnapping	Residential burglary
Luring	Stalking
Malicious explosion 1	Theft
Malicious explosion 2	Theft-welfare
Malicious harassment	Unlawful imprisonment
Malicious mischief domestic violence	Unlawful use of a building for drug purposes
Malicious placement of an explosive 1	Violation of the Imitation Controlled Substances Act (manufacture/deliver/intent)
Manslaughter	Violation of the Uniform Controlled Substances Act (manufacture/deliver/intent)

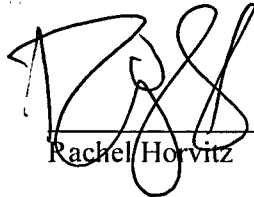
(a) Crimes that permanently disqualify a subject individual	(b) Crimes that disqualify a subject individual for five years from date of conviction
Murder/aggravated murder	Violation of the Uniform Legend Drug Act (manufacture/deliver/intent)
	Violation of the Uniform Precursor Drug Act (manufacture/deliver/intent)
Possess depictions minor engaged in sexual conduct	
Rape	
Rape of child	
Robbery	
Selling or distributing erotic material to a minor	
Sending or bringing into the state depictions of a minor	
Sexual exploitation of minors	
Sexual misconduct with a minor	
Sexually violating human remains	
Use of machine gun in felony	
Vehicular assault	
Vehicular homicide (negligent homicide)	
Violation of child abuse restraining order	
Violation of civil anti-harassment protection order	
Violation of protection/contact/restraining order	
Voyeurism	

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I caused the foregoing to be served via Messenger to:

Patricia L. Allen
Assistant Attorney General
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Attorney for State of WA. Department of Early Learning

I declare under penalty of perjury that the foregoing is true and correct.



Rachel Horvitz