No._____
COA No. 75422-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TANJIA DAVIS
Appellant

and

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL & HEALTH SERVICES
Respondent

ON REVIEW OF THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

TANJIA DAVIS, Self-Represented
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Statutes, Rules, & Other Authorities

A. IDENTITY OF PETITIONER

Tanjia Davis, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review.

B. COURT OF APPEALS DECISION

Petitioner Tanjia Davis, seeks review of the Court of Appeals decision entered on October 2, 2017, affirming the Department's final order holding that Petitioner's actions and failure to act evidenced negligent treatment or maltreatment of the children in her care. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Does a State Agency (DSHS) have the authority to interpret and promulgate/apply rules which amend or change legislative enactments?

2. Are conflicting appellate decisions regarding the

interpretation of state statutes related to negligent mistreatment of a child a violation of due process rights?

D. STATEMENT OF THE CASE

On March 28, 2012, the Department placed Petitioner Tanjia Davis ("Davis") three grandchildren with her after their mother,

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Constance Ford ("Ford") (Davis daughter) was found to be suffering from mental illness and substance abuse which culminated in the physical assault of family members and corporal punishment of the children.

On May 7, 2012, Davis was served by the Department with a finding of negligent treatment or maltreatment of her grandchildren related allegations involving an incident where Davis had allowed the children to attend a birthday party at a relative's home, where they were later abducted by Ford.

On February 25, 2015, a hearing was held upon Davis request whereby she challenged the Department's finding of neglect. The Administrative Law Judge (ALJ) issued an initial order upholding the Department's findings.

On April 7, 2015, a Department review judge issued a review decision and final order affirming the ALJ's initial order and adopting, in pertinent part, the ALJ's findings of fact and credibility assessments.

Davis subsequently petitioned for judicial review to the Superior Court which was denied. Davis now seeks review in this

Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Division One's decision in effect steers Davis actions into a narrow funnel which holds her accountable for a series of events which could not have been foreseen.

Davis was in no way negligent in allowing her grandchildren to attend a birthday party at the home of a relative, and she could not have predicted, foreseen, or controlled Ford's actions in abducting her own children.

The interests of justice require Davis not bare the permanent stigma of a label attached to her by a State Government Agency as having negligently mistreated her grandchildren

For this reason, this case presents an issue of substantial public interest, RAP 13.4(b)(4).

1. DSHS'S FINDING THAT DAVIS ACTIONS IN ALLOWING HER GRANDCHILDREN TO ATTEND A BIRTHDAY PARTY CONSTITUTED NEGLIGENT TREATMENT OF A CHILD, ARE AN INVALID EXERCISE OF AGENCY POWER. 3

Division One's decision completely sidesteps the issue that Davis would have had no way of knowing Ford's intention to abduct her children, and as such would have been unable to prevent such an occurrence. DSHS interpretation of negligent treatment of a child as applied to the scenario with Davis clearly extends and enhances the punitive reach of the statute.

"Although DSHS interpretation of WAC 388-15-009(5) is not arbitrary and capricious, DSHS as-applied interpretation of the rule clearly falls outside of DSHS authority. An agency "does not have the [***16] power to promulgate rules which amend or change legislative enactments, the agency may adopt rules which 'fill in the gaps' if those rules are necessary" for implementing "a general statutory scheme." *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000). But rules that extend a statute's

punitive reach are an invalid exercise of agency power." *See, e.g., State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940).Marcum v. Dep't of Soc. & Health Servs., 172 Wn. App. 546, 558, 290 P.3d 1045, 1051, 2012 Wash. App. LEXIS 2974, *15-16.

2. THERE ARE CONFLICTING APPELLATE DECISIONS RELATED TO THE NEGLIGENT TREATMENT OF A CHILD AND FAILURE TO PROTECT

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Davis was found to have negligently mistreated her grandchildren by failing to protect them from their biological mother who abducted them from a family birthday party. However, as the case noted below involving the failure to protect a child who resided with a known sexual offender clearly shows, there is inconsistent interpretation and application of the state statute at the appellate level.

[5-7] ¶30 Here, DSHS takes the position that Poirier's criminal history alone establishes that he poses a danger to M.S.D.'s health, welfare, and safety, and supports the trial court's finding of dependency due to Davis's failure to protect her. If the dependency trial had taken place in 1999 or 2000, when M.S.D. was an infant, the significance of Poirier's criminal conviction of assault of a child and the scope of the danger to M.S.D. would weigh heavily in favor of finding a clear and present danger to M.S.D. But at the time of the dependency trial in 2006, Poirier had lived with M.S.D. for several years and there was no evidence that he ever physically abused her or any other child during that [***21] period. DSHS also presented no evidence showing that someone who has assaulted an infant approximately 10 years earlier was likely to assault a 7-year-old child. Nor was there any evidence that the risk posed by the prior conviction does not diminish with age and maturity or that Poirier was unable to change.

[*482] ¶31 The dependency court's oral ruling reflects not so much a concern that Poirier would physically abuse M.S.D., but that he was a poor choice as a partner for Davis. The court speculated that the reason Davis made such a poor choice was that she had been sexually abused in her youth. While the court's assessment may be true, the poor choice of a partner is not a reason for the State to interfere in the life of a family. Only where a partner poses a clear and present danger to the child's health, welfare, and safety may a child be declared dependent. RCW 13.34.030(5)(b); RCW 26.44.020(15).

¶32 Here, unlike *In re J.F.*, Davis had not just met Poirier through a personal ad but had known Poirier and lived with him for six years before the dependency petition was filed. While Poirier's criminal history should have been a concern to Davis, the evidence showed that she was able to protect [***22] herself and M.S.D. and did not leave M.S.D. in his care. Davis had known Poirier long enough and well enough to enable her to dispel the concerns that his conviction raised. Unlike the father in *In re S.M.H.*, any risk Poirier posed would have been most acute when M.S.D. was very young. The risk of harm to M.S.D. in this situation is in no way comparable to the documented risk in *In re S.M.H.* or to that of the newborn of schizophrenic parents in *In re Frederiksen*. And in contrast to the mother in *In re S.M.H.*, Davis articulated a real understanding of the nature of Poirier's conviction after she read the certification for determination of probable cause and successfully [**985] participated in counseling for non offending partners. While continuing contact with Poirier may not be ideal, "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998).

¶33 Because the court's finding that Davis neglected [***23] M.S.D. by failing to protect her from Poirier is not supported [*483] by substantial evidence, the finding of dependency is reversed. In re Dependency of M.S.D., 144 Wn. App. 468, 481-483, 182 P.3d 978, 984-985, 2008 Wash. App. LEXIS 274, *20-23

F. CONCLUSION

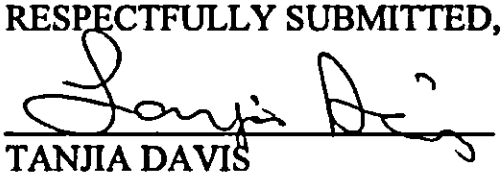
This case involves the finding by a state agency that Davis negligently mistreated her grandchildren as a result of allowing them to attend a family birthday party where they were later abducted by their biological mother. Despite Davis attempts to address the allegations of

neglect as something for which she had no ability predict or control, Division 1 affirmed these findings. Clearly this appellate decision is in gross conflict with others issued in inarguably more extreme cases. Ultimately, this inconsistency has unjustly left Davis with a permanent mark as an individual who has negligently mistreated a child.

For these reasons, Davis respectfully requests this Court to take review and to reverse the Court of Appeals, and if appropriate remand for further action.

Dated this 2nd day of November 2017,

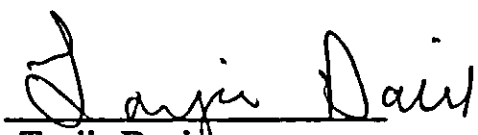
RESPECTFULLY SUBMITTED,



TANJIA DAVIS
Petitioner, Self-Represented

CERTIFICATE OF SERVICE

I certify that I mailed, or caused to be mailed, a copy of the foregoing Petition for Review postage prepaid, via U.S. mail at State of Washington office of Attorney General, Lisa M.Roth Assistant Attorney General 800 fifth Avenue Suite 200 . Seattle, Wa. 98104 and Washington State Court of Appeals Division 1. One Union Square 600 university st. Seattle , WA. 98101`1176 on the November 2, 2017 to the following counsel of record at the following address:



Tanjia Davis
Petitioner-Self Represented

75422-0

75422-0

NO. 75422-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

TANJIA DAVIS,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

E

APPELLANT'S BRIEF

PHIL MAHONEY, WSBA #1292
Attorney for Petitioner

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TABLE OF CASES

3. ASSIGNMENT OF ERROR.

The Court was in error in finding that the Appellant was in violation of the rules governing foster parents.

4. STATEMENT OF THE CASE.

Appellant had her three grandchildren placed with her by Respondents due to mental illness problems of their mother Constance Ford (CP Sub No. 12, Transcript of Administrative Hearing p. 19-20, hereinafter Tr.).

The children's paternal great grandmother, Rethef Hawkins (Tr. P. 80), wished to throw a birthday party for the youngest child for which a special cake had been ordered (Tr. 75). Their paternal aunt, Regina who was a caretaker for the great grandmother, Regina Hawkins (Tr. P. 81), was to supervise the party. Appellant told Regina that the children's mother, Constance, was not to have unsupervised contact with the children or leave with the children. Regina assured her that it was just a family affair and that would not be a problem and Appellant had no indication that Constance would be there (Tr. P. 75-76, p. 82 and p. 84).

Sabrina Eldridge was Respondent's social worker working with the children and Appellant called her to see if that would be alright (Tr. P. 75-76, p. 80-81, p. 87) and Ms. Eldridge said it would be as long as there was no contact with the mother.

Appellant's daughter, Kiera Davis, took the children to the party and told Regina that Constance was not to see the children and Regina said Constance had not been invited (Tr. P. 153-154). Kiera came back to pick the children up around 7:30 p. m. but the party was still going and not all the guests had arrived so the children were

left to spend the night (Tr. p. 96 and p. 98-99).

When Kiera came back Sunday night after work at 10:00 p. m. to pick up the children she was unable to get into this secure building and no one answered the buzzer. Appellant left several messages on their phone (Tr. p. 100-101). They presumed the people had gone to bed. Appellant did not know on Sunday that the children were missing (Tr. 115)

Appellant sent Kiera over to get them Monday morning and Regina told Kiera that Constance had taken them (Tr. p. 101). Constance, whose children were living with her at the time of the administrative hearing (Tr. p. 125), went to the party and after everyone had gone to sleep woke up the children at about 3:00 a. m. and "snuck" out of the house with them (Tr. p. 139).

When Appellant learned this on Monday morning she called Ms. Eldridge who instructed her to call the police, which she did (Tr. p. 36-37)

5. ARGUMENT.

Appellant's position is that it wasn't negligence to have allowed the children to go to a birthday party for one of the children being thrown by their paternal great grandmother. This would be a normal child raising practice. Appellant had no notice of anything likely to occur at the party which would endanger the children and she should not be considered a guarantor that no unanticipated event will ever occur which might pose a threat to the children.

Appellant took the precautionary step of clearing it with Respondent's social worker and with getting assurance from the great grandmother's caregiver that the

children's mother wasn't expected to be there and that the caregiver would not allow the mother to take the children. This was reinforced when the caregiver gave the same assurance to Appellant's daughter who dropped off the children at the party. This wasn't even ordinary negligence. As will be shown later the Administrative Law Judge is required to find greater than ordinary negligence.

Appellant was engaged in what would be the same child raising practices we all would engage in. RCW 26.44.010 specifically states, "This chapter shall not be construed to authorize interference with child-raising practices which are not proved to be injurious to the child's health, welfare and safety." This was re-emphasized using the same language in RCW 26.44.015. It can not be said that allowing children to attend a party thrown by their great grandmother would be injurious.

Similar circumstances have been raised in each of the three Divisions of The Court of Appeals which would support Appellant's position.

Division One decided Dependency of M. S. D., 144 Wn. App. 468 (2008), there DSHS had decided that a child was dependent because the mother lived for six years with a man who ten years earlier had been convicted of criminal mistreatment of his two-month old baby. The court found that this didn't show a clear and present danger to the child's health, welfare and safety. There was ambiguous language as to whether the standard should be clear, cogent and convincing.

Division Two decided Marcum v. DSHS, 172 Wn. App. 546 (2012) failing to find that the Board's finding of strict liability under WAC 388-15-009(5) did not correctly interpret the statute which demands a showing of clear and present danger.

In that case the operator of a day care center accidentally left a two year old child locked in her facility while she left for ten minutes and drove a few blocks to pick up some children.

Division Three decided the most recent case, Brown v. DSHS, 190 Wn. App. 572, 360 P.3d 875 (2015). They specifically found a higher standard of proof. RCW 26.44.020(16) states "Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety...." and the court found, at p. 590, "The word 'magnitude' is defined in part as 'greatness of size or extent.' Webster's Third New International Dictionary 1360 (1993). The legislature's use of the word 'magnitude' implies Brown's misconduct must be of a greater level of fault than negligence." (emphasis added)

In Brown a two year old boy suffered scalding burns in a bath tub and was treated at home for several days and taken to a doctor when the injury seemed to worsen. The court reversed the lower courts finding of a dependent child.

In the instant case, negligence is also alleged when the Appellant reported Constance's taking the children to DSHS and the police when she discovered it Monday morning rather than on Sunday when her daughter was unable to arouse anyone at the great grandmother's secure residence.

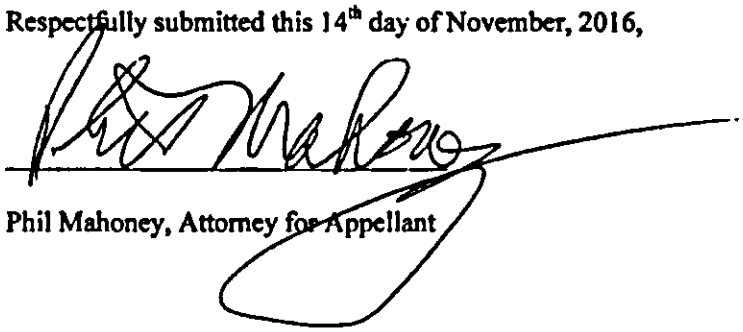
Not only would this not be negligence if she had made such a report Sunday when she didn't know the circumstances, it would be a crime. RCW 9A.84.040

makes false reporting a crime when it would "cause public inconvenience or alarm' and is also a crime under SMC 12A.16.040(C).

6. CONCLUSION.

For the reasons stated above the findings and judgment below should be reversed.

Respectfully submitted this 14th day of November, 2016,



Phil Mahoney, Attorney for Appellant

No. 75422-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

TANJIA DAVIS
Appellant
v.
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
Respondent

DECLARATION OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this date I served by hand delivery a copy of Appellant's Brief in this matter to Lisa Roth, Office of Attorney General, 800 5th Ave, Suite 2000, Seattle, WA 98104.

Dated this 14th day of November, 2016 in Seattle, Washington

Tom Nelson
Paralegal
Law Office of Phil Mahoney

75422-0

NO. 75422-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

TANJIA DAVIS,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

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APPELLANT'S REPLY BRIEF

PHIL MAHONEY, WSBA #1292
Attorney for Petitioner

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Statutes

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When Appellant learned this on Monday morning she called Ms. Eldridge, who instructed her to call the police, which she did (Tr. p. 36-37).

2. ARGUMENT.

A. BACKGROUND CHECKS.

In the instant case the children were going to a birthday party for one of the children given by their paternal grandmother and aunt. These people

were not caregivers or supervisors of the children but merely the people throwing the party. There is no Washington Administrative Code or RCW requiring a background check in such a situation and this is an arbitrary and capricious demand on the part of the respondent.

RCW 74.15.030(1)(b) provides it for an "applicant" or a "service provider" and (c) to those with "unsupervised access" to children. It was undoubtedly this sort of arbitrary action by respondent which caused the legislature to since amend RCW74.15.030(1)(c) to add, "...however, a background check is not required if a caregiver approves an activity pursuant to the prudent parent standard contained in RCW 74.13,710." This amendment makes it clear that instances such as in the instant case should not require background checks for every person who will have limited contact with the child. Even less a necessity when the maternal aunt who was throwing the party was already a licensed "care giver" by the respondent.

Since RCW74.13.710 is also important as to the alleged negligence it will be examined in the next section.

B. NEGLIGENCE.

Respondent seems to view this from the standpoint of ordinary negligence when the recent case law has set a greater standard. As appellant pointed out in her opening brief, Brown v. DSHS, 190 Wn. App. 572, 360

P.2d 875 (2015), the case law requires more than ordinary negligence. At p. 590, "The word 'magnitude' is defined in part as 'greatness of size or extent.' Webster's Third New International Dictionary 1360 (1993). The legislature's use of the word 'magnitude' implies Brown's misconduct must be of a greater level of fault than negligence."

In the instant case the appellant was guilty of no negligence let alone a greater level than negligence.

The statute specifically contemplates that the caregiver (appellant) should allow the children to engage in normal social activities. This is not negligence. Respondent never addressed the statute calling for this.

RCW 26.44.010 states, "This chapter shall not be construed to authorize interference with child-raising practices which are not proved to be injurious to the child's health, welfare and safety." Nowhere in respondent's brief to they show that allowing children to go to a birthday party isn't a normal "child-raising" practice or that doing so is an act of negligence. This was re-emphasized, using the same language, in RCW 26.44.015.

The respondent's arbitrary and capricious interpretation appears to be what led the legislature to further define such situations in RCW 74.13.710(3) stating "Caregivers have the authority to provide or withhold permission without prior approval of the caseworker, department, or court to allow a

child in their care to participate in normal childhood activities based on a reasonable and prudent parent standard." Respondent's brief argues as to whether the caseworker's permission was given but the caseworker's permission shouldn't have been necessary.

Section (3)(a) of this statute says, "Normal childhood activities include, but are not limited to, extracurricular, enrichment, and social activities, and may include overnight activities outside the direct supervision of the caregiver for periods of over twenty-four hours and up to seventy-two hours." Thus the caseworker's permission should not be needed to allow the children to go to a "social" activity such as a birthday party or to spend the night there.

This newly added statute defines the "prudent parent standard" in RCW 74.13.710(3)(b) as:

> The reasonable and prudent parent standard means the standard of care used by a caregiver in determining whether to allow a child in his or her care to participant in extracurricular, enrichment, and social activities. This standard is characterized by careful and thoughtful parental decision making that is intended to maintain a child's health, safety, and best interest while encouraging the child's emotionaland developmental growth.

Allowing children to attend a birthday party for one of them at the house of their paternal great grandmother being thrown by their paternal aunt, who respondent has licensed as a caregiver, certainly appears to be a normal

social activity. Additionally, in this instance appellant specifically instructed the maternal aunt that the children were to have no contact with their mother and were told that the mother hadn't been invited. This wouldn't be negligence under any standard.

Nowhere in their brief does the respondent present any argument that this would be negligence whether ordinary or, as required by Brown v. DSHS, supra, a "...greater level of fault than negligence." Instead they set up a "straw man" argument which they then try to destroy.

They say that it would be negligence if appellant had allowed her daughter Constance to take the children. There is no evidence whatsoever that she allowed her daughter Constance to have the children. Yet, the major part of their brief is a discussion as to why this would be improper. Every bit of evidence presented showed that she told the aunt that Constance was to have no contact with the children.

Respondent presented no authority that would hold that appellant should be a guarantor that no bad thing would happen to the children if they were not in appellant's presence. This entire line of argument on respondent's part is fallacious.

Respondent then argues that it was negligence, but they present nothing to show their allegations rise to a "greater level of fault than

negligence" for appellant not to have called the police before she knew that the children were missing. There is no evidence in the record that appellant knew they were missing until Monday morning when she immediately called the caseworker and then the police. It is arbitrary and capricious to require appellant to speculate as to the reason why appellant's daughter was unable to make contact with the aunt on Sunday. The administrative judge found facts on sheer speculation as to the reason why contact with the children couldn't be made on Sunday.

In appellant's opening brief it was pointed out that it would be a crime for appellant to report to the police without knowledge that that was the case. Respondents never addressed this in their brief.

Beginning at p. 19 of their brief they cite the case of Morgan v DSHS, 99 Wn. App. 148 (2000), as comparable to the instant case, which it is not. There the caregiver left a disabled child alone at a skating rink. In the instant case the children were left with a DSHS licensed caregiver with specific instructions that they were to have no contact with their mother.

At p. 20 respondent attempts to distinguish Marcum v. DSHS, 172 Wn. App. 546 (2012), where they found no negligence in leaving a two-year-old child alone for ten minutes. There the appellate court found that the ALJ went beyond the legislative definition of negligent treatment. As pointed out

in above argument the ALJ here has also gone beyond the legislative definition of negligent treatment.

At p. 23 of respondent's brief they try to distinguish In re Dependency of M.S.D., 144 Wn. App. 468 (2008), by saying that appellant knew that her daughter was a dangerous person. This isn't apt since, as pointed out above, appellant never gave the children to her daughter and there is no evidence to the contrary in the record.

At p. 28 respondent tries to distinguish Brown v. DSHS, supra, by reiterating the two arguments addressed above regarding leaving the children with the aunt and not contacting the police before she knew that the mother had taken the children. Earlier respondent relied on the speculative statement of the ALJ that appellant must have known the mother had the children when appellant had been unable to contact the aunt until Monday. Clearly speculative and clearly arbitrary and capricious.

3. CONCLUSION.

For the reasons stated above, the decision below should be reversed.

Respectfully submitted this 3rd day of March, 2017.

Phil Mahoney, WSBA 1292
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

TANJIA DAVIS,

Appellant,

No. 75422-0-I

V

DECLARATION OF SERVICE

DEPARTMENT OF SOCIAL AND

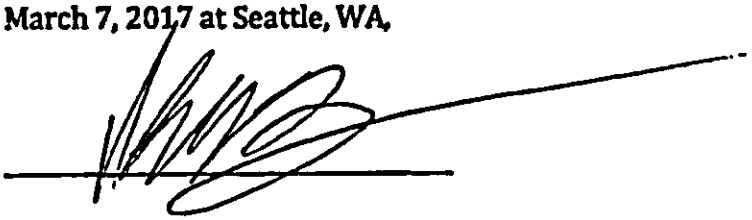
HEALTH SERVICES,

Respondent.

Phil Mahoney, subject to the laws of perjury of the State of Washington, declares as follows:

That on todays date he mailed a copy of this document, a letter to the Clerk of the Court and the Reply Brief of Appellant to Assistant Attorney General Lisa Roth.

March 7, 2017 at Seattle, WA,



Phil Mahoney WSBA #1292

Attorney for Appellant.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TANJIA DAVIS, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondents.	)	No. 75422-0-I DIVISION ONE UNPUBLISHED OPINION FILED: October 2, 2017

SPEARMAN, J. – Tanjia Davis permitted the three grandchildren in her custody to spend the night with unauthorized caregivers and then delayed contacting the Department of Social and Health Services (Department) or law enforcement upon learning that the children's mentally ill mother had abducted them. Because the record supports the determination that Davis's actions constituted a serious disregard of the consequences to the children of such magnitude that it created a clear and present danger to the children's health, welfare or safety, we affirm the Department's finding of negligent treatment.

FACTS

Davis has not assigned error to any of the Department's findings of fact. The findings are therefore verities on appeal and establish the following sequence of events. See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

On March 23, 2012, the Department filed a dependency petition on behalf of Constance Ford's three children, who were approximately three, eight and ten.

Appellant Tanjia Davis is Ford's mother. Ford was suffering from "severe, non-medicated mental illness, as well as chronic substance abuse. . . ."[1] Davis informed Child Protective Services (CPS) that Ford had recently assaulted several family members, stopped taking her medication, and was using drugs and alcohol. Davis and her other daughter, Kiera Davis, also alleged that Ford had slapped the children at times. After the shelter care hearing on March 26, 2012, the Department placed the three children with Davis.

On May 7, 2012, the Department served Davis with a finding of negligent treatment or maltreatment of her grandchildren. The finding was based on evidence that Davis left the children in the care of relatives who lacked the requisite background checks and then delayed reporting that Ford had abducted the children. An internal Department review affirmed the finding.

Davis requested a hearing to challenge the neglect finding. After the hearing on February 25, 2015, the Administrative Law Judge (ALJ) issued an initial order upholding the Department's finding of negligent treatment. On April 7, 2015, a Department review judge issued a review decision and final order affirming the ALJ's initial order and adopting, in pertinent part, the ALJ's findings of fact and credibility assessments. The superior court denied Davis's petition for judicial review.

The order of dependency permitted only supervised contact between Ford and her children. When discussing the placement of the three grandchildren, Sabrina Eldridge, the assigned CPS social worker, informed Davis that anyone who had unsupervised contact with the children must first complete a background check.

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[1] Findings of Fact (FF) 3, Certified Appeal Board Record (CABR) at 17.

Eldridge expressly told Davis that this meant no relative, including Davis's other daughter, could babysit or keep the children overnight without a background check.

Eldridge handed Davis the background check forms for each relative present at a late March 2012 meeting. Each person living with Davis, including Davis's husband, 17 year old son, and daughter Kiera, had completed a background check at the time the Department placed the children with her. Davis had already completed a background check to become a licensed adult family home care provider.

Davis reported that shortly after the Department placed the children with her, she saw Ford "'stalking the neighborhood,'" wearing a mask, and "'singing Jesus songs in the street.'"[2] On April 6, 2012, during a supervised visit with the children, Ford assaulted Davis. Davis then obtained a domestic violence no contact order against Ford.

On Saturday, April 14, 2012, Davis permitted the three children to attend an overnight birthday party at a paternal relative's residence. Ford showed up during the party and absconded with the children. Federal marshals found the children several weeks later and returned them to the Department's custody. None of the relatives present at the party had completed background checks.

At the ALJ hearing, Davis testified that she called social worker Eldridge several days before the party and that Eldridge said it was "'ok'"[3] for the children to attend as long as Ford was not present. Davis also claimed that she informed Regina Hawkins, the children's paternal aunt and a sponsor of the birthday party, that Ford could have no contact with the children. According to Davis, Hawkins assured her

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[2] FF 11, CABR at 19.

[3] FF 15, CABR at 21.

that Ford was not invited to the party and that no one had told Ford about the party. But a cousin apparently told Ford about the party and when she appeared, the relatives allowed her in.

Davis testified that she and Kiera dropped the children off for the party at about 4:00 p.m. on Saturday. Davis maintained that the initial plan was for Kiera to pick the children up after work at about 7:30 p.m. Davis then claimed that on Saturday evening, one of the relatives called to say the party was running late. At the relative's request, Davis gave her approval for the children to spend the night.

Kiera Davis, however, testified that she arrived after work at about 11:00 p.m. on Saturday to pick up the children. Kiera rang the bell and called the relatives, but no one opened the door. At this point, Kiera decided "'they were all in bed, and the children would just spend the night.'"[4] Upon arriving home, Kiera assured her mother that the children were sleeping and "'that we'll go back first thing in the morning.'"[5]

On Sunday, both Davis and Kiera were admittedly very worried about the children. They claimed that they were unable to reach any of the relatives by phone, and Kiera testified that she returned to the home twice on Sunday, but no one answered the door. Kiera also telephoned other relatives throughout the day on Sunday, attempting to find the children. Kiera acknowledged that "'[w]e were up all [Sunday] night trying to figure something out, calling out people, and sending out messages . . . .'"[6]

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[4] FF 17, CABR 21.

[5] Clerk's Papers (CP) at 156.

[6] CP at 166.

On Monday morning, Davis called Eldridge and told her the children were supposed to be at a paternal relative's home, but could not be found. Davis said she had not yet called the police earlier because she first wanted to give her daughter "the benefit of the doubt"[7] to return the children on her own. At Eldridge's direction, Davis immediately reported the abduction to the police. When federal marshals found the children on May 2, 2012, they did not appear to be abused or visibly harmed.

At the ALJ hearing, Davis insisted that she did not learn of the kidnapping until Monday morning and then promptly notified Eldridge. The review judge adopted the ALJ's assessment that this claim was not credible in light of the significant discrepancies between Davis's account of providing permission on Saturday for the children to spend the night and Kiera's attempts to pick the children up late Saturday night, the acknowledged concern and attempts of both Davis and Kiera to find the children on Sunday, and Davis's account when she reported the abduction to the police on Monday:

> The Appellant's story that she approved an overnight stay on Saturday is, more likely than not, an attempt to cover the fact that she knew the children were missing, or were not where they should be, on Saturday night by around 11 p.m.[8]

The review judge found that the paternal relatives had informed Davis that the children were missing no later than Sunday. The review judge also rejected Davis's assertion that Eldridge had given her permission for the children to attend the birthday party, noting that Eldridge's extensive and detailed case notes provided no support for this claim.

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[7] FF 25, CABR at 24.

[8] FF 21, CABR at 23.

Ford also testified at the administrative hearing. She asserted that she arrived at the party on Saturday afternoon and then spent Saturday night and all day Sunday at the home before leaving with the children at about 3:00 a.m. on Monday. The review judge found Ford's account not credible in light of the evidence that Davis and Kiera discovered the abduction no later than Sunday.

The review judge concluded that Davis's failure to contact the Department immediately upon learning that Ford had abducted the children, as well as her actions in permitting the children to be supervised by persons who had not completed a background check, constituted negligent treatment or maltreatment of the children.

Davis appeals.

DISCUSSION

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of agency actions. Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000). We review an agency order in adjudicative proceedings under RCW 34.05.570(3), which provides, in part, that we will grant relief only if the agency has erroneously interpreted or applied the law, or if the order is unconstitutional, is outside the statutory authority of the agency, is not supported by substantial evidence, or is arbitrary or capricious. Our review is limited to the Department's final order, not the ALJ's initial order or the superior court's order. See Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 403-04, 858 P.2d 494 (1993).

We review findings of fact to determine whether, considering the record as a whole, the evidence is sufficient to persuade a fair minded person of the matter. Mowat Const. Co. v. Department of Labor and Industries, 148 Wn. App. 920, 925,

201 P.3d 407 (2009). As indicated, because Davis has not assigned error to the agency's findings of fact, the findings are verities on appeal.[9]

We review questions of law, and the agency's application of the law to the facts, de novo, but we afford "great weight" to the agency's interpretation of law "where the statute is within the agency's special expertise." Cornelius v. Dep't of Ecology, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). We do not weigh witness credibility or substitute our judgment for the agency's findings of fact. Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn. 2d 568, 588, 90 P.3d 659 (2004). "The burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

Under RCW 26.44.020(1), the definition of abuse or neglect includes, among other things, "the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." Negligent treatment or maltreatment includes:

> [A]n act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

RCW 26.44.020(16).

The Department has also adopted a regulation defining "negligent treatment or maltreatment":

> (5) Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, on the part of a child's parent, legal custodian,

[9] In any event, substantial evidence supports the relevant findings.

> guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes, but is not limited, to:
>
> (a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves;
>
> (b) Actions, failures to act, or omissions that result in injury to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child; or
>
> (c) The cumulative effects of a pattern of conduct, behavior or inaction by a parent or guardian in providing for the physical, emotional and developmental needs of a child's, or the effects of chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties, when the result is to cause injury or create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child.

WAC 388-15-009(5). In order to satisfy the statutory definition of negligent treatment in RCW 26.44.020(16), the Department must establish more serious misconduct than simple negligence. Brown v. Dep't of Soc. & Health Servs., 190 Wn. App. 572, 593, 360 P.3d 875 (2015) (Department erred in incorporating "reasonable person" standard into finding of neglect).

On appeal, Davis argues that allowing her grandchildren to attend the birthday party at a relative's home did not amount to ordinary negligence, much less satisfy the heightened statutory standard of negligent treatment. To support this argument, Davis points to the fact that she had no notice that any "unanticipated event" might pose a risk of harm to the children, that she "took the precautionary step"[10] of obtaining Eldridge's permission before allowing the children to attend, and that the

[10] Brief (Br.) of App. at 2.

relative holding the party assured her that she would not let Ford attend. Davis claims that under the circumstances, she was "engaged in what would be the same child raising practices we all would engage in."[11]

But Davis's arguments rest on an incomplete, conclusory factual account that the review judge rejected in pertinent part as not credible. Contrary to Davis's assertions, the review judge found that she did not contact Eldridge before the party. The unchallenged findings also establish that Davis allowed the children to spend the night with caregivers who had not completed background checks, contrary to the Department's express instructions.

Moreover, Davis was aware that Ford was prohibited from having any unsupervised contact with the children. Davis was also well aware of Ford's severe mental health issues, chronic substance abuse, and recent erratic and assaultive behavior. Yet when she learned no later than Sunday that Ford had abducted the children, Davis failed to notify the Department or the police in an effort to give Ford "the benefit of the doubt" to return the children. Davis acknowledged the serious risk of harm to the children in her comments to the police. The concern was also reflected in her frantic efforts, along with Kiera, to contact or find the children on Sunday, efforts that continued all through Sunday night. About a week after the abduction, Davis called and left a message for Eldridge demanding that the Department locate the children because she "did not want to be burying" her grandchildren.[12]

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[11] Br. of App. at 3.

[12] CP at 126.

Viewed together, Davis's actions and failure to act evidenced a serious disregard of consequences "of such magnitude as to constitute a clear and present danger" to the children's health, welfare, or safety and were therefore sufficient to satisfy the statutory definition of negligent treatment or maltreatment.

Davis's reliance on Brown, 190 Wn. App. 572, Marcum v. Dep't of Soc. and Health Servs., 172 Wn. App. 546, 290 P.3d 1045 (2012), and In re Dependency of M.S.D., 144 Wn. App. 466, 182 P.3d 978 (2008), is misplaced. In Brown, the court held that the Department had erred in applying a "reasonable person" standard to the finding of neglect. The court concluded that the statutory definition of "negligent treatment" in RCW 26.44.020(16) required a higher standard of misconduct than simple negligence. In Marcum, the court vacated the Department's finding that neglect had occurred under WAC 388-15-009(5) regardless of whether the conduct created a clear and present danger to the child's safety. Here, unlike Brown and Marcum, the Department's finding of negligent treatment was based on the application of the proper standard. The review judge expressly noted that the statutory and regulatory definitions did not "relieve the Department of having to show that a particular action or failure to act constituted a serious disregard of the consequences to a child of such magnitude as to create a clear and present danger to that child's health, welfare, or safety. . . ."[13]

In M.S.D., the court reversed a dependency based on a finding that the mother negligently failed to protect her daughter from the risk posed by the mother's boyfriend. The court concluded that under the circumstances, the evidence failed to

[13] CABR at 34, n.64.

establish that the boyfriend's ten year old conviction constituted a risk to the child's safety. Here, however, the evidence was sufficient to establish that Davis's actions and failure to act created a clear and present danger to the children's health, safety or welfare.

In her reply brief, Davis argues for the first time that the Department's requirement that "the people throwing the party" complete background checks "in such a situation ... is an arbitrary and capricious demand on the part of the respondent."[14] Because this argument is raised for the first time in the reply brief, we decline to consider it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Affirmed.

Specman, J.

WE CONCUR:

Trickey, ACJ

[14] Reply Br. at 3.