Supreme Court No. 96742-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

CHRISTELLE CUNNINGHAM,

Petitioner.

Court of Appeals No. 76612-1-I

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Christelle Cunningham (Ms. Cunningham), the Petitioner, requests review of the Court of Appeals' decision affirming the Superior Court's order denying her Petition for Judicial Review. The Superior Court declined to review the Washington State Department of Social and Health Services' (DSHS) decision that she negligently maltreated a child by accidentally leaving him unattended for approximately 30 minutes.

Ms. Cunningham also appeals the Superior Court's order denying her Motion to Amend her Petition for Judicial Review of the Washington State Department's Early Learning (DEL) review and revocation of Ms. Cunningham's license based on the DSHS' finding of negligent maltreatment.

II. CITATION TO COURT OF APPEALS' DECISION

Ms. Cunningham seeks this Court's review of the decision of the Court of Appeals, Division I, in Case No. 76612-1-I, dated December 17, 2018. A true copy of the Court of Appeals' decision is appended hereto as Attachment "A."

III. ISSUES PRESENTED FOR REVIEW

Ms. Cunningham seeks review of the Court of Appeals' decision pursuant to RAP 13.4 based on the following issues:

1. WHETHER THE COURT OF APPEALS' ERRONEOUS APPLICATION OF RCW 26.44.020 TO MS. CUNNINGHAM'S ACTIONS PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON?

2. WHETHER THE COURT OF APPEALS' ERRONEOUS APPLICATION OF RCW 34.05.570 TO MS. CUNNINGHAM'S CASE PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON?

3. WHETHER THE COURT OF APPEALS' ERRONEOUS DENIAL OF MS. CUNNINGHAM'S MOTION TO AMEND HER PETITION FOR REVIEW TO ADD DEL'S REVIEW ORDER PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON?

IV. STATEMENT OF THE CASE

Ms. Cunningham was a licensed child care provider from January 25, 2008 until her license was revoked by DEL on November 14, 2014. Clerk's Papers ("CP") 1174, 1215. Ms. Cunningham's most recent license was issued in January 26, 2014. Certified Appeal Board Record ("CABR") 249.[1] Her license authorized her to operate Kids R' Us, a family home child care in Seattle, Washington for up to 12 children ranging in age from birth to 12 years. *Id*,; CP 185: 9-21.

On August 1, 2014, while Ms. Cunningham was operating her home child care, Kids R' Us, Ms. Cunningham unknowingly left a child, TJ, at a local community center. A custodian, security guard, and the two middle school girls observed TJ alone on the playground for approximately 30 minutes. CP 168: 11-

[1] The Certified Appeal Board Record is included in the Clerk's Papers, but is not numbered. As such, references to the Certified Appeal Board Record will be made to the page number of the Certified Appeal Board Record ("CABR").

17 At approximately 12:20 p.m., a recreation center worker and the girls brought TJ into the Community Center. CABR 275-285; Police Report, 8-9. They took TJ to the Center's indoor gym to be attended to by the permanent staff member and play ball. CP 470: 21-25; 1177; 1217. Eventually, a Garfield Center employee called the police and they were dispatched to Garfield at 12:41 p.m. and arrived at 12:51 p.m. CP 1177, 1217. From 12:20 p.m. until the police arrived, TJ was under adult supervision and inside the Community Center. CP 469:14-17. Thereafter, he was under the police officers' supervision. CP 485:23-486:1. TJ communicated to the police his name, age, and that he was with "Ms. Christelle." CABR 275-286; Police Report, 9. One of the officers described TJ as in "good spirits and happy he was playing." CP 487:11-16.

Once Ms. Cunningham realized that TJ was missing. she phoned the Garfield Community Center. At that time she was informed the police were on the scene. She then returned to the community center. CP 1177, 1217-18. The police received permission from TJ's father to release the boy to Ms. Cunningham. CP 554:20-555:4.

A. DSHS Proceedings

In 2014, the initial DSHS proceeding took place. In that proceeding, parents of children who were enrolled in Ms. Cunningham's home child care testified to the excellent care and nurturing their children received from her. *See, e.g.,* CP 1041:8-13; 1053: 2-7. TJ's parents described Ms. Cunningham as a

trusted member of their child care "tribe" and "like family" and explained that they would return their children to her care immediately. CP 559:15-19; 568: 12-15; 568:24-569:1. TJ's father described it as an "isolated incident." CP 559: 16-17. In fact, all the parents who testified at the administrative hearing indicated that, despite the DSHS finding, they would return their children to Ms. Cunningham's care. CP 580:5-6; 1053: 2-7; 1060:19-21. The parents all also testified that they did not ever have any complaints and had never heard any complaints about Ms. Cunningham prior to the DSHS finding. *See, e.g.,* CP 1050: 17-20;1060: 14-16.

The record shows and the administrative judge found that Ms. Cunningham "did truly care for the children in her care." CP 1182. TJ had been under Ms. Cunningham's care for four years, since he was 4 months old.

It is undisputed that, during the time that she operated Kids R' Us, Ms. Cunningham had in place and utilized numerous protocols and procedures to ensure the safety and security of the children in her care, including "partnering", "link lines", "attendance sheets" and "head counts". CP 207:19-21, 221:23-222: 21, 231:15, 232:7-24, 324:15-235:9, 707:24-25.

The DSHS proceedings resulted in the following findings:

(1) the DSHS issued a founded finding of child negligent maltreatment against Ms. Cunningham. A true copy of the DHS decision is appended hereto as Attachment "B." and

(2) the DEL disqualified Ms. Cunningham as a child care worker and revoked her facility's child care license. A true copy of the DEL decision is appended hereto as Attachment "C."

On October 22, 2014, the DSHS Division of Licensed Resources/Child Protective Services ("CPS") issued a letter to Ms. Cunningham notifying her that it had determined she had negligently treated or maltreated a child in her child care (The finding she had negligently treated or maltreated a child is hereinafter referred to as the "DSHS Finding"). CP 1171.

Following DSHS' determination of neglect against Ms. Cunningham, DEL thoroughly reviewed Ms. Cunningham's licensing history and on November 14, 2014 hand delivered to Ms. Cunningham a Notice of Disqualification and Revocation of Child Care License. CP 1143-49, 1161-67 ("DEL Decision").[2] The DEL Decision made it clear that the WAC required that DEL, upon a finding of negligent maltreatment, revoke Ms. Cunningham's license and disqualify her from child care.

On November 20, 2014, Ms. Cunningham requested that the DSHS Finding be reviewed. CABR 321-324, Exhibit 33. On December 9, 2014, the DSHS issued a letter indicating that the Finding would not be changed. CP 1141.

[2] In addition to citing the DSHS finding of negligent maltreatment, the DEL Decision cited other alleged violations of the Washington Administrative Code ("WAC") from 2011-2012. CP 1144-46. Despite these alleged violations, in January of 2014, DEL had issued to Ms. Cunningham, a license to increase the children in her care from 5 to 12. CP 1215-16. The other violations are not before the Court.

On December 22, 2014, Ms. Cunningham requested a hearing to contest both the DSHS Finding and the DEL Decision to the Office of Administrative Hearings and the DEL. CP 1150-59. A prehearing conference for the two dockets was held on January 15, 2015, which resulted in the matters being scheduled for a consolidated hearing that was held on May 11-13, 2015, and May 18-19, 2015. CP 16-1067.

On August 4, 2015, the Administrative Law Judge ("ALJ") mailed an Initial Order on both the DEL and DSHS matters. CP a1169-94. In Initial Order the ALJ affirmed DSHS's Finding of negligent maltreatment. *Id.*

On August 27, 2015, Ms. Cunningham filed a Petition for Review of the Initial Order to the Administrative Review Judges, contesting the legal conclusions reached in paragraphs 9, affirming the DSHS Finding, as well as paragraphs 14 and 22, affirming the DEL Decision to revoke and disqualify as a consequence of the DSHS Finding. CP 1200-01.

DEL moved for a stay of its review of the ALJ's Initial Order relating to paragraphs 14 and 22, pending the outcome of the DSHS' review the ALJ's Initial Order. CP 1085. On September 9, 2015, DSHS filed a Response to the Petition for Review. CP 1085. The DEL's review was stayed on September 16, 2015. CP 1085.

On December 29, 2015, the DSHS Review Judge and Board of Appeals entered a Review Decision and Final Order ("DSHS Review Order") affirming

the ALJ's Initial Order and the DSHS' finding of negligent maltreatment. CP 1212-28.

B. Superior Court Proceedings

On January 20, 2016, Ms. Cunningham filed a Petition for Judicial Review in King County Superior Court ("Petition") of the DSHS Finding and DSHS Review Order and the Review Order. CP 1-4.

On February 1, 2016, DEL filed its response to Ms. Cunningham's Petition for Review. CP 1085.

On February 10, 2016, the DEL Review Judge affirmed the Initial Order (hereinafter referred to as the "DEL Review Order"). CP 1085-88. The DEL Review Judge held that as a result of the DSHS Review Order affirmance of negligent maltreatment, it was required to disqualify Ms. Cunningham from providing licensed child care, caring for children, and having any unsupervised access to children receiving early learning services. CP 1087-88.

On April 26, 2016, Ms. Cunningham moved to amend her Petition to seek review of the DEL Review Order, which is based on the DSHS Finding and the DSHS Review Order. CP 1071-1106. On April 29, 2016, DSHS responded in opposition to the Motion to Amend. CP 1107-1243. On May 3, 2016, Ms. Cunningham filed her reply in support of the Motion to Amend. CP 1244-50. On May 4, 2016, the Superior Court denied the Motion to Amend. CP 1261-62. On

May 13, 2016, Ms. Cunningham moved for reconsideration on her Motion to Amend and on May 25, 206, it was denied. CP 1266-70; 1271.

On November 18, 2016, the Superior Court heard argument from counsel and on December 27, 2016, entered its Order Affirming Review Decision and Final Order (hereinafter referred to as the "Final Order"). CP 1327-28.

C. Appellate Court Proceedings

In 2017, Ms. Cunningham timely filed her notice of appeal of the Superior Court's order denying her Petition for Judicial Review with the Court of Appeals, Division I. On appeal, Ms. Cunningham argued that:

(1) substantial evidence did not support a finding of negligent treatment,

(2) her conduct did not "constitute child neglect or negligent treatment," and

(3) the agency finding was arbitrary and capricious.

On December 17, 2018, the Court of Appeals entered its decision affirming the Superior Court's order. Attachment A.

V. ARGUMENT

A. When Review is Appropriate

The Rules of Appellate Procedure, RAP 13.4, allow a party to petition the Supreme Court for discretionary review of a Court of Appeals' decision. A petition for review will be accepted if:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review of the Court of Appeals' final order based on a determination that there is a significant question of law under the Constitution of the State of Washington or of the United States.

In the present case, as discussed in detail below, the Court of Appeals' Order upholding the finding of child negligent maltreatment should be set aside by the Court, pursuant to RCW 34.05.570(3), because the DSHS Finding's determination on whether there was a "***serious disregard*** of consequences of such magnitude as to constitute a ***clear and present danger***" is not supported by substantial evidence, and is based on an erroneous interpretation and application of the law.

The Superior Court erroneously interpreted and applied WAC 388-15-009(5) in Ms. Cunningham's case because the Department's interpretation is outside the statutory authority of the agency and erroneously fails to follow the statute governing child abuse and neglect. Finally, the Court should find that the trial court abused its discretion when it denied Ms. Cunningham's Motion to Amend the Petition for Review to add DEL and its Review Order.

B. The Court of Appeals' Decision Presents a Significant Question of Law Under the Constitution of the State of Washington with Respect to the Court of Appeals' Erroneous Application of RCW 26.44.020 to Ms. Cunningham's Actions.

Washington's statutory scheme regarding child abuse and neglect unambiguously requires a determination as to whether alleged conduct rises to the level of a serious disregard of consequences of such magnitude constituting a clear and present danger. RCW 26.44.020(1) defines "Abuse or neglect" as follows:

> [S]exual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

RCW 26.44.020(14) further defines "negligent treatment or maltreatment" as:

> [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. When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.

No language in the child abuse and neglect statute directs or authorizes DSHS, either explicitly or implicitly, to promulgate rules regarding or expanding the statutory definitions of either "abuse or neglect," or "negligent treatment or maltreatment."

The Court Appeals found that the plain language of the statute does not require actual harm to show a "clear and present danger" to a child's health, welfare, or safety. Petitioner is not arguing that actual harm must be shown. The Court of Appeals found that a "clear and present" danger must be close in time to the act or failure to act. Petitioner argues that the mere failure to protect a child from possible, but unknown harms is not sufficient to show "clear and present danger." Petitioner argues there was no significant risk of harm to TJ that would show a "clear and present danger." The mere *exposure to possible risks of clear and present danger* alone is not the standard. To be deemed negligent maltreatment, there must be actual, clear and present danger to the child. The DSHS failed to meet that standard here.

It is well established that Courts have consistently focused on the statutory elements regarding a "serious disregard" of consequences constituting a "clear and present danger" to a child's health, welfare and safety. See *Morgan v. Dep't of Soc. and Health Servs.,* 99 Wn. App. 148, 153-154, 992 P.2d 1023, 1026 (2000); *In Re Welfare of Fredericksen,* 25 Wn. App. 726, 733, 610 P.2d 371, 375

(1979); *In the Matter of the Dependency of M.S.D.,* 144 Wn. App. 468, 182 P.3d 978 (2008).

The unchallenged findings in this case established "[t]he fact that TJ was found safe, and was secured by friendly children and adults." CP 1227 ¶ 11. The Garfield playground is on a property with a staffed Community Center and next to a high school. CP 171: 16-24; 1176, 1216. The record shows that on August 1, 2014, from approximately 12:00 p.m. until 12:50 p.m., there were at least four adult employees of the Community Center, the playground, or the park grounds, who were at or within 15 feet (CP 169:8-11) of the Garfield playground: a custodian (CP 165:23-166:10), a security guard (CP 168: 14-17), a permanent Community Center staff member (CP 168:21-169:2), and a temporary intermittent recreation assistant[3] (CP 160:25-161:7). Additionally, as part of the summer youth program, a high-school aged girl was working in support of the Community Center on August 1, 2014. CP 887:7-15. There were two other middle-school aged girls on the playground. CP 173: 21-25. Finally, on that date and during that time, the playground was described as quiet, empty, with no other people or adults coming through. CP 173:7-11; 177:5-6. There is no record evidence of any suspicious, dangerous, or unusual, activity or persons, near or around the playground or the Garfield Community Center grounds on August 1, 2014.

[3] Ms. Debra Khaljani, the temporary recreation assistant, testified that she was a certified substitute teacher and that the Community Center required background checks prior to hiring her. CP 162:23-163: 3; 163:9-11.

Clearly, there was no significant risk of harm to the TJ that would show a "clear and present danger."

In addition, there is no record evidence that Ms. Cunningham intentionally or was grossly negligent when she left TJ behind. The Review Judge found that Ms. Cunningham did not mean to leave TJ at the park. CP 1223 ¶ 34. Accidently missing a head count or seatbelt check, and/or trusting a verbal confirmation from her assistant that everyone was in the van, does not constitute a reckless disregard of TJ's safety. There is no evidence that Ms. Cunningham knew or should have known that these acts would create an unreasonable risk of bodily harm and a high degree of probability that harm would result to TJ. At worst, Ms. Cunningham was negligent and that is not a basis for a finding of child neglect.

C. The Court of Appeals' Decision Presents a Significant Question of Law Under the Constitution of the State of Washington with Respect to the Court of Appeals' Erroneous Application of RCW 34.05.570 to Ms. Cunningham's Case.

Under the Administrative Procedure Act, RCW 34.05 et seq., an individual who is substantially prejudiced by a state agency adjudicative order may seek judicial review of both the individual order in her case, and the state agency regulations on which the order was based. RCW 34.05.570(3); *see also* RCW 34.05.570(1)(d); RCW 34.05.530; RCW 34.05.570(2)(a).

The reviewing court may set aside the agency's final adjudicative order based on a determination that the order (or the statute or rule on which the order is

based) is outside the statutory authority of the agency; is not supported by substantial evidence; or the agency has erroneously interpreted or applied the law. RWC 34.05.570(2)(c) and RCW 34.05.570(3).

In the present case, the DSHS' Review Order upholding the finding of child negligent maltreatment should be set aside by the Court, pursuant to RCW 34.05.570(3), because the DSHS finding's determination on whether there was a "***serious disregard*** of consequences of such magnitude as to constitute a ***clear and present danger***" is outside the Department's statutory authority, is not supported by substantial evidence, and is based on an erroneous interpretation and application of the law.

DSHS's abuse of children regulations at WAC 388-15-009(5) first faithfully recite the statutory definition of "negligent treatment or maltreatment" but goes on to add language not found in the RCW. This added language expands the statutory definition of the term to also include "failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety..." WAC 388-15-009(5).

In this case, the Review Judge found that Ms. Cunningham failed to provide "adequate supervision" as set out in the WAC definition. CP 1226-27 ¶ 9. The Review Judge goes on to find that "[h]er failure to supervise shows a serious disregard of the possible consequences to the child of such magnitude that it

created a clear and present danger to TJ's health, welfare, and safety." CP 1226-27 ¶ 9.

The Review Judge noted that WAC 388-15-009(5) creates the requirement that for a child's caregiver's act to be negligent treatment or maltreatment, that act must "[show] 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, and safety." However, the Review Judge then interpreted and applied subsection (a) of the WAC to be a list of acts by a caregiver that are functionally, "per se" serious enough to meet the above quoted requirement.

The Review Judge found that as a matter of law, the regulation permits the failure to supervise without more to constitute negligent maltreatment regardless of whether there is any evidence that the failure demonstrated a "serious disregard of such magnitude" that it creates a "clear and present danger" as a result. Even if the Review Judge did not explicitly state in the Review Order that a failure to supervise was, per se a "serious disregard," that is the consequence of the ruling.

The DSHS Review Order and Final Order should be reversed as outside the statutory authority or jurisdiction of the DSHS under RCW 34.05.570(3)(b). Further, the DSHS erroneously interpreted or applied the law under RCW 34.05.570(3)(d) and its decision is not supported by evidence that is substantial when viewed in the light of the whole record before the Court under RCW 34.05.570(3)(e).

D. The Court of Appeals' Decision Presents a Significant Question of Law Under the Constitution of State of Washington with Respect to the Court of Appeals' Erroneous Denial of Ms. Cunningham's Motion to Amend her Petition for Review to add DEL's Review Order

The Court should review the trial court's abuse of discretion when it denied Ms. Cunningham's Motion to Amend the Petition for Review to add DEL and its Review Order. DSHS opposed the Motion to Amend as an untimely petition for judicial review of the DEL Review Order. CP 1107-1130. The DSHS argued that Ms. Cunningham could not use the civil rules of procedure on pleading amendments to circumvent the APA's statute of limitations requiring that Ms. Cunningham file her petition for judicial review within 30 days of service of the DEL Review Order. *Id.*

The DEL Review Order purports to have been served on February 10, 2016, making March 11, 2016 the deadline to file the petition. CP 1115: 1-10. The Superior Court denied Ms. Cunningham's Motion to Amend by holding that it had no discretion to grant the Motion. CP 1261-62.

The Superior Court's denial of the Motion to Amend for "lack of discretion" is erroneous. The APA establishes the exclusive means of judicial review for agency action, except: "ancillary procedural matters before the reviewing court, including intervention…, consolidation, [and] joinder..., are governed, to the extent not inconsistent with this chapter, by court rule." RCW 34.05.510(2). Thus, as long as the procedural matter before the trial court is

ancillary and not inconsistent with Chapter 34.05 of the APA, then the court is governed by the applicable rule of civil procedure. Amendments are analogous to joinder, intervention, and consolidation, such that they should be deemed "ancillary."[4]

A ruling on a request to amend a complaint under CR 15(a) or to file a supplemental complaint under CR 15(d) is reviewed for abuse of discretion. *Herron v. Tribune Publ. Co*, 108 Wn.2d 162, 736 P.2d 249 (1987). The primary consideration in permitting amendment is prejudice to the opposing party resulting from delay, surprise, jury confusion, or unrelated claims relying on a different factual basis. *Id.*

CR 15 is not inconsistent with RCW 34.05. The legislative intent of RCW Chapter 34.05 is

> to clarify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making.

RCW 34.05.001. The purposes of CR 15 are to "facilitate a proper decision on the merits" and "to provide each party with adequate notice of the basis of the claims or defenses asserted against him." *Herron v. Tribune Publ. Co*, 108 Wn.2d at 165, 736 P.2d at 253 (citations omitted). In addition, the Washington Supreme Court

[4] Black's Law Dictionary defined "ancillary" as "Supplementary; subordinate." Black's Law Dictionary (10th ed. 2014).

has held that relation back under CR 15(c) does not subvert the policies behind statutes of limitations once the notice and prejudice requirements have been met. *Haberman v. Washington Public Power Supply Sys*.,109 Wn.2d 107, 172-73, 744 P.2d 1032 (1987).

The Superior Court had jurisdiction and abused its discretion when it failed to grant the Motion to Amend. Allowing the Amended Petition would not have prejudice either DEL or DSHS; both of which were notified that the DSHS Review Order was on appeal. There is no record evidence supporting otherwise. The fact that the administrative hearing and the Initial Order resulting therefrom consolidated the DEL and DSHS proceedings created reasonable confusion in relation to the subsequent review orders and judicial review.

After the Initial Order, Ms. Cunningham only sought review of DSHS finding of negligent treatment and DEL licensing decision based on that finding. The DEL proceedings were stayed pending the DSHS Review Order, which further confused matters. It was not clear to Ms. Cunningham or her counsel that she would also have to appeal the DEL Order until April 2016. These facts support a finding of excusable neglect.

The DEL Review Order and DSHS Review Order are inextricably intertwined. The denial of the Motion to Amend produces the absurd possibility of reversing a final order upon which another is based, without relieving the party from both orders. Washington Court Rule 60(b)(6) provides that " the court may

relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:"... a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Therefore, Petitioner should be found to have filed her Petition to Amend in a timely manner.

VI. CONCLUSION

For the foregoing reasons, this Court should grant discretionary review of the appellate court's denial of Ms. Cunningham's appeal under RAP 13.4. The Court of Appeals abused its discretion when it affirmed the Superior Court's decision to deny Ms. Cunningham's motion to amend her petition for judicial review to add DEL's Review Order disqualifying Ms. Cunningham from child care and revoking her license as a result of the DSHS Review Order. Finally, the Court should authorize an award of reasonable attorneys' fees and costs to Ms. Cunningham.

Respectfully submitted this 16th day of January, 2019.

LAW OFFICE OF COREY EVAN PARKER

Corey Evan Parker

Corey Evan Parker, WSBA #40006
Attorney for Petitioner, Christelle Cunningham

CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on January 16, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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Corey Evan Parker
Corey Evan Parker

Attachment “A”

RICHARD D. JOHNSON,
Court Administrator/Clerk

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December 17, 2018

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CASE #: 76612-1-I
Christelle Cunningham, Appellant v. State of WA., DSHS, Respondent
King County, Cause No. 16-2-01470-4 SEA

Counsel:

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

> "We affirm the DSHS Board of Appeals Final Order affirming the finding of negligent treatment and the superior court denial of the CR 15(c) motion to amend the petition for judicial review."

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

khn

Enclosure

c: The Honorable Barbara A. Mack

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTELLE CUNNINGHAM, Appellant, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	No. 76612-1-I UNPUBLISHED OPINION FILED: December 17, 2018

SCHINDLER, J. — Licensed childcare provider Christelle Cunningham left a four-year-old child alone at a community center park. The Department of Social and Health Services (DSHS) found Cunningham engaged in negligent treatment under RCW 26.44.020(17) and former WAC 388-15-009(5). The DSHS Board of Appeals Review Judge upheld the finding of negligent treatment that evidenced a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child. The superior court affirmed the decision of the DSHS Board of Appeals Review Judge and the Final Order. Cunningham contends the DSHS Board of Appeals Review Judge erroneously interpreted and applied the law, substantial evidence does not support the finding of negligent treatment, and the Final Order is arbitrary and

capricious. Cunningham also contends the superior court erred in denying her motion to amend the petition for judicial review. We affirm.

Child Protective Services Referral

Christelle Cunningham has been a licensed childcare provider since 2008 and owned and operated Kids R Us day care. In July 2014, Cunningham hired Tiffany Jones as a childcare assistant.

On August 1, 2014, Cunningham and Jones drove 10 children, including four-year-old T.J., in a van to the Garfield Community Center playground. They left Garfield Community Center before noon to drive to the Tukwila Community Center.

Two middle school girls found four-year-old T.J. alone at the playground. Garfield Community Center staff contacted the police. Seattle Police Officer Vincent Feuerstein responded and contacted Child Protective Services (CPS). The Division of Licensed Resources/Child Protective Services investigated the report of neglect of the child.

On August 4, CPS investigator Terri Muller interviewed Cunningham and Jones. Cunningham told Muller that at approximately 11:40 a.m., she and Jones "started loading" the children into the van to leave the Garfield Community Center. Cunningham went to the restroom before leaving. Cunningham said she "did not do a regular head count of the children" because she "thought [Jones] had" done the head count. However, Cunningham said she "routinely did seat belt checks." Cunningham said she and Jones "realized that TJ was missing" about "10 to 15 minutes" later and "immediately called the Garfield Community Center."

Jones told Muller she did not "count the children prior to leaving the playground." Jones said it was " '20 minutes' " before "anyone realized that TJ was missing."

Muller interviewed Garfield Community Center employees Champaine O'Brien and supervisor Dwayne Jackson. O'Brien told Muller that two 12- or 13-year-old girls " 'found [T.J.] outside by himself' " and brought him into the gym at approximately 12:30 p.m. Jackson "attempted to talk to the boy" but T.J. "provided little additional information except to say that he was four." Jackson said Cunningham called about T.J. "approximately 45 minutes after the police arrived at the community center."

Muller issued a report finding negligent treatment of four-year-old T.J. The report states Cunningham disregarded the consequences to the child of such magnitude as to constitute "a clear and present danger to the child's health, welfare, and safety":

> After investigation it is determined, more likely than not, that the allegation of Negligent Treatment or Maltreatment of four year old T.[J]. by Christelle Cunningham is FOUNDED. There was an act, or failure to act on the part of Ms. Cunningham that shows a serious disregard of the consequences to the child of such magnitude that it created a clear and present danger to the child's health, welfare, and safety.

DSHS notified Cunningham by letter on November 12, 2014 of the finding. On November 14, the Department of Early Learning (DEL) notified Cunningham she was disqualified to provide childcare and her license was revoked.

Administrative Appeal

Cunningham appealed the DSHS finding of negligent treatment and the DEL decision to revoke her childcare license. The Office of Administrative Hearings consolidated the two appeals for hearing. A number of witnesses testified, including Cunningham, Jones, Seattle Parks and Recreation Department employees Debra Khaljani and Jackson, Officer Feuerstein, and CPS investigator Muller.

Cunningham testified, "[W]e always do a headcount." Cunningham said that before going to the restroom, she told Jones to " '[f]inish loading up the kids' " in the van and " 'finish off the headcount and count the seatbelts.' " Cunningham said that when she returned to the van, it was "already locked up." Cunningham testified she asked Jones if she did " 'all the seatbelt checks' " and Jones said, " 'Yes.' "

When Cunningham "realized" she "didn't have" T.J., she "panicked" because "I didn't know where my kid was. Maybe somebody came and snatched him." Cunningham admitted it was "a very serious situation" and T.J. "was at risk of harm."

Jones testified that she did not "recall" Cunningham "ask . . . about any headcounts." Jones said, "[W]e got in the van, and we were like, 'Is everyone here?' And they're like, 'Yeah.' And we pulled off."

Investigator Muller testified it is "a dangerous situation" for a "very young child to be alone in . . . any situation unsupervised. . . . [A] four-year-old child requires stringent supervision. . . . [T]hey're young, they're vulnerable, they're unable to self-protect." Muller said T.J. was "even more vulnerable" because he was "unable to communicate . . . or identify his full name."

Muller testified about the circumstances that "posed an imminent risk of harm."

> [A] four-year-old child, being alone in a park setting like that with access to the street and the parking lot that's right there, . . . that poses a risk to me that there's easy access for someone to, uh, observe that child being alone, and . . . have contact with that child . . . . [T]he child could've . . . hurt himself or sustained some type of injury. He could've entered into the parking lot, where people are driving in and out . . . . There's so many things about it that had the potential for serious harm.

Muller also testified that 19 registered sex offenders lived within "a half a mile" of the community center.

The administrative law judge (ALJ) upheld the DSHS finding of negligent treatment and the DEL order revoking Cunningham's childcare license. The ALJ issued an "Initial Order" and extensive findings of fact and conclusions of law. Preliminarily, the ALJ notes the evidence conflicts "on certain material points" and the decision and findings reflect "a careful consideration of the record of the case, including the demeanor and motivations of the parties and witnesses, the reliability and/or other reasonableness of the testimony and/or exhibits, and the totality of the evidence presented." The ALJ states, "Findings made in compliance with a particular witness's or witnesses' testimony and/or other evidence presented indicate the undersigned found that evidence to be credible over conflicting evidence, considering the burden of proof and standard of proof." The ALJ also notes, "When possible and reasonable, the undersigned has harmonized the different recountings of certain events and occurrences in order to arrive at a determination of the facts surrounding those events and occurrences."

The ALJ found that Cunningham and Jones left T.J. at Garfield Community Center "between 11:40 and 11:50 a.m." The ALJ did not find Cunningham's testimony that a headcount was performed credible. The ALJ found Cunningham and Jones did not do a headcount of the children despite "assertions to the contrary." The ALJ found the "two young girls" saw T.J. "playing alone on a slide for about a half hour" and brought him into the Garfield Community Center gym at approximately 12:20 p.m. The ALJ found Cunningham did not call Garfield Community Center until "90 minutes after the child care group left to go to Tukwila."

The ALJ cites chapter 26.44 RCW, "Abuse of Children," and highlighted the following pertinent part of WAC 388-15-009(5):[1]

> 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, 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:
>
> . . . .
>
> (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.

The ALJ concluded the preponderance of the evidence supports finding negligent treatment that constitutes a clear and present danger to a child's welfare and safety. Conclusion of law 9 states:

> The undersigned finds and concludes that a preponderance of the evidence supports a determination that Appellant Christelle Cunningham committed acts of neglect as to the child TJ. She neglected him when she failed to provide proper supervision which resulted in his being left alone at Garfield Playfield, creating a clear and present danger to TJ's safety and welfare because her actions or failure to act created a substantial risk of injury to TJ. The fact that TJ apparently suffered no harm is irrelevant. The substantial risk of harm (e.g. being injured by traffic, or on the Playfield, or abducted) was clear, present, and significant.

The Initial Order states Cunningham "did negligently treat the child TJ."

[1] Effective July 1, 2018, the Department of Children, Youth and Families replaced DSHS and DEL as the state agency responsible for children and early learning issues. See SECOND ENGROSSED SECOND SUBSTITUTE H.B. 1661, 65th Leg., 3rd Spec. Sess. (Wash. 2017). Title 388 WAC and Title 170 WAC were recodified as Title 110 WAC. Wash. State Register (WSR) 18-14-078. For purposes of this opinion, we cite the WAC in effect before the 2018 recodification.

The ALJ also concluded Cunningham is disqualified from providing childcare and upheld the decision of DEL to revoke her childcare license:

> Based upon the founded finding of neglect made against the Appellant, she must be disqualified from providing child care or having unsupervised access to children. . . . Further, the Appellant has numerous additional child care licensing violations which warrant revocation of her child care license.[2]

Cunningham appealed the ALJ finding of negligent treatment to the DSHS Board of Appeals and the decision to revoke her childcare license to a DEL Review Judge. The DEL Review Judge stayed review of the proceeding "pending issuance of a final agency decision by the DSHS Board of Appeals."

In the appeal to the DSHS Board of Appeals, Cunningham does not assign error to any of the findings of fact of the Initial Order on negligent treatment. Cunningham assigned error to only the conclusion of law on negligent treatment, conclusion of law 9. Cunningham argued the ALJ found she "did not mean to leave TJ at the park" and therefore, DSHS did not prove "a serious disregard of the consequences to the child" under WAC 388-15-009(5).

The DSHS Board of Appeals Review Judge considers a finding of negligent treatment on the record de novo. WAC 388-02-0217(3). The DSHS Board of Appeals Review Judge issued a "Review Decision and Final Order" (Final Order) affirming the Initial Order and finding of negligent treatment. The Final Order adopts the following

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[2] The ALJ also found that Cunningham violated "numerous additional child care licensing" requirements between 2008 and 2014, including WAC 170-296-0520(1) (documentation of attendance), WAC 170-296A-5625(1) (capacity and supervision requirements), WAC 170-296A-5750 (staff-to-child ratios), WAC 170-296A-2200(1) (911 reporting requirements), WAC 170-296A-2250(1) (reporting to parent or guardian requirements), WAC 170-296A-2300 (reporting to DSHS requirements), WAC 170-296A-6475(6) (transportation requirements), WAC 170-296A-1875 (primary staff requirements), WAC 170-296A-1200(3) and (4) (leaving children with an unlicensed individual), and WAC 170-06-0040 (background clearance requirements).

unchallenged findings of fact:

Incident of August 1, 2014

11. On August 1, 2014, the Appellant decided to take her child care children on a field trip off-site from her child care home. One of the children entrusted to her care on this day (of the 10 total children on the trip) was TJ, who was then 4 years old. Also on the field trip was Tiffany Jones, the Appellant's new assistant who had been working at the child care for less than a month, and who had not been approved to have unsupervised contact with the children in care because her background authorization had not yet cleared. August 1, 2014, was described by the Appellant as a busy day in Seattle due to Seafair celebrations around the city.

12. The first stop the Appellant and Ms. Jones made with the children was at the playground around the Garfield Community Center. The playground is on property with a Community Center, and next to a high school. After being at this playground for a short period of time, the Appellant decided that Ms. Jones and she should take the children to another venue in Tukwila.

13. The Appellant testified that she went to the restroom by the Garfield playground while the van was being loaded with child care children. Ms. Jones testified that the Appellant went to the restroom immediately after the van was loaded, before leaving for Tukwila. The undersigned does not find that a head count of the child care children was performed despite the Appellant's and Ms. Jones' assertions to the contrary. The reasons that the undersigned does not believe that a head count was performed are as follows: (a) had a head count been performed, the absence of TJ (who was left at Garfield as is more fully discussed below) should have been known; (b) the Appellant and Ms. Jones gave contradictory testimony regarding whether the Appellant had asked Ms. Jones if a head count had been performed; (c) at hearing Ms. Jones asserted that a head count technique had been used which involved 10 separate attendance sheets for the 10 children on the field trip; (d) at hearing the Appellant denied that any written form of head count was utilized; (e) the Appellant told CPS Investigator Terri Muller on August 4, 2014, that no head count had been performed when leaving Garfield; (f) Ms. Jones told Ms. Muller that . . . no head count had been performed before the child care group left Garfield.

14. The Appellant, Ms. Jones, and 9 of the 10 child care children on the field trip left Garfield to go to Tukwila between approximately 11:40 and 11:50 a.m. TJ was left behind at the Garfield playground.

15. At approximately 12:20 p.m., TJ was brought into the Garfield Community Center after being observed outside and alone for approximately 30 minutes. He could not provide any contact information; he could not identify himself other than to say he was TJ. The area in which the Garfield Community Center is located is not a safe area for

young children to be left alone in because it abuts a busy street and because, at the time, 19 registered sex offenders resided within a one-half mile radius of the playground. Furthermore, the playground is not a safe place for unsupervised young children because of the risk of falling or otherwise getting hurt on slides and other play structures. Seattle Police were called not by the Appellant but by Ms. Khaljani, who was working at the Community Center. The police were dispatched to the Community Center at 12:41 p.m., arriving at 12:51 p.m. Officer Hartsock met TJ, who told him: "I am TJ and I am 4 years old." TJ stated that he was with "Miss Christelle." TJ was unaware of his address, parents' names, or how he ended up at the Garfield Community Center.

16. At some point after arriving at Tukwila, the fact that TJ was not in the child care van was discovered. The drive to Tukwila from Garfield would have taken at least 20 minutes and quite possibly longer, considering the route taken and given the evidence that it was a busy day in Seattle.

17. Upon discovering TJ missing, the Appellant did the following: (a) she left Ms. Jones with the 9 child care children that had been transported to Tukwila; (b) she called 4-1-1 at 1:04 p.m. asking for the telephone number for the Garfield Community Center; (c) she called the Community Center and spoke with Officer Hartstock and advised him that she believed Ms. Jones had custody of TJ and did not realize that he was missing until a head count was performed once she, Ms. Jones, and the children arrived in Tukwila and that she called the Community Center as soon as she realized TJ was missing, which was nearly 90 minutes after the child care group had left to go to Tukwila; (d) she arrived at the Community Center at some point after 1:04 p.m. and was unable to provide the police with requisite parent and child documentation or evidence of her caretaker role for TJ; and (e) she left the Community Center to go back to the child care facility in West Seattle to retrieve the necessary documents while TJ was left in the care of the police.

. . . .

20. The Appellant told the Seattle Police on August 1, 2014, that when she and Ms. Jones had "approximately 8 children" and decided to take the children to the pool in Tukwila previously that morning, she had assumed Ms. Jones had custody of TJ, and did not realize he was missing until she conducted a head count at the pool, at which point she called the Garfield Community Center, nearly 90 minutes after she had left the Garfield Community Center.

. . . .

22. Because the August 1, 2014, incident was indicative of possible child abuse or neglect, CPS was the agency charged with investigating the allegations. After Seattle Police called in a CPS referral, the matter was immediately assigned to Terri Muller to investigate. DEL was also notified of the referral.

23. As part of her investigation, Ms. Muller reviewed the Seattle Police Department records regarding the incident of TJ being left at the Garfield playground. She spoke to numerous persons.

. . . .

28. On August 6, 2014, Ms. Muller spoke with Champaine O'Brien, who was working at Garfield Community Center through a youth employment program. She told Ms. Muller that on August 1, 2014, she was handing out lunches to children in the gym of the Community Center building and two young girls, ages 12 or 13, came into the gym with a young boy (later determined to be TJ) and said they found him outside by himself. The police were notified.

29. Ms. Muller spoke to Dwayne Jackson on August 6, 2014. He was also employed at the Garfield Community Center on August 1, 2014. He told her that he arrived at work at approximately 12:30 p.m. and TJ was there. He went to the gym to help with TJ. He said that the girls who found TJ told him that they saw TJ playing alone on a slide for about half an hour, and they walked around the playground to see if they could find anyone that TJ belonged to, and then finally brought him into the Community Center because they had to leave. Mr. Jackson told Ms. Muller that it was approximately 45 minutes after the police arrived that the Appellant called looking for TJ, and that it then took her about an hour to get back to the Community Center. Mr. Jackson gave consistent testimony at the hearing.[3]

The DSH Board of Appeals Review Judge entered the following additional "Ultimate Fact Findings":

33. Despite the Appellant's and Ms. Jones' assertions to the contrary, a head count of the day care children was not performed when the Appellant left the Garfield playground to go to Tukwila. The reasons for this finding are: (a) if a head count had been performed, the absence of TJ should have been known; (b) the Appellant and Ms. Jones gave conflicting testimony regarding whether the Appellant had asked Ms. Jones if a head count had been done; (c) at hearing, Ms. Jones asserted that a head count technique had been used that involved 10 separate attendance sheets for the ten children on the field trip; (d) at hearing the Appellant denied that any written form of head count was used; (e) the Appellant told Ms. Muller on August 4, 2014, that no head count had been performed when leaving Garfield; (f) Ms. Jones told Ms. Muller during the course of Ms. Muller's investigation of the alleged neglect of TJ that no head count had been performed before the child care group left Garfield.

34. The Appellant did not mean to leave TJ at the park.

[3] Footnotes omitted.

35. TJ was a four-year-old child left alone on a busy playground. The Appellant was responsible for supervising him, and did not do so for a period of at least two hours. Risks to TJ included falling off the slide he was playing on and getting injured; getting injured by rough play with older children; being bit by a dog; walking away from the playground into a busy parking lot or onto a busy street and being hit by a car; being kidnapped or abused by a stranger; children like to jump on things, they can jump off a toy and injure themselves; in an emergency, like an earthquake or fire, a child left alone would have no one to assist him. He walked off the playground without objection with the two girls who found him alone. He could have walked off the playground without objection with dangerous persons.

36. The Appellant exposed TJ to a significant risk of harm because he was left at a busy playground without adequate adult supervision for at least an hour, and without her supervision for at least two hours. The Appellant should have known that he was missing from the day care group. Her failure to count heads, or use some other simple means to determine whether she had all of the child care children with her, evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to TJ's health, welfare, or safety. If she had, in fact, checked the seat belts, as she claimed to have done, she would have realized that TJ was not in his seat in the van.

The Final Order cites chapter 26.44 RCW and WAC 388-15-009(5).

8. Chapter 26.44 of the Revised Code of Washington (RCW) is entitled "Abuse of Children." It establishes a system for reporting instances of non-accidental injury, neglect, death, abuse, and cruelty to children. The Legislature's intent in adopting RCW 26.44 is that, as a result of these reports, protective services will be made available in an effort to avoid further abuse and to safeguard the general welfare of these children. The Department investigates reports of child abuse and neglect and notifies the alleged perpetrator of its investigative findings. A person so named by the Department as an alleged perpetrator has the right to request an adjudicative hearing governed by the Administrative Procedure Act, chapter 34.05, RCW. The Department has implemented chapter 26.44 RCW by adopting chapter 388-15 of the Washington Administrative Code (WAC) entitled "Child Protective Services."

9. The Department's determination that the Appellant had abused or neglected a child was based on WAC 388-15-009, which provides, in pertinent part:

> **WAC 388-15-009 What is child abuse or neglect?** Child abuse or neglect means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child under circumstances which indicate that the child's health, welfare, and

safety is harmed. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

. . . .

(5) Negligent treatment or maltreatment means an act or a failure to act on the part of a child's parent, legal custodian, 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, and 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, and 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, and 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 consistent inaction or behavior 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.

The Department alleged that the Appellant negligently treated or maltreated TJ, a child in her care, by leaving this young child alone on a playground. The Department alleged that definition of negligent treatment of a child includes failures to act, where that failure shows serious disregard of a clear and present danger to that child. The Appellant should have known that TJ was missing from the day care group. The Appellant did not provide adequate supervision for TJ. Her failure to supervise shows a serious disregard of the possible consequences to the child of such magnitude that it created a clear and present danger to TJ's health, welfare, and safety. [4]

[4] Footnotes omitted.

The DSHS Board of Appeals Review Judge concluded Cunningham "exposed TJ to a significant risk of harm."

> 10. TJ was a four-year-old child left alone on a busy playground. The Appellant was responsible for supervising him, and did not do so for a period of at least two hours. A young child like TJ does not have a real awareness of danger and might wander away. This behavior can lead to being hit by a car due to his short stature, either in the parking lot or in the street. Other catastrophes that were possible in this case include, molestation, abduction, and injury, with the possible outcome of death for this preschool child. Additional risks to TJ included falling off the slide he was playing on and getting injured; getting injured by rough play with older children; being bit by a dog; jumping off a toy and injuring himself, and, in an emergency, like an earthquake or fire, a child left alone would have no one to assist him. He walked off the playground without objection with the two girls who found him alone. He could have walked off the playground without objection with dangerous persons.
>
> 11. The Appellant exposed TJ to a significant risk of harm because he was left at a busy playground without adequate adult supervision, and the Appellant should have known that he was missing from the day care group. The fact that TJ was found safe, and was secured by friendly children and adults, does not detract from the magnitude of the Appellant's neglect of her duty to keep track of the children in her care and custody. Her failure to count heads, or use some other simple means to determine whether she had all of the child care children with her, evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to TJ's health, welfare, or safety. A child does not need to suffer actual harm for a finding of negligent treatment; exposure to clear and present danger risk is enough. If the Appellant had made a head count, or had, in fact, checked the seat belts, as she claimed to have done, she would have realized that TJ was not in his seat in the van. A preponderance of the evidence supports a conclusion that the Appellant neglected TJ, a child in her care.

The Final Order affirms the finding of negligent treatment or maltreatment.

Superior Court Appeal

On January 20, 2016, Cunningham filed a petition for judicial review of the DSHS Board of Appeals Final Order affirming negligent treatment. Cunningham argued (1) substantial evidence did not support a finding of negligent treatment, (2) her conduct did

not "constitute child neglect or negligent treatment," and (3) the agency finding was arbitrary and capricious.

After Cunningham filed the petition, the DEL Review Judge issued a "Final Order" affirming the DEL order finding Cunningham disqualified from providing childcare and revoking her childcare license.[5] Cunningham filed a CR 15 motion to amend the petition to add judicial review in superior court of the DEL order. The court denied the CR 15 motion to amend the petition. The superior court affirmed the DSHS Final Order. Cunningham appeals.

Standard of Review

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs review of agency decisions. Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000). Under RCW 34.05.570(3), we will grant relief from an agency order in an adjudicative proceeding if the order exceeds the statutory authority of the agency, the agency erroneously interpreted or applied the law, substantial evidence does not support the order, or the order is arbitrary or capricious.

We review only the Final Order of the DSHS Board of Appeals Review Judge, not the decision of the ALJ or the superior court. Verizon Nw., Inc. v. Emp't Sec. Dep't, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The appellant has the burden of demonstrating the invalidity of agency action. Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

We review findings of fact for substantial evidence. Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Substantial evidence

[5] WAC 170-06-0070(1) and (3)(a) provides that a person shall be disqualified to "provid[e] licensed childcare" if her background information "contains a negative action . . . that relates to . . . [a]n act, finding, determination, decision, or the commission of abuse or neglect of a child."

is evidence sufficient to persuade a fair-minded person of the truth of the matter. Mowat, 148 Wn. App. at 925. 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). Where, as here, the appellant does not assign error to any of the findings, the unchallenged findings are verities on appeal. Darkenwald, 183 Wn.2d at 244.

We review questions of law and the agency's application of the law to the facts de novo. Cornelius v. Dep't of Ecology, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). But we afford "great weight" to the agency's interpretation of law "where the statute is within the agency's special expertise." Cornelius, 182 Wn.2d at 585.

Statutory Authority

RCW 26.44.020(1) defines "neglect" as "the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." RCW 26.44.020(17)[6] defines "negligent treatment," in pertinent part, as follows:

> "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.

WAC 388-15-009(5) defines "negligent treatment" of a child, in pertinent part, as follows:

> 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, 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

[6] The legislature renumbered RCW 26.44.020(16) to subsection (17) in 2018. See Reviser's note (1) ("The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k)."). Because the definition of "negligent treatment" has not changed, we cite the current statute RCW 26.44.020(17) throughout the opinion.

> 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 or 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.

Cunningham contends the DSHS Board of Appeals exceeded its statutory authority by relying on the failure to supervise under the WAC 388-15-009(5)(a) definition of "negligent treatment" without regard to whether DSHS proved serious disregard of the consequences that created a clear and present danger.

In Marcum v. Department of Social & Health Services, 172 Wn. App. 546, 558-59, 290 P.3d 1045 (2012), the court held the board exceeded its statutory authority by treating the failure to provide adequate supervision under WAC 388-15-009(5)(a) as per se negligent treatment without regard to whether the record established "a serious disregard of consequences of such magnitude" that created "a clear and present danger to a child's health, welfare, or safety" as required under RCW 26.44.020(17). The court held DSHS "lacks the authority to promulgate and interpret a rule that fundamentally shifts the standard required to make a neglect finding" under RCW 26.44.020(17). Marcum, 172 Wn. App. at 559. The court vacated the finding of negligent treatment

under WAC 388-15-009(5). Marcum, 172 Wn. App. at 559. However, the court in Marcum notes:

> Had the Board concluded that [appellant]'s actions "evidence[d] a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety," . . . we would give substantial weight to such an interpretation in light of DSHS's expertise in this field.

Marcum, 172 Wn. App. at 560[7] (quoting RCW 26.44.020(17)).

Unlike in Marcum, here, the DSHS Board of Appeals Review Judge did not disregard the statutory definition of negligent treatment. The extensive unchallenged findings support the conclusion that leaving four-year-old T.J. alone at the Garfield Community Center playground for approximately an hour and a half evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to T.J.'s welfare or safety.

For the first time on appeal, Cunningham claims DSHS exceeded its statutory authority in promulgating WAC 388-15-009(5) "to the extent it allows the Department to circumvent the requirements" of RCW 26.44.020. " '[A] party attacking the validity of an administrative rule has the burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation.' " State ex rel. Evergreen Freedom Foundation v. Educ. Ass'n., 140 Wn.2d 615, 635, 999 P.2d 602 (2000)[8] (quoting Green River Cmty. Coll. v. Higher Ed. Pers. Bd., 95 Wn.2d 108, 112, 622 P.2d 826 (1980)). Cunningham cannot meet her burden. WAC 388-15-009(5) mirrors the statutory definition under RCW 26.44.020(17) and DSHS did not exceed its authority by

[7] Second alteration in original.

[8] Alteration in original.

listing examples of negligent treatment. See RCW 74.08.090 (general rule making authority); chapter 26.44 RCW (Children Abuse and Neglect Act).[9]

RCW 26.44.020

Cunningham contends the DSHS Board of Appeals Review Judge erroneously interpreted and applied the law by ignoring the "clear intent and plain meaning" of RCW 26.44.020(17).

We review the meaning of a statute de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our objective is to discern and implement the legislature's intent. Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). If the statute's meaning is plain on its face, we give effect to that plain meaning as an expression of legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10. We give effect to all language used in a statute, rendering no part superfluous. HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). The rules of statutory interpretation apply to administrative rules and regulations. Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd., 186 Wn.2d 648, 667-68, 381 P.3d 1 (2016).

RCW 26.44.020(17) defines "negligent treatment or maltreatment" as "an act or a failure to act . . . 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."

Cunningham also argues insufficient evidence supports finding negligent treatment because the evidence showed she did not "intentionally" leave T.J. at Garfield

[9] We note DSHS amended WAC 388-15-009(5) in 2017 to state that negligent treatment "may include, but is not limited to," the "[f]ailure to provide adequate food, shelter, clothing, supervision, or health care necessary" to the child's welfare or safety. WSR 17-22-059 (emphasis in original) (codified at former WAC 388-15-009(5)(e)(i) (2017)).

Community Center. Citing Brown v. Department of Social & Health Services, 190 Wn. App. 572, 360 P.3d 875 (2015), Cunningham asserts the statute requires proof of an intentional act. Neither Brown nor the plain language of the statute supports her argument.

In Brown, the court held DSHS erred by using a "reasonable person" standard in finding neglect under RCW 26.44.020(17) because the statutory definition requires a "higher standard" than simple negligence. Brown, 190 Wn. App. at 592-93. The court in Brown also notes "serious disregard" under RCW 26.44.020(17) is analogous to "reckless disregard," which is defined as an intentional act or failure to act. Brown, 190 Wn. App. at 590.

The plain and unambiguous language of RCW 26.44.020(17) does not require a showing of negligent treatment. Consistent with Brown, the plain and unambiguous language of the statute requires proof of a failure to act that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, or safety. And unlike in Brown, the DSHS Board of Appeals Review Judge did not use a reasonable person standard.

Cunningham also claims "clear and present danger" means "actual" danger that is "unmistakable and free from ambiguity." Cunningham argues "exposure to potential risks" is insufficient to show "clear and present danger." We disagree. The plain language of the statute does not require actual harm to show a "clear and present danger" to a child's health, welfare, or safety. See In re Dependency of H.S., 135 Wn. App. 223, 233, 144 P.3d 353 (2006). A "clear and present" danger must be close in time to the act or failure to act. See In re Dependency of M.S.D., 144 Wn. App. 468,

481, 182 P.3d 978 (2008). The failure to protect a child from significant risk of harm is sufficient to show "clear and present danger." See, e.g., M.S.D., 144 Wn. App. at 480-481; In re Dependency of S.M.H., 128 Wn. App. 45, 60, 115 P.3d 990 (2005); In re Interest of J.F., 109 Wn. App. 718, 731, 37 P.3d 1227 (2001).

The unchallenged findings established that leaving four-year-old T.J. alone at the Garfield Community Center created a clear and present danger to T.J.'s health, safety, or welfare. The findings describe a number of risks to T.J., including the location of the playground near a busy street and parking lot and 19 registered sex offenders living within a half-mile radius of Garfield Community Center. Cunningham conceded it was a "very serious situation" and T.J. "was at risk of harm." Cunningham testified that she was scared "somebody came and snatched" T.J. and she "didn't know if he was kidnapped."

Arbitrary and Capricious

Cunningham contends the DSHS Board of Appeals Review Judge's interpretation of WAC 388-15-009(5) was arbitrary and capricious because the Final Order does not adequately address "whether there was a 'serious disregard' of the circumstances that created a 'clear and present' danger." The Final Order does not support her argument.

Agency action is " 'arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.' " Rios v. Dep't of Labor & Indus., 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (quoting Hillis v. Dep't of Ecology, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Where there is room for two opinions, action

taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it is erroneous. Rios, 145 Wn.2d at 501.

The DSHS Board of Appeals Review Judge considered the facts and circumstances in finding negligent treatment. The extensive unchallenged findings support the conclusion that the failure to supervise T.J. evidenced a serious disregard of consequences of such magnitude as to constitute clear and present danger to T.J. The Final Order is neither willful and unreasoning nor without consideration or regard of the facts and circumstances.

CR 15 Motion to Amend

Cunningham claims the court abused its discretion by denying the CR 15 motion to amend the petition for judicial review.

The ALJ held a consolidated hearing on the DSHS finding of negligent treatment and the DEL decision disqualifying Cunningham from caring for children and revoking her childcare license. Cunningham filed separate appeals to the DSHS Board of Appeals and the DEL Review Judge. The DEL Review Judge stayed the DEL appeal "pending issuance of a final agency decision" on negligent treatment by the DSHS Board of Appeals Review Judge.

On December 29, 2015, the DSHS Board of Appeals Review Judge entered a Final Order upholding the DSHS finding of negligent treatment. On January 20, 2016, Cunningham filed a petition in King County Superior Court for judicial review of the DSHS Final Order.

On January 22, the DEL Review Judge lifted the stay and issued a Final Order revoking Cunningham's childcare license. On February 10, DEL mailed the DEL Final

Order to her attorney. The Final Order includes a "Statement of Appeal Rights after Review Decision and Final Order" and states Cunningham must file a petition for judicial review within "(30) calendar days from the date of mail."

On April 26, Cunningham filed a CR 15(c) motion to amend the petition filed in superior court to add review of the DEL Final Order. Cunningham argued the DEL Final Order "relate[s] back to the original petition" and DEL would not be prejudiced. DSHS argued the Civil Rules "do not apply to the APA provisions governing judicial review of agency action" and the petition for judicial review of the DEL order was not timely under the APA, RCW 34.05.542(2). In reply, Cunningham did not address whether the petition for judicial review of the DEL Final Order was timely under the APA.

The court denied the motion to amend the petition for judicial review. The court ruled the "Administrative Procedure Act requires Petitioner to file her appeal within 30 days" and "[c]ase law makes clear that this court has no discretion to grant the Motion to Amend the Petition."

Cunningham contends the court abused its discretion by denying the CR 15(c) motion because the DEL Final Order relates back to the DSHS order. Because the APA establishes the "exclusive means of judicial review for agency action," we disagree. Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd., 153 Wn.2d 207, 213, 103 P.3d 193 (2004); RCW 34.05.510. "The superior court and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction." Diehl, 153 Wn.2d at 217. When reviewing an administrative decision, "the superior court is acting in its limited appellate capacity, and all statutory procedural requirements must be met before the court's

appellate jurisdiction is properly invoked." Seattle v. Pub. Emp't Relations Comm'n, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991).

RCW 34.05.542(2) provides that a petition for judicial review of an agency order "shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within [30] days after service of the final order." Cunningham filed the motion to amend the petition for judicial review to request review of the DEL order 76 days after DEL mailed the Final Order. Because Cunningham did not comply with the requirements of RCW 34.05.542, we conclude the court did not abuse its discretion by denying the motion to amend the petition for judicial review.

For the first time on appeal, Cunningham cites Devore v. Dep't of Soc. & Health Servs., 80 Wn. App. 177, 906 P.2d 1016 (1995), to argue her petition for judicial review of the DEL order was not untimely. Cunningham asserts the 30-day statute of limitations has not expired because DEL failed to properly serve the order on her under RCW 34.05.464(9). Devore is distinguishable.

In Devore, the trial court dismissed the petition for judicial review filed 33 days after DSHS mailed the final order "to the Devores addressed in care of [their attorney]." Devore, 80 Wn. App. at 180. Because " 'the APA requires a reviewing officer to serve copies of final orders "upon each party," ' " we reversed. Devore, 80 Wn. App. at 181-83 (quoting Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp., 127 Wn.2d 614, 618-19, 902 P.2d 1247 (1995) (quoting RCW 34.05.464(9))). In Devore, the Devores "never authorized that service be made in care of their attorney, rather than to them directly." Devore, 80 Wn. App. at 182 n.3. The court held "requirement of service" is

not met "by merely addressing the mailing to the party in care of the party's attorney." Devore, 80 Wn. App. at 182.

Here, unlike in Devore, Cunningham expressly authorized service on her attorney. In her administrative appeal of the DEL order revoking her license, Cunningham "requests that all communication go through her attorney, Abigail Jin at Barokas Martin & Tomlinson 1422 Bellevue Avenue, Seattle, WA 98122, and phone number (206) 621-1871." In the "Witness and Exhibit List," Cunningham lists her address as in care of her attorney.

DSHS filed a motion to supplement the record with "Appendix X" under RAP 9.11(a). We grant the motion to supplement the record. Appendix X is a copy of the February 1, 2016 notice of appearance of Cunningham's attorney. The notice of appearance states, in pertinent part, "You are further notified that all further pleadings, notices, documents or other papers herein, exclusive of original process, may be had upon said Appellant by serving the undersigned attorney at the address below." Cunningham did not submit a response or oppose the motion.

Because Cunningham expressly authorized service on her attorney rather than to her directly, DEL properly mailed the DEL Final Order to the attorney, and her petition for review of the DEL order was untimely.[10]

[10] For the first time on appeal, Cunningham also cites RCW 34.05.510(2) to argue the Civil Rules apply because amending the petition for judicial review to include review of the DEL order is an "[a]ncillary procedural matter[ ]." RCW 34.05.510(2) states, in pertinent part, "Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, [and] joinder . . . are governed, to the extent not inconsistent with this chapter, by court rule." Cunningham does not address whether the petition for review of the DEL Final Order is an ancillary procedural matter.

We affirm the DSHS Board of Appeals Final Order affirming the finding of negligent treatment and the superior court denial of the CR 15(c) motion to amend the petition for judicial review.[11]

Schindler, J.

WE CONCUR:

Chun, J.

Dwyer, J.

[11] Because Cunningham is not the prevailing party, she is not entitled to fees under RAP 18.1 and Washington's equal access to justice act, RCW 4.84.340 through .360.

LAW OFFICE OF COREY EVAN PARKER

January 16, 2019 - 9:22 AM

Filing Petition for Review

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