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I. COUNTER STATEMENT OF THE ISSUES

1. Whether the Superior Court properly upheld those portions of the Review Decision and Final Order which found that Atkinson had failed to lock up a foster child's medication in 2002, an incident that was litigated in the context of the revocation of her foster care license in 2005.

2. Whether the Superior Court correctly denied Atkinson's petition for a writ of mandamus requiring the Department of Social and Health Services to purge its records of the entry of a "valid" licensing violation finding stemming from the 2002 incident.

II. COUNTER STATEMENT OF THE CASE

A. Proceedings

1. Administrative Proceedings

Annette Atkinson was licensed as a foster parent through three different child placing agencies at different times. Her first license was through the Department of Social and Health Services (Department) itself and was issued on January 10, 1992. (Ex. 25, 000262) Atkinson let this license lapse after one year. She was next licensed through Catholic Community Services during the time period of December 21, 2001 through January 6, 2003. (Ex. 21, 000253) Atkinson asked for that license to be closed. 000225. On February 9, 2005, Atkinson was licensed for a third time, this time through Kitsap Mental Health Services (KMHS). (Ex.

18, 000244) KMHS certified Atkinson to be licensed to provide therapeutic foster care for up to three children, either gender, ages 4-17.

By letter dated September 28, 2005, the Department notified Atkinson that it was revoking her foster care license after it had determined she had violated several regulations concerning management of medications for foster children, protection of children from neglect, and for lack of the personal characteristics required of a foster parent. (000228-234) In the license revocation letter, the Department noted that Atkinson had previously been found to have violated the regulations concerning medication management in 2002 and had received additional training on those regulations. (000229)

Prior to the revocation of her license, Atkinson had been notified by the Department that she had been found to have neglected a teen aged foster child in her care due to a deliberate failure to keep the foster child's medications locked up, resulting in the teen overdosing on her lithium. (000169-175)

Atkinson filed timely requests for an administrative hearing to challenge the Department's actions. The matters were consolidated for hearing and the case was tried to Administrative Law Judge (ALJ) Rebekah Ross on March 8, 9, and 15, 2006. On April 5, 2006, ALJ Ross issued her Initial Decision wherein she reversed the finding of negligent

treatment. (000108; 000119) ALJ Ross, however, affirmed the revocation of Atkinson's foster care license after finding she had violated the following regulations: (1) WAC 388-148-0205; (2) WAC 388-148-0352; (3) WAC 388-148-0365; (4) WAC 388-148-0100(1)(c); and (5) WAC 388-148-0035(1). The ALJ found Atkinson had not violated the following regulations: (1) WAC 388-148-0095-committing child abuse/neglect; and (2) WAC 388-148-0420-failure to protect child from abuse/neglect. (000110.) Atkinson filed, pro se, a petition for review with the DSHS Board of Appeals on April 13, 2006. (000074-70)

On May 2, 2006, the Department filed its response to Atkinson's petition and cross-petitioned for review of the Initial Decision, seeking reinstatement of the finding of negligent treatment of a foster child. (000064-70) On August 10, 2006, Review Judge Marjorie Gray issued her Review Decision and Final Order. (000020-70) She reversed the DLR-CPS findings portion of the Initial Decision, finding Atkinson had indeed negligently treated a foster child in her care. (000055; 000059) She also modified the Initial Decision finding that Atkinson had violated (1) WAC 388-148-0095-committing child abuse/neglect; and (2) WAC 388-148-0420-failure to protect from child abuse/neglect. (000057; 000059)

Atkinson filed a motion for reconsideration on August 15, 2006. (000012-13) That motion was denied on September 5, 2006.

2. Superior court proceedings.

On October 4, 2006, Atkinson filed a Petition for Review with the superior court, seeking reversal of those portions of the Review Decision which affirmed the finding of negligent treatment of a child. (CP 25) Atkinson also petitioned for issuance of writs of mandamus and prohibition seeking the purging from the Department's records of a 2002 "valid" licensing finding that Atkinson had violated the regulations concerning medication management for foster children. (CP 25)

Atkinson did not appeal the revocation of her foster care license.

The case was argued to Kitsap Superior Court Judge Leonard W. Costello on April 25, 2008. Relying on *Costanich v. Soc. & Health Services*, 138 Wn. App. 547, 156 P.3d 232 (2007), the court reversed the finding of negligent treatment due to the Review Judge having exceeded her authority in substituting her judgment for that of the Administrative Law Judge. (CP18, 25)

The Superior Court denied the petition for a writ of mandamus and prohibition finding that the ALJ had heard the evidence concerning the 2002 incident and had ruled against her. (CP 25) Atkinson filed a motion

for reconsideration on May 5, 2008 and said motion was denied by the court on May 8, 2008. (CP 44)

Atkinson filed her notice of appeal to this court on May 23, 2008. (CP 34) The Department did not appeal from the Superior Court's decision overturning the finding of negligent treatment of a child.

B. Facts

1. The 2002 incident

In making its decision to revoke Atkinson's foster care license, the Department considered evidence in its records that in 2002 Atkinson had violated the licensing requirements concerning medication management for foster children and had received additional training concerning those regulations.

In 2002, Annette Atkinson was a licensed foster parent through Catholic Community Services. On March 14, 2002, seventeen-year-old Tonya was placed with Atkinson. Tonya had had multiple psychiatric hospitalizations. (Exhibits 38, 39, 40, 000321-332) Tonya was diagnosed with Post Traumatic Stress Disorder, major depressive disorder, polysubstance abuse, and borderline personality traits. (Tr. Vol. II, pg. 121, 123, 125) She had been the victim of sexual abuse, physical abuse and parental neglect. (Ex. 42, 000338) Tonya had a history of self mutilation, very poor self esteem, and suicidal thoughts. (Ex. 33, 000303)

She was prescribed an anti-depressant medication. (Ex. 33, 000302) She would turn eighteen on May 30, 2002.

Tonya's Health, Safety, and Crises Plan recommended keeping medications locked up as a preventative strategy to protect Tonya from harming herself. (Ex. 33, 000303)

Because Tonya would soon be eighteen-years-old, and could not safely live with her family, her team at Catholic Community Services (CCS), including Atkinson, discussed the possibility of Tonya remaining in care on a voluntary placement agreement. The team decided to have Atkinson begin to treat Tonya like she was already eighteen-years-old. According to Tonya's social worker, Lynda Miller, this did not include handing control of her medications to Tonya. (Tr. Vol. II, pg. 133) Ms. Miller testified she would not have approved Tonya administering her own medications due to her significant and chronic mental health issues, including substance abuse. (Tr. Vol. II, pg. 147-148)

Atkinson, however, decided the plan did include allowing Tonya to administer her own medications despite the foster care regulation requiring medications to be kept locked up. (Tr. Vol. II, pg. 190-191) While it is true some of Lynda Miller's notes from 2002 are missing from the file, she testified that she had not given permission, written or otherwise, for Tonya to self medicate. (Tr. Vol. II, pgs. 147-148, 174) As

both the administrative law judge and the review board judge found, there is no proof that the CCS team directly discussed or approved Atkinson's plan to let Tonya administer her own medication. (000044) There is no credible proof that Lynda Miller had given Atkinson the required written permission to allow Tonya to administer her own medications. (000044)

Atkinson did not keep Tonya's medication locked up. In fact she left the medications out for Tonya to take on her own. (Tr. Vol. II, pg. 192) Tonya told Atkinson she had taken extra anti-depressant medication. Atkinson called Poison Control, then took the girl to the emergency room where it was determined she had not actually taken additional medication. (00044, Tr. Vol. II, pg. 192)

After the medication incident in 2002, Atkinson's CCS licensor, Donna Smith, extensively reviewed WAC 388-148-0350 with her. Ms. Smith took a copy of the regulation to Atkinson, read it to her, discussed it with her, and made sure Atkinson understood her obligations under the regulation. (Tr. Vol. III, pg. 16) Ms. Smith told Atkinson to lock up the medications. (Tr. Vol. III, pg. 195) As the ALJ found, there is no credible proof Atkinson told her licensor in 2002 that she had written permission from Ms. Miller to allow Tonya to self medicate. (Tr. Vol. III, pg. 18)

When a foster parent is licensed through the certification process by a private child placing agency such as Catholic Community Services,

that agency investigates licensing issues in the foster home and reports to the Division of Licensed Resources (DLR) licensor. The private agency can choose to close a foster home, but only DLR can revoke the license. Therefore, Donna Smith investigated the medication incident with Tonya in 2002 and discussed her findings with the regional licensor for the state. (Tr. Vol. I, pgs. 186-187) The Department determined that Atkinson had violated the minimum licensing requirements for medication management in foster homes and entered a finding of “valid” in Atkinson’s file. No further action was taken as Atkinson had had her license through CCS for less than six months, and it was believed she had made a simple error in judgment and could be re-trained in the regulations. (Ex. 3, 000299; Tr. Vol. I, pg. 200) Atkinson was not formally notified of the valid licensing finding as no adverse action was taken against her, although Ms. Smith believes she mailed Atkinson a copy of her letter to the Department. (Tr. Vol. III, pg. 30-31)

As no adverse action was taken against Atkinson’s license in 2002, she was not afforded a due process hearing at that time to contest the finding.

2. The 2005 incident.

On February 9, 2005, Annette Atkinson was licensed through Kitsap Mental Health Services to provide therapeutic foster care for at-

risk, Bureau of Rehabilitative Services (BRS) children. Many BRS children are victims of abuse and neglect, have juvenile justice histories, mental health issues, and/or have had failures in foster care placement. (Tr. Vol. 1, pg. 51)

The regulations that govern medication are discussed with prospective foster parents during the licensing process. Atkinson, like all foster parents, was given a copy of the regulations. (000032; Tr. Vol. II, pg. 239) As part of the licensing process, foster parents must agree to lock up all medications – prescription, over the counter, pet, herbal, and vitamins. (Tr. Vol. II, pgs. 67-69) Foster parents may allow foster children to self-medicate only with the written permission of the child's state social worker.

In March 2005, Crissa (DOB 3-12-98) was placed in Atkinson's home. (Tr. Vol. II, pg. 65). At 17, Crissa had been diagnosed with bipolar disorder and with post traumatic stress disorder. She is also borderline developmentally delayed. Emotionally, Crissa functioned at about the level of an 8-10 year old child. (Tr. Vol. I, pg. 111) She was not going to transition into independent living on her 18th birthday. (Tr. Vol. I, pg. 112)

At the time Crissa was placed in Atkinson's home, she was prescribed several psychotropic medications: Lithium, Abilify, Propanolol

and Trileptal. (000034-35; Exhibit 11, 000207) Crissa was to take 450 milligrams of Lithium in the morning and 900 milligrams in the evening. (000034-35; 000207)

Lithium is an antipsychotic, antimanic medication used to treat bipolar disorder. (Exhibit B, pg 2, 000035) The therapeutic level for Lithium in the blood is between .5 and 1.2 mg. (Tr. Vol. I, pg. 229) Lithium toxicity can occur at doses close to the therapeutic level. (000035). Because the therapeutic levels and toxicity levels are so close, or even overlap, it can be difficult to keep patients safe while being treated with Lithium. (Tr. Vol. II, pg. 19) Mild to moderate adverse reactions can occur at levels from 1.2 to 2.5 mg with moderate to severe reactions occurring at levels above 2.0 mg. (Tr. Vol. I, pgs. 229-233) The half life of Lithium in the body is twenty-four hours. (Tr. Vol. II, pg. 16)

Lithium affects the central nervous system. Even at low doses, a patient can suffer muscle weakness, fatigue, tremors, and muscle fasciculation (muscle spasms). At higher levels, there is a risk for seizures and coma. (Tr. Vol. I, pgs. 233-234) With seizures there is the added risk of trauma due to falls. (Tr. Vol. I, pg. 258)

On her own, Atkinson embarked on a program to teach Crissa how to take her own medications. Atkinson would remove a week's worth of the medications from the bubble packs, and put them in a plastic mediset

box. This box had a removable smaller box for each day of the week. Atkinson would generally lock the larger mediset box away but would leave out on the kitchen counter the smaller box containing the next day's medications. The bubble pack was kept locked up. (Tr. Vol. II, pgs. 213-215, 216)

Atkinson admits she did not have permission from Crissa's social worker, Belan Lopez, to allow Crissa to self medicate. (Tr. Vol. II, pg. 245) Ms. Lopez testified that she would not have given permission if asked, because she did not believe Crissa could handle the responsibility. (Tr. Vol. I, pg. 98) Atkinson did not discuss her medication administration plan with staff at Kitsap Mental Health Services. Crissa's case manager at KMHS, Christine Welch, testified that the team overseeing Crissa's care would not have supported having Crissa help administer her own medications due to her significant mental health issues, and tendency to make impulsive decisions. (Tr. Vol. II, pg. 72) Atkinson did not comply with the policies, procedures, and training of Kitsap Mental Health Services when she allowed Crissa to access her medications. (Tr. Vol. II, pg. 73)

Atkinson never claimed she did not know Crissa's medications were required to be kept locked. (Tr. Vol. I, pg. 248) Atkinson's excuse for not locking up Crissa's medications was that she did not think one

day's worth of medication could be harmful for anyone. (Tr. Vol. II, pg. 248)

During the evening of April 14, 2005, Crissa started talking about not liking herself and not feeling safe. She took her evening medications at about 6:00 p.m. She later went to her bedroom, Atkinson sat and talked to her. Crissa said she wanted to hurt herself. Atkinson asked if she could be safe. Crissa got sleepy and when the other foster child called for Atkinson, Atkinson left Crissa's room. (Tr. Vol. II. Pgs. 217-218)

After Crissa went to bed, Atkinson put the girl's medications for the next day out on the kitchen counter. When Atkinson went to check on Crissa around 10:15 p.m., the girl told her she had taken some of her medications for the next day. She showed Atkinson the container which had only half of the next day's psychotropic medications in it. Crissa had taken the next evening's 900 mg dose of Lithium. Crissa believed she had taken her morning dose of 450 milligrams, but Atkinson testified the girl had actually taken the evening dose. This meant Crissa took 900 mg of Lithium at 6:00 p.m. and another 900 mg around 10:15 p.m. (Tr. Vol. II, pgs. 218-219)

Crissa was treated in the emergency room of Harrison Hospital for an overdose of Lithium. She was ultimately placed in a group home. (Tr. Vol. I, pg. 100)

The DLR-CPS investigator who investigated the 2005 incident involving Crissa, did consider the 2002 incident involving Tonya when completing the risk assessment portion of her final report. (Tr. Vol I, pg. 147-148, Ex. 4, 000180-181). However, Ms. Turner testified she would have reached the conclusion that Atkinson had negligently treated Crissa by deliberately leaving her medications unlocked, and not supervising the girl on April 14, 2005, even if the 2002 incident had not occurred. (Tr. Vol. I, pg. 147-148).

For foster care licensing, the significance of the 2002 event with Tonya was that Atkinson had been specifically trained on the medication regulations and deliberately and knowingly violated the regulations in 2005 in her care of Crissa, resulting in the girl over dosing on Lithium.

The Department's determination that Atkinson had negligently treated Crissa was overturned by the Administrative Law Judge, reinstated by the Review Judge, and ultimately overturned by the Superior Court.

Atkinson, however, did not appeal the revocation of her foster care license based on this incident to the Superior Court and that revocation can no longer be challenged.

III. ARGUMENT

A. Review of Administrative Proceedings.

1. Standard of Review

In reviewing this case, the Court of Appeals, like the superior court, is to apply the standards of the Administrative Procedure Act directly to the record before the agency. *Conway v. Dep't of Soc. & Health Services*, 131 Wn. App. 406, 414, 120 P.3d 130 (2005); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 497 (1993); *Aponte v. DSHS*, 92 Wn. App. 604, 615, 965 P.2d 626 (1998). Further, the court reviews the final decision of the administrative agency on the record before the administrative agency. *See Waste Mgt. Of Seattle, Inc. v. Utilities and Transportation Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). The reviewing court does not evaluate witness credibility or re-weigh the evidence. *Kraft v. DSHS*, 145 Wn. App. 708, 717, _____ P.3d _____ (2008); *Affordable Cabs, Inc. v Employment Sec. Dep't*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004).

The court may, however, consider the evidence before the superior court, in cases such as this one wherein the superior court reviewed additional evidence outside the administrative record. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 129 P.3d 838, as amended (2006).

The court reviews questions of law de novo by independently determining the applicable law and applying that law to the facts as found by the Review Judge. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Questions of fact, however, are not reviewed de novo but are reviewed according to the “substantial evidence” test set forth in the Administrative Procedure Act, RCW 34.05.570(3)(e). *Olmstead v. Department of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991). Pursuant to RCW 34.05.464, the Review Judge’s findings of fact, to the extent they modify or replace the findings of the Administrative Law Judge, are pertinent on appeal. *Tapper*, 122 Wn.2d at 406.

2. Burden Of Proof

The party challenging the agency’s action bears the burden of proving the invalidity of the agency’s decision. RCW 34.05.570(1)(a); *Aponte v. DSHS*, 92 Wn. App. at 615; *Superior Asphalt & Concrete v. Dept. of Labor & Industries of the State*, 84 Wn. App. 401, 405, 929 P.2d 1120, 1122, *review denied* 132 Wn.2d 1009, 940 P.2d 654 (1996); *Grabicki v. Department of Retirement Systems*, 81 Wn. App. 745, 750, 916 P.2d 452, 455, *review denied* 130 Wn.2d 1010, 928 P.2d 412 (1996).

3. Authority To Reverse

The reviewing court has the authority to reverse an agency’s adjudicative decision if: (a) the agency erroneously interpreted or applied

the law; (b) the agency's decision is not supported by substantial evidence; (c) the agency has failed to follow a prescribed procedure; (d) the agency's ruling is arbitrary or capricious; (e) the order, or statute or rule on which the order is based is in violation of constitutional provisions on its face or as applied. RCW 34.05.570(3)(a)(c)(d)(e)(i).

The court shall grant relief only if it determines a person seeking judicial relief has been substantially prejudiced by the agency's action. RCW 34.05.570(1)(d).

Atkinson asserts on appeal to this court that there is not substantial evidence in the record to support the Administrative Law Judge's determination that Atkinson had violated the regulations governing medication management for foster children in 2002.

Atkinson further asserts her rights to procedural due process were violated by the determination by the Department in 2002 that she had violated the minimum licensing regulations concerning medication management for foster children without affording her a right to an adjudicatory hearing.

4. Substantial Evidence

Agency findings of fact are reviewed under the substantial evidence test. RCW 34.05.570 (3)(e). The court in *Hensel v. Dept. of Fisheries*, 82 Wn. App. 521, 526, 919 P.2d 102, 104-105 (1996), held that

substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. The reviewing court does not try the facts de novo. *Jerome v. State Employment & Security Dept.*, 69 Wn. App. 810, 814, 850 P.2d 1345 (1993). An agency decision supported by substantial evidence is not arbitrary and capricious. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, 516, review denied 132 Wn.2d 1004, 939 P.2d 215 (1997).

In this case, the Administrative Law Judge (ALJ) made extensive findings concerning the 2002 incident. (000097-990) The Review Judge made additional findings. (000044-46). The ALJ heard the testimony of Tonya's social worker, of the Catholic Community Services licensor, and of Ms. Atkinson. (000098-99) The ALJ also reviewed the existing records concerning the incident. The ALJ determined there was no credible evidence that Atkinson had the required written permission to allow Tonya to self medicate. (000098) This credibility determination is especially significant given the ALJ's finding that Atkinson was an impressive foster parent, and that the incident concerning Tonya was not relevant to Atkinson's current abilities and judgment. (Footnote 2, 000118)

There is substantial evidence in the record to support the Review Decision.

B. Due process did not require the Department to afford Atkinson an adjudicative hearing to contest the 2002 licensing finding prior to revocation of her license in 2005

1. Chapter 74.15 RCW does not provide for a hearing to contest a finding of violation of a foster care licensing regulation

Atkinson was entitled to an administrative hearing to challenge the 2002 finding only if the authority to provide such a hearing was within the scope of the Department's authority or was required by law or constitutional right. RCW 34.05.413(1)(2).

The legislature of this state has declared that:

...the state of Washington has a compelling interest in protecting and promoting the health, welfare, and safety of children, including those who receive care away from their own homes. The legislature further declares that no person or agency has a right to be licensed under this chapter to provide care for children. The health, safety, and well-being of children must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, and whether to take other licensing action.

Historical and statutory notes, RCW 74.15.010.

In enacting chapter 74.15 RCW, the legislature granted authority to the Secretary of the Department of Social and Health Services to license agencies, including foster care homes, which provide care for children away from their own homes, and to promulgate those regulations necessary to safe-guard the children. RCW 74.15.010(1); RCW 74.15.030.

Despite its declaration that no person has a right to a foster care license, the legislature chose to provide foster care applicants and licensees a right to an administrative hearing if aggrieved by certain specific decisions of the Department. These adverse actions are: denial of an application for a foster care license, modification of an existing license, or suspension or revocation of a license. RCW 74.15.130(2)¹ The Department is required to provide written notice of any of these adverse actions to the applicant or licensee, stating the reasons for the adverse action. RCW 43.20A.205(1). The person aggrieved by one or more of these adverse actions is then afforded the right to an adjudicative hearing governed by the provisions of the Administrative Procedure Act, unless the suspension is based on noncompliance with a child support order. RCW 43.20A.205(3).

Nothing in the statutory scheme required or permitted the Department to provide Atkinson with an administrative hearing in 2002 to challenge a determination that she had violated the medication management regulations for foster children absent an adverse action being taken against her license.

¹ RCW 74.15.130(1) provides in part: "...RCW 43.20A.205 governs notice of a license denial, revocation, or modification and provides the right to an adjudicative hearing."

Once, however, the Department revoked Atkinson's foster care license in 2005, relying in part on the 2002 incident for its decision to revoke, Atkinson was entitled to litigate the prior "valid" licensing action.

2. Atkinson had no due process right to an administrative hearing to challenge the 2002 finding prior to the revocation of her license

a. Due process-protected liberty interest

Atkinson asserts the Department violated her due process rights in not affording her an adjudicatory hearing in 2002 when it determined she had violated the minimum licensing requirements for foster parenting when she allowed Tonya to self-medicate.

It is well established that due process of law does not require a hearing in "every conceivable case of government impairment of private interest." *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S. Ct. 1208 (1972); *Cafeteria and Restaurant Workers Union etc. v. McElroy*, 367 U.S. 886, 894, 81 S. Ct. 1743 (1961). In the area of employment, an early case did hold that the right to hold specific private employment and to follow a given profession free from unreasonable government interference is a fundamental right within the liberty and property concepts of the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400 (1959). *Greene*, however, has been restricted to its facts and has come to be construed as requiring the government imposing a stigma which

forecloses the employee's ability to obtain employment or when the government discharges the employee under circumstances that call into question the employee's integrity, honor, or good name in the community. *Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System*, 44 Wn. App. 906, 914, 724 P.2d 1030 (1986). These cases, which address due process liberty and property interests in government employment, are known as the "stigma-plus" cases because more than just harm to reputation is required to elevate loss of employment to a matter of constitutional magnitude.

The seminal case is *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-573, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In *Roth*, the Court held that a person has a due process liberty interest in her good name, reputation, honor, and integrity. When the government harms that reputation, coupled with the deprivation of a tangible interest, such as government employment, due process requires notice and the opportunity to refute the charges. *Roth*, 408 U.S. at 573; *Paul v. Davis*, 424 U.S. 693, 701-702, 96 S. Ct. 1155 (1976); *Skiff v. Colchester Board of Education*, 514 F. Supp. 2d 284, 295-296 (2007); *Gies v. Flack*, 495 F. Supp. 2d 854, 866-867 (2007).

In order for a person to show she was deprived of a liberty interest and entitled to a name clearing hearing under the stigma-plus line of cases,

a claimant must show: (1) the stigma is one that goes to the very heart of the employee's competence and will very seriously impair her ability to find employment; (2) the stigmatizing statements are false; (3) were voluntarily made public; and (4) are concurrent with the claimant's dismissal from government employment. *Skiff v. Colchester*, 514 F. Supp. 2d at 295-296; *Campanelli v. Bockrath*, 100 F.3d 1476, 1484-1485 (9th Cir. 1996).

Clearly, Atkinson can not meet the "stigma-plus" test. In neither 2002 nor 2005 was she a government employee. She was not terminated from employment from a governmental entity as a result of the investigation. The statements of the Department that Atkinson had allowed Tonya access to medications in violation of the regulations were true and were not even made public until after her license was revoked in 2005. Atkinson further relies on cases from outside the realm of public employment in her assertion that she has been deprived of a liberty interest without due process of law. Her reliance on these cases is also misplaced. In *City of Redmond v. Moore*, 151 Wn.2d 664,670-671, 91 P.3d 875 (2004), the court was concerned with whether or not a particular statutory scheme was sufficient to meet the due process requirements concerning suspension or revocation of a driver's license – a protected property interest under the Fourteenth Amendment. In *Wisconsin v. Constanineau*,

400 U.S. 433, 436-437, 91 S. Ct. 507 (1971), the Court was concerned with the constitutionality of publicly labeling a person an “excessive drinker” and denying that person the right to purchase alcohol for a one year period without any opportunity to be heard and present his side of the story. Conversely, courts have held that a convicted sex offender, however, has no liberty interest arising out of the sex offender and disclosure statutes. *In re Personal Restraint Petition of Meyer*, 142 Wn. 2d 608, 16 P.3d 563 (2001).

The Department did not violate Atkinson’s right to due process in not affording her a hearing to challenge the 2002 licensing finding prior to revoking her foster care license.

b. Due process-protected property interest

In *Board of Regents of State Colleges v. Roth*, 408 U.S. at 569-570, the Court defined the nature of the property interests protected by the Fourteenth Amendment: “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing in is paramount. But the range of interests protected by procedural due process is not infinite.”

The court went on to hold that in order to have a property interest in a benefit, a person must have more than just an abstract need or desire for it, she must have a legitimate claim of entitlement to it. *Roth*, 408 U. S. at 577; *Wash. Ind. Tel. Ass'n v WUTC*, 149 Wn.2d 17, 24-25, 65 P.3d 319 (2003). Thus, in *Roth*, an assistant professor working under a nine month contract, had no possible claim of entitlement to continued employment. In *Wash. Ind. Tel. Ass'n v WUTC*, 149 Wn.2d at 24, the Association members had no protected property interest in being designated a sole telecommunications provider in rural areas of Washington State.

In *Crescent Convalescent Ctr. V. DSHS*, 87 Wn. App. 353, 358, 942 P.2d 981 (1997), the court held that a nursing home such as Crescent had a due process right to an administrative hearing concerning citations in a survey report. Because the statutory scheme for nursing homes provided for preferential treatment by the government for citation free facilities, the nursing homes had a protected property interest in the survey results.

In order to protect foster children, the Department is required to inspect foster homes on a regular basis to insure compliance with the minimum licensing requirements for foster homes and to conduct investigations into allegations of child abuse/neglect in said homes. RCW 74.15.030(4)(7). Foster parents, however, are neither financially rewarded

nor penalized as the result of an inspection or investigation. RCW 74.15.130(4) specifically prohibits the imposition of civil monetary penalties against licensed foster homes.

As a foster parent, Atkinson did not have a property interest in the results of every inspection/investigation of her home absent adverse licensing action being taken by the Department.

In this case, Atkinson asserts she has been or will be denied employment as a result of the 2002 licensing finding. To support that assertion, she relies on the declaration of Dianne Thompson, a Contracts Manager for the Department. Ms. Thompson did disqualify Atkinson from working directly with children at Therapeutic Solutions. That disqualification, however, was based only in part on the 2002 incident. As Ms. Thompson noted, the revocation of the license itself was sufficiently serious to justify the disqualification.

The Department did not violate Atkinson's protected property interests when it entered the 2002 finding into its records without first affording her an adjudicative hearing.

C. Atkinson was afforded due process to contest the revocation of her license

As noted above, while Atkinson did not have the right to an administrative hearing to challenge the 2002 finding, once the Department

revoked her license in 2005, relying in part on the 2002 incident, she was afforded an opportunity to be heard concerning the earlier incident. The opportunity to be heard is the fundamental requisite of due process. *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973); *Tobin v. Labor & Indus.*, 145 Wn. App. 607, 619, ___ P.3d. ___ (July 2008). The opportunity to be heard must also be granted at a meaningful time and in a meaningful manner. *Tobin*, 145 Wn. App. at 619 (additional citations omitted).

Atkinson asserts that she was not provided with a meaningful opportunity to be heard concerning the 2002 incident in the context of the revocation hearing. This assertion is without merit. Tonya's social worker, Atkinson's licensor through Catholic Community Services, the Department's licensor, the licensing supervisor, and Atkinson all testified concerning the 2002 incident. While it is correct the social worker was unable to locate Tonya's file, the Department's computerized records were still available as was Atkinson's licensing file. These records were admitted into evidence during the hearing. The ALJ ultimately determined, based on the evidence presented to her, that Atkinson had violated the medication regulations. She did not, however, rely on this evidence in affirming the revocation of Atkinson's license. (000118)

Atkinson was afforded due process concerning the 2002 incident at a time when such a hearing would be meaningful-when her license was being revoked. That she did not prevail on the issue does not equate to deprivation of due process.

D. The Trial Court properly denied the petition for writ of mandamus

Atkinson sought a statutory writ of mandamus pursuant to RCW 7.16.160² from the superior court to the Department of Social and Health Services, compelling it to change Atkinson's foster care licensing records. In 2002, the Department entered into its records a "valid" licensing finding against Atkinson for her failure to lock up foster child Tonya's anti-depressant medications. The Superior Court denied her application. Atkinson now seeks to have this court reverse the Superior Court and direct that the writ issue. This request should be denied.

As the court noted in *Kirkland v Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996), "(a) statutory writ is an extraordinary remedy and should only issue when there is no plain, speedy and adequate remedy in the ordinary course of law." A remedy is not inadequate just because it is expensive, time consuming or even annoying. *Kirkland* at 827.

² RCW 7.16.160 provides that a writ of mandamus "...may be issued by any court, except a district or municipal court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station...."

Mandamus is an appropriate remedy to compel performance when a state official has violated and continues to violate a specific, existing duty. *Walker v. Munro*, 124 Wn.2d 402, 409, 879 P. 2d 920 (1994). And while a court of competent jurisdiction can direct the Department to exercise its discretion, it can not require that discretion be exercised in a particular manner, unless the agency is acting in a manner so arbitrary and capricious as to evidence a total failure to exercise discretion. *Trans-Canada v. King County*, 29 Wn. App. 267, 275, 628 P.2d 493 (1981); *Hillis Homes, Inc. v. Snohomish County*, 32 Wn. App. 279, 281, 647 P.2d 43 (1982).

In this case, Atkinson complains the Department did not give her formal notice in 2002 of the valid licensing finding, that the investigation was not conducted properly, and that the passage of time made it difficult to present evidence. She does not complain that the Department failed to exercise its discretion in 2002, which it did in allowing her to maintain her foster care license with additional training on the regulations despite her conduct.

Atkinson further argues in support of her petition for a writ of mandamus that the Department should be equitably stopped from entering a valid licensing finding in Atkinson's licensing records because Atkinson claims she was following the directive of the social worker. A claim of

equitable estoppel against a government agency requires clear, cogent and convincing evidence that: (1) the agency's admission, statement or act is inconsistent with its later claim; (2) the person seeking estoppel has acted in reliance on the agency's admission, statement or action; (3) the person relying on the agency's admission, statement or action will suffer an injury if the government is allowed to change its position; (4) estoppel is necessary to prevent a manifest injustice; and (5) that there will be no impairment of governmental functions if estoppel is applied. *Kramarvecky v DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993); *Bond v Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 575, 45 P.3d 1087 (2002).

Atkinson can not meet her burden to prove equitable estoppel is appropriate in her situation by clear, cogent and convincing evidence. First, the ALJ, and later the Review Judge, found there was no credible evidence that Atkinson had permission to let Tonya have free access to her anti-depressant. As a licensed foster parent Atkinson had an obligation to comply with the regulations governing the care of foster children. She did not do so. The Department has not changed its position in this matter, so there is no inconsistent admission, statement or action for Atkinson to have relied upon to her detriment. Second, there is no manifest injustice to be prevented here – Atkinson did not lock up Tonya's medications and that is a violation of the regulations. The Department could have revoked

her license in 2002, but chose not to do so. It was only after Atkinson again decided, on her own, to allow a second mentally ill teen to access her medications in violation of the regulations that the Department revoked her foster care license. Third, the Department is mandated to enforce licensing regulations to protect the children in care. See RCW 74.15.010 and RCW 74.15.030. The exercise of its mandate would be impaired if estoppel is applied in this case. See *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. at 576. Equitable estoppel is not appropriate in this matter.

The superior court properly denied the petition for a writ of mandamus requiring the Department to alter its records.

IV. CONCLUSION

There is substantial evidence in the record to support the Initial Decision as reinstated by the superior court. Atkinson's rights to due process were not violated by the Department. The superior court properly denied the petition for a writ of mandamus. The Department of Social and Health Services respectfully requests this court affirm Judge Costello's April 25, 2008 order in this matter.

RESPECTFULLY SUBMITTED this 17th day of November, 2008.

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In Re:

Annette Atkinson v. DSHS

CERTIFICATE OF MAILING

I, KIM WILCOX, certify: I am a citizen of the United States and competent to be a witness herein. On November 17, 2008, 2008, I caused the Brief of Respondent to be served as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 17th day of November, 2008.

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