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## I. INTRODUCTION

Appellant Carla Smith seeks review of a Department of Social and Health Services' (DSHS) finding that Ms. Smith abused her eight-year-old son when she hit him with a belt, causing him a swollen lip and a long red mark on his face that was clearly visible for at least three days.

Ms. Smith appealed the DSHS finding and the Administrative Law Judge (ALJ), Board of Appeals and Superior Court all upheld the finding of abuse. Ms. Smith now asks this Court to interpret the child abuse rule, which defines child abuse as the “nonaccidental infliction of physical injury or physical mistreatment” on a child, to require a finding of intent to cause the specific harm suffered by the child. This Court should reject her argument and affirm the finding of abuse.

## II. RESTATEMENT OF THE CASE

On May 6, 2008, D.S. arrived at his elementary school with a swollen lip and a four-and-one-half inch dark red mark on the left side of his face—running from his mouth up his cheek bone to his hairline. Administrative Record (hereinafter AR) at 46-47. The child told school staff that the previous day his mother, Appellant Carla Smith, had been hitting him on his bottom and legs with a belt, and she slipped and hit him in the face when he moved. AR at 47. The school made a referral to the DSHS Child Protective Services (CPS). AR at 46.

During the CPS investigation, Ms. Smith admitted to striking her son on the evening of May 5, 2008. AR at 47. She reported that she intended to hit the child on his buttocks with a belt, but he tried to run away to avoid punishment, and she hit him in the face. AR at 48. The dark red mark on the child's face was beginning to fade but still obvious three days after the incident. AR at 48.

DSHS determined child abuse had occurred and notified Ms. Smith of its finding. AR at 6. Ms. Smith appealed.

Prior to the administrative hearing before the ALJ, the parties stipulated to the facts. AR at 46-49. The ALJ affirmed the finding of physical abuse by Ms. Smith. AR at 23-28. Ms. Smith petitioned for review of the ALJ decision and the DSHS Board of Appeals affirmed. AR at 1-14.

Ms. Smith then sought judicial review in Thurston County Superior Court. She argued that her actions were "accidental" and, thus, did not fall within the legal definition of child abuse. The Superior Court, sitting in its appellate capacity, rejected her argument, affirmed the agency's decision—and its interpretation of the child abuse statute and rule—concluding that "[u]nintended consequences are not accidents. While Ms. Smith did not intend to hit her son in the face with a belt on May 5, 2008, doing so was not accidental." CP at 52.

DSHS submits that the ALJ, Board of Appeals, and Superior Court correctly interpreted and applied the definition of child abuse. It asks that this Court affirm DSHS's finding that Ms. Smith abused her young son when she injured him while purposefully hitting him with a belt.

### **III. ARGUMENT**

This appeal raises a single issue: Does the definition of child abuse require a finding of intent to cause injury to the child?

The definition of child physical abuse is set forth in an unchallenged Department rule—WAC 388-15-009(1). The rule harmonizes the child abuse statute's legislative intent with its broadly stated definition of child abuse, and clarifies that physical abuse is the “nonaccidental infliction of physical injury or physical mistreatment of a child.” WAC 388-15-009(1). This includes “[d]oing any . . . act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety.” WAC 388-15-009(1)(f).

While Ms. Smith did not intend to hit her son in the face, leaving him with a swollen lip and a four inch red mark that was visible three days later, she did intend to hit him with a belt with one hand, while she held

him within reach with the other hand. Her act of hitting the child was intentional and not accidental. Therefore, the infliction of the injury was nonaccidental, and was properly determined to be abuse under the child abuse statute, RCW 26.44.020(1), and the Department's rule interpreting that statute, WAC 388-15-009(1).

**A. Standard Of Review**

A reviewing court may reverse an agency decision when (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious. RCW 34.05.570(3); *Scheeler v. Dep't. of Empl. Sec.*, 122 Wn. App. 484, 488, 93 P.3d 965 (2004). Here Appellant Smith argues the administrative decision was based on an error of law.

The error of law standard calls for *de novo* review of the administrative tribunal's interpretation of law and allows the reviewing court to substitute its judgment for that of the administrative tribunal. *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). However, substantial weight is accorded the agency's interpretation of the statute. *Univ. of Wash. Medical Center v. Wash. State Dep't. of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that DSHS misunderstood or violated the law. *Id.* at 103.

**B. DSHS Properly Interpreted The Term “Abuse” When It Determined That Appellant Abused Her Son**

Ms. Smith argues that the Board of Appeals erroneously interpreted and applied the definition of child abuse. Br. of Appellant at 5-6. However, DSHS correctly applied the law when it determined that Ms. Smith abused her son by purposefully hitting him with a belt, causing him a swollen lip and four-inch mark on his face that was visible for at least three days.

The legislature declared in RCW 26.44.010 that where “instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information.” RCW 26.44.010.

The child abuse statute does not define abuse specifically; instead, it broadly defines “abuse or neglect” as “sexual 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 [lawful physical discipline]; or the negligent treatment or maltreatment of a child

by a person responsible for or providing care to the child.”  
RCW 26.44.020(1).<sup>1</sup>

In WAC 388-15-009(1), the legislative declaration in  
RCW 26.44.010 is harmonized with the statutory definition of abuse as  
follows:

(1) Physical abuse means the nonaccidental infliction of physical  
injury or physical mistreatment on a child. Physical abuse  
includes, but is not limited to, such actions as:

- (a) Throwing, kicking, burning, or cutting a child;
- (b) Striking a child with a closed fist;
- (c) Shaking a child under age three;
- (d) Interfering with a child's breathing;
- (e) Threatening a child with a deadly weapon;
- (f) Doing any other act that is likely to cause and which does  
cause bodily harm greater than transient pain or minor  
temporary marks or which is injurious to the child's health,  
welfare or safety.

The definition of abuse does not require intent to cause a specific  
harm to a child. The statutory definition makes no mention of intent;  
instead, it focuses only on the effect on the child of the abusive act, in that  
it requires that the injury result in harm to the child’s health, welfare or  
safety. *See* RCW 26.44.020(1). The rule’s definition of physical abuse  
requires the *infliction* of injury to be nonaccidental; it does not require that

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<sup>1</sup> Washington’s statutory definition is consistent with the federal definition,  
which similarly defines “child abuse and neglect” to broadly mean “at a minimum, any  
recent act or failure to act on the part of a parent or caretaker, which results in death,  
serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to  
act which presents an imminent risk of serious harm...” 42 U.S.C. § 5106(g)(2).

the parent intend the resulting harm of her actions. In fact, in subsection f, the regulatory definition clearly states that the focus of the inquiry is on the severity of the resulting harm to the child and not on whether the parent subjectively intended to cause that level of harm.

DSHS's interpretation of "abuse" fits squarely within the unchallenged regulatory definition, which aligns the legislature's declaration of intent in RCW 26.44.010, with its broad definition of "abuse or neglect" in RCW 26.44.020(1).

Rules of statutory construction apply to administrative rules and regulations, especially when they are adopted pursuant to express legislative authority. *State v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). The legislature requires that DSHS investigate reports of abuse or neglect and thereafter provide a report that is consistent with chapter 74.13 RCW. RCW 26.44.050. The legislature further authorized DSHS to issue regulations to administer Title 74 throughout the state. RCW 74.08.090. Thus, rules of statutory construction apply to the interpretation of WAC chapter 388-15, which was adopted pursuant to express legislative authority.

DSHS's interpretation of WAC 388-15-009 is consistent with the underlying policy of chapters 26.44 and 74.13 RCW of protecting children and safeguarding them from harm. Under rules of statutory construction,

courts interpret regulations to give effect to their underlying policy and intent. *Cannon*, 147 Wn.2d at 56. In addition to investigating reports of abuse and neglect, DSHS is charged with providing services to protect children from child abuse and neglect, and with safeguarding them from future abuse and neglect. RCW 26.44.020(3). The purpose of chapter 74.13 is “to safeguard, protect, and contribute to the welfare of the children of the state . . . .” RCW 74.13.010. DSHS is charged with administering a comprehensive plan aimed at protecting children. *See* RCW 74.13.031(1).

The underlying policy and intent of WAC 388-15-009 is to ensure the protection of children by authorizing DSHS to investigate allegations of child abuse, offering remedial services to families, and safeguarding children from future harm. The important policy of protecting children from harm is carried out in the language of WAC 388-15-009, and in DSHS’s interpretation thereof.

Further, this court should give deference to DSHS’s interpretation of “abuse” and of its own rule. A reviewing court accords substantial deference to an agency’s interpretation, particularly in regard to the law involving the agency’s special knowledge and expertise. *Univ. of Wash. Medical Center*, 164 Wn.2d at 102. Here, the law at issue involves the very meaning of child abuse—an issue central to DSHS’s mission, which

includes investigating reports of child abuse, protecting children, and providing child welfare services to families.

Moreover, DSHS's interpretation of WAC 388-15-009(1) gives meaning to all words in the rule. Administrative regulations should be interpreted as a whole, and all language and provisions should be given effect. *Cannon*, 147 Wn.2d at 57. The express language of the regulation in question requires that the *infliction* of the injury—the act that resulted in the injury—must not be accidental in order to find abuse. Additionally, subsection f focuses on the harm to a child resulting from a purposeful act, and not on whether the parent intended that level of harm. DSHS's interpretation gives meaning to all provisions of the regulation by correctly focusing on the purposefulness of the mother's act in hitting her son and on the severity of harm that resulted in concluding that the mother abused her son.

Finally, to interpret WAC 388-15-009 to require intent to cause specific harm would place children in grave danger, and would eviscerate the statute. Certainly, few parents intend the level or type of harm they cause to children when they mistreat them, even when their purposeful acts directly result in those harms. A parent who shakes an infant in a rage

does not intend to cause brain damage. To require such intent would increase the burden of proof in abuse cases in such a way that DSHS would be able to substantiate few incidents of abusive behavior—resulting in the children harmed in those cases going unprotected.

Ms. Smith did not accidentally hit her young son with a belt—she did so purposefully. As the Superior Court indicated in its Conclusions of Law, CP at 52, an unintended consequence is not an accident. Ms. Smith intended to hit her child with a belt with one hand while she held onto him with the other. When he squirmed, her action resulted in hitting him in the face with the belt, causing a swollen lip and a four-inch mark on his face, which was still visible three days later. While Ms. Smith may not have intended the exact location or severity of harm, she did not accidentally hit her son. Her infliction of injury upon him was nonaccidental. Moreover, it was likely to cause—and did cause—bodily harm greater than transient pain or minor temporary marks. Her beating of her son, and the injury she caused him, fits squarely within the definition of physical abuse in WAC 388-15-009(1) and RCW 26.44.020(1).

#### IV. CONCLUSION

DSHS properly interpreted and applied the term “abuse” when it determined that Appellant Smith abused her eight-year-old son by purposefully hitting him with a belt, causing him injuries that were visible three days later. Appellant’s action in hitting her son with the belt was not an accident; it falls within the statutory and regulatory definition of abuse. The agency decision should be affirmed.

RESPECTFULLY SUBMITTED this 5 day of October, 2010.

ROBERT M. MCKENNA  
Attorney General



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CARRIE L. HOON  
Assistant Attorney General  
WSBA No. 32220  
P.O. Box 40124  
Olympia, WA 98504-0124  
(360) 586-6498

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of October, 2010, I served a copy of the RESPONDENT'S BRIEF on the following by US Mail via Consolidated Mail Service:

**Attorney for Appellant**

Gregory M. Rhodes  
Younglove Lyman & Coker PLLC  
PO Box 7846  
Olympia, WA 98507-7846

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

DATED this 5<sup>th</sup> day of October, 2010, at Tumwater, Washington.

  
CORINNE A. STAMEY, Legal Assistant

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