



## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b> .....	iii-iv
<b>I. INTRODUCTION</b> .....	1
<b>II. ARGUMENT</b> .....	2
<b>A.</b> If WAC 388-15-009(5) is an “interpretive rule,” it cannot be the basis of a penalty or sanction, and the Department’s finding of child neglect against Ms. Marcum, which is based on that rule, must be overturned .....	2
<b>B.</b> Because WAC 388-15-009(5), as interpreted and applied in Ms. Marcum’s case, conflicts with the intent of the statute, Ms. Marcum must prevail despite the Department’s assertion that it is an interpretive rule .....	5
<b>C.</b> The language defining “negligent treatment or maltreatment” is plain and unambiguous and it is therefore appropriate for the Court to determine the legislative intent from the plain meaning of the words in the statute itself, and where certain words are not defined by the statute, it is appropriate for the Court to rely on their dictionary definitions .....	6
<b>D.</b> The Department’s argument that Ms. Marcum’s alleged failure to supervise a child in her care constituted a serious disregard and a clear and present danger to that child was based on impermissible speculation and not supported by substantial evidence in the record .....	7
<b>E.</b> It is arbitrary and capricious for the Department to uphold a finding of child neglect based on a new and restrictive interpretation of its child neglect regulations that ignores the requirements of the governing child neglect statute.....	10
<b>F.</b> Appellant Melinda Marcum is entitled to attorneys’ fees and costs on appeal in this matter pursuant to RAP 18.1 and Washington’s Equal Access to Justice Act, RCW 4.84.340-360 .....	10

**III. CONCLUSION ..... 11**

**IV. CERTIFICATE OF SERVICE ..... 13**

## TABLE OF AUTHORITIES

### Cases

<i>Ass'n of Wash. Bus. v. Dep't of Revenue</i> , 155 Wn.2d 430, 447 120 P.3d 46 (2005).....	2, 3
<i>Galloway v. United States</i> , 319 U.S. 372, 395, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943).....	8
<i>Hanson v. Estell</i> , 100 Wn. App. 281, 285-86, 997 P.2d 426, 429 (2000) .....	1
<i>Poppell v. City of San Diego</i> , 149 F.3d 951, 954 (9 <sup>th</sup> Cir. 1998).....	8
<i>Shell Dealers Ass'n v. Shell Oil</i> , 725 F. Supp. 1104, 1109 (D. Nev. 1989) .....	1
<i>Tose v. First Pa. Bank, N.A.</i> , 648 F.2d 879, 895 (3d Cir. 1981).....	8

### Statutes

RCW 4.84.340-360.....	10
RCW 4.84.350.....	11
RCW 26.44 .....	1, 7, 11
RCW 26.44.010.....	5
RCW 26.44.020(14).....	11
RCW 34.05.....	6
RCW 34.05.328(5)(c)(ii).....	2
RCW 34.05.328(5)(c)(iii).....	3

### Agency Regulations

WAC 388-15-009.....	3
WAC 388-15-009(5).....	<i>passim</i>
WAC 388-15-011.....	3

### Court Rules

RAP 18.1 .....	11
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**Other Authorities**

Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*  
26-27 (3d ed. 1997).....8

## I. INTRODUCTION

The Department's Response Brief addresses some, but not all of the issues raised by Appellant Melinda Marcum's Opening Brief. Where the Department has failed to respond to an argument or to distinguish authority relied upon by Ms. Marcum, it should be treated as having conceded the issue entirely.<sup>1</sup> Specifically, the State did not respond to the Appellant's argument that there was no substantial evidence in the record that Ms. Marcum's alleged conduct amounted to a "serious disregard," as required by the statute. Appellant's Opening Brief at 2. On that basis alone, Ms. Marcum must prevail. The State also did not dispute Ms. Marcum's argument that the intent of RCW 26.44 is to prevent "nonaccidental" injury. Appellant's Opening Brief at 20-21.

The record in this case contains evidence which strongly supports Ms. Marcum's position that her actions: (a) did not amount to a "serious disregard," as required by the relevant statute and regulation to support a finding of child neglect; and (b) were not the type of "nonaccidental" behavior the statute intended to address. Ms. Marcum had systems in place to keep track of the children in her care, the ALJ found that Ms.

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<sup>1</sup> *Hanson v. Estell*, 100 Wn. App. 281, 285-86, 997 P.2d 426, 429 (2000) (respondent's failure to file brief precluded oral argument); *Shell Dealers Ass'n. v. Shell Oil*, 725 F. Supp. 1104, 1109 (D. Nev. 1989) (failure to respond to arguments regarding one of several claims deemed concession supporting partial summary judgment).

Marcum would never intentionally harm a child, and neither the ALJ nor the Department's Review Judge made a determination that Ms. Marcum's alleged conduct amounted to a "serious disregard," under either the statute or the WAC at issue. This Court should therefore reverse the Review Decision and Final Order.

## II. ARGUMENT

- A. If WAC 388-15-009(5) is an "interpretive rule," it cannot be the basis of a penalty or sanction, and the Department's finding of child neglect against Ms. Marcum, which is based solely on that rule, must be overturned.**

After approximately three years of litigation in this matter, the State now, for the first time, asserts in its Response Brief that WAC 388-15-009(5) is an interpretive rule, and therefore not binding on either the court or Ms. Marcum. Response Brief at 15. The import of this argument in the present matter is unclear, however, for even if Department is correct and the regulation is "interpretive" – a point that Ms. Marcum does not concede – "interpretive" rules merely set forth the agency's interpretation of statutory provisions it administers and cannot subject the public to penalties or sanctions. RCW 34.05.328(5)(c)(ii); see also *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005)

(holding that “interpretive” regulations “are not binding on the courts” and “the public cannot be penalized or sanctioned for breaking them”).<sup>3</sup>

Here, the record is clear that everyone from the Department investigators<sup>4</sup> to the Review Judge treated WAC 388-15-009(5) as the sole basis for the penalty and sanction in this case, a finding of child neglect. Relying on subsection (a) of the rule, the Review Judge circumvented the requirements of the statute and of the rule itself to consider the elements of “clear and present danger” and “serious disregard” when she concluded:

- (a) “the ‘failure to provide adequate ...supervision...necessary for a child’s health, welfare, and safety’ is included in the list of sufficiently serious and therefore negligent acts. Thus, the proper factual and legal analysis is whether the Appellant’s actions failed to provide Marlon with adequate supervision necessary for Marlon’s health, welfare, and safety; **it is not whether the Appellant’s actions created a clear and present danger to Marlon.**” AR at 16 (emphasis added); and

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<sup>3</sup> In contrast to “interpretive rules,” the APA defines a “significant legislative rule” as “...a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.” RCW 34.05.328(5)(c)(iii).

<sup>4</sup> In its December 31, 2008 Notice to Ms. Marcum that it had made a “founded” determination of abuse/neglect against her, the Department explicitly relied on the WAC and not the statute: “This decision is based on the definitions of abuse or neglect in Washington Administrative Code (WAC) section 388-15-009 and 011...” AR at 76.

(b) “When the Appellant failed to provide adequate supervision necessary for Marlon’s health, welfare, or safety on December 19, 2008, the Appellant engaged in an act that is **per se** negligent treatment or maltreatment of a child.” AR at 17 (emphasis added).

As these conclusions make clear, the Review Judge relied on the rule and only the rule to conclude that Ms. Marcum committed child neglect. Specifically, the Review Judge treated Ms. Marcum’s alleged failure to provide adequate supervision as a per se act of child neglect because it fell within the rule’s stated categories of conduct. Notably, the statute itself does not cite the failure to provide adequate supervision as an act of neglect, let alone a per se act of neglect. In reaching this conclusion, the Review Judge explicitly and improperly failed to consider whether Ms. Marcum’s allegedly inadequate supervision also satisfied the statutory and regulatory elements of “clear and present danger” and especially “serious disregard.” Assuming WAC 388-15-009(5) is an “interpretive rule,” which the Department so strenuously asserts, this result violates both the APA and Washington Supreme Court’s clear statement that an interpretive rule cannot subject the public to penalties or sanctions. For this reason, the decision upholding the finding of neglect should be overturned.<sup>5</sup>

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<sup>5</sup> If Ms. Marcum is to be sanctioned under the authority of the statute for violating an interpretive rule, as the State attempts to assert, Response Brief at 16, 23-24, then the State has failed to provide statutory authority for why the Department can make a finding

**B. Because WAC 388-15-009(5), as interpreted and applied in Ms. Marcum’s case, conflicts with the intent of the statute, Ms. Marcum must prevail despite the Department’s assertion that it is an interpretive rule.**

The Department argues that the WAC at issue in this case is an interpretive rule and need only “not conflict with the legislative intent underlying the statute it interprets and enforces.” Response Brief at 16. However, even if WAC 388-15-009(5) is an interpretive rule, the rule, as interpreted and applied in Ms. Marcum’s case, conflicts with the intent of the statute.

As discussed in the Appellant’s Opening Brief, the intent of the neglect statute is to prevent nonaccidental injury, RCW 26.44.010, yet there is no evidence that the Review Judge even considered or applied the intent of the statute in her decision. Here, fortunately, Marlon was not injured, but even if he had been, there is absolutely no evidence that it would have been nonaccidental. In fact, all evidence points to the conclusion that any injury that might have occurred would have been accidental.<sup>6</sup>

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of neglect without consideration as to whether the conduct being sanctioned was “nonaccidental,” constituted a “serious disregard,” and presented a “clear and present danger.” For these reasons, this argument must fail.

<sup>6</sup> The Review Judge specifically found that: “Ms. Marcum testified credibly, and was backed up by the parents, that she had numerous protocols and procedures in place to ensure that children are safe and secure at her facility. Among the most relevant of these are ‘buddy systems’ and child ‘head counts.’” AR at 10. The Review Judge also found

Here, the regulation at issue which defines “negligent treatment or maltreatment” of a child contains the core elements of “serious disregard” and “clear and present danger,” which are also found in the statutory definition of that term. Neither the language in the rule nor the statute is ambiguous. The Department’s Review Judge simply chose to explicitly ignore these required elements in making a finding of child neglect against Ms. Marcum, interpreting and applying the rule in a manner that is inconsistent with the statute.

Under an interpretive rule analysis and a legislative (substantive) rule analysis, the Department’s interpretation and application of WAC 388-15-009(5) in Ms. Marcum’s case exceeded the scope of its authority under the statute, and this Court should therefore invalidate that rule under its authority in RCW 34.05.

**C. The language defining “negligent treatment or maltreatment” is plain and unambiguous and it is therefore appropriate for the Court to determine the legislative intent from the plain meaning of the words in the statute itself, and where certain words are not defined by the statute, it is appropriate for the Court to rely on their dictionary definitions.**

The Department confuses the use of dictionary definitions, under a statutory plain language analysis, as evidence of “ambiguity” in a statute.

Response Brief at 21. Ms. Marcum has never asserted that either the

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that: “There is absolutely no evidence whatsoever that Ms. Marcum would ever mistreat or harm a child intentionally.” AR at 10.

statutory or the regulatory definition of “negligent treatment or maltreatment” of a child is “ambiguous.” She has merely argued that, in making a determination that she committed child neglect, the Department explicitly refused to apply critical elements required by both the statute and the rule itself, and that to ascertain the intent of the neglect statute, a plain language analysis was required.

In the Appellant’s Opening Brief at 18-22, Ms. Marcum argued that the Department’s interpretation and application of WAC 388-15-009(5) violated the clear intent and plain meaning of the governing child abuse and neglect statute in RCW 26.44. Because the key phrases “serious disregard” and “clear and present danger” were not defined in either the statutory or the regulatory scheme, Ms. Marcum used the dictionary to define those terms. For the reasons cited above and in the Appellant’s Opening Brief at 18-22, Ms. Marcum re-iterates that the language defining “negligent treatment or maltreatment” is plain and unambiguous and it is therefore appropriate for the Court to determine the legislative intent from the plain meaning of the words in the statute itself, and where certain words are not defined by the statute, it is appropriate for the Court to rely on their dictionary definitions.

**D. The Department’s argument that Ms. Marcum’s alleged failure to supervise a child in her care constituted a serious disregard and a clear and present danger to that child was**

**based on impermissible speculation and not supported by substantial evidence in the record.**

It is critical to distinguish between a permissible inference and impermissible speculation when either is the basis for a finding of fact. An “inference” has been defined as a “process in which one proposition (a conclusion) is arrived at and affirmed on the basis of one or more other propositions, which were accepted as the starting point of the process.” *Poppell v. City of San Diego*, 149 F.3d 951, 954 (9<sup>th</sup> Cir. 1998). The distinction between a permissible inference and impermissible speculation has been articulated by the federal courts:

“The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated [in *Galloway v. United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)]: “The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible interferences favoring the party whose case is attacked.” *Poppell v. City of San Diego*, 149 F.3d 951, 954 (9<sup>th</sup> Cir. 1998). (quoting *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 895 (3d Cir. 1981), as quoted in Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* 26-27 (3d ed. 1997)).

Here, in Finding of Fact 18, the Review Judge speculates that while Marlon, the child at issue, was not hurt as a result of lack of supervision, a number of things could “reasonably have happened.” AR at 15. The Review Judge provides several hypothetical examples of possible dangers the unsupervised child could have faced, including dropping a footnote to explain that the “newly-erected Christmas tree was in and of itself an ‘attractive nuisance’ likely to entice a child to climb or perhaps reach for a decoration, causing the tree to topple.” AR at 15.

The Department has not articulated a logical foundation by which it can conclude that there would have been “a fire, natural disaster such as earthquake, choking on food that was left out or on a toy or other object, a fall due to climbing, an intrusion by an unknown and perhaps criminal person.” Neither the Review Judge, nor the Department in its Brief, cites to evidence to establish that there is a logical probability that any of these things would happen. This finding is based on impermissible speculation, not permissible inference, and not on substantial evidence in the record. The Court should conclude that this finding is not based on substantial evidence in the record.

Additionally, as discussed above, the statute requires an analysis as to whether there was a “serious disregard” when making a finding of neglect. The statute also focuses on “nonaccidental” conduct, which

means that any “serious disregard” would have to be intentional in order to sustain a finding of child neglect. In the present case, there is no evidence that Ms. Marcum failed to pay “attention” to a child or treated a child “without due regard, respect, or attentiveness.” Appellant’s Opening Brief at 19-22. In this case, the Review Judge even made a specific finding of fact that “there is absolutely no evidence whatsoever that Ms. Marcum would ever mistreat or harm a child intentionally.” AR at 10. Therefore, this Court should conclude that the BOA’s Finding of Fact that Ms. Marcum’s failure to supervise a child in her care constituted a clear and present danger was based on impermissible speculation and not supported by substantial evidence in the record.

**E. It is arbitrary and capricious for the Department to uphold a finding of child neglect based on a new and restrictive interpretation of its child neglect regulations that ignores the requirements of the governing child neglect statute.**

For all the above reasons cited in this brief, and for the reasons cited in the Appellant’s Opening Brief at 25-26, Ms. Marcum re-iterates that the Court should conclude that the BOA Review Decision and Final Order is arbitrary and capricious.

**F. Appellant Melinda Marcum is entitled to attorneys’ fees and costs on appeal in this matter pursuant to RAP 18.1 and Washington’s Equal Access to Justice Act, RCW 4.84.340-360.**

For the reasons cited in the Appellant's Opening Brief at 26-28, Ms. Marcum re-iterates that the Court should authorize an award of fees and costs, including reasonable attorneys' fees pursuant to RAP 18.1 and RCW 4.84.350.<sup>7</sup>

### III. CONCLUSION

The Court should conclude that WAC 388-15-009(5), as interpreted and applied in Ms. Marcum's case, is a substantive, "legislative rule," and that the Department's interpretation and application of that rule in this case, which defines "negligent treatment or maltreatment," is invalid insofar as it circumvents the requirements of RCW 26.44 and exceeds the statutory authority granted to the agency. The Court should also conclude that the meaning of the statutory definition of "negligent treatment or maltreatment" in RCW 26.44.020(14) is unambiguous and plain on its face, and therefore apply the plain language meaning of "serious disregard" and "clear and present danger" to the facts of this case.

In the alternative, should the Court conclude that WAC 388-15-009(5) is an interpretive rule, the Court should conclude that, as interpreted and applied in Ms. Marcum's case, the rule is invalid insofar as

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<sup>7</sup> Ms. Marcum will file the affidavit establishing that she is a qualifying party.

it conflicts with the legislative intent of the child neglect statute and is the basis for a penalty or sanction.

The Court should set aside the DSHS Board of Appeals Review Decision and Final Order issued in Ms. Marcum's case, and set aside the agency action finding her to have committed child neglect. Finally, the Court should authorize an award of reasonable attorneys' fees and costs to Ms. Marcum.

**RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of January, 2011.

NORTHWEST JUSTICE PROJECT



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**IV. CERTIFICATE OF SERVICE**

I certify that today, the 17<sup>th</sup> day of January, 2012, a true and accurate copy of the foregoing **Appellant's Reply Brief** in the above-entitled matter was delivered to the attorney for Respondent in this matter; Lucretia Fishburn Greer, Assistant Attorney General, Attorney for the State of Washington Department of Social and Health Services, at 1250 Pacific Ave Ste 105, PO Box 2317, Tacoma, WA 98401-2317.

**DATED** this 17<sup>th</sup> day of January, 2012.



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ALBERTO CASAS, WSBA #39122  
Attorney for Appellant

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