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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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MELINDA MARCUM,

Appellant,

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Respondent.

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**RESPONSE BRIEF OF THE  
DEPARTMENT OF SOCIAL & HEALTH SERVICES**

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## I. INTRODUCTION

This appeal arises from an adjudicative proceeding conducted under the Administrative Procedure Act (APA), chapter 34.05 RCW; and according to Department of Social and Health Services (DSHS) statutes, chapter 26.44 RCW, and rules, chapters 388-15 and 388-02 WAC. A preponderance of the evidence shows that Melinda Marcum violated both the applicable statutes and DSHS' rules when she left a two-year-old toddler, who attended her licensed daycare, alone and unsupervised for at least ten minutes, potentially exposing him to dangers including but not limited to choking, falling, fire or other natural disasters and kidnapping. The final DSHS order upholding a finding of child neglect against Ms. Marcum issued on May 7, 2010, following an adjudicative hearing. Ms. Marcum also appealed a Department of Early Learning (DEL) decision to revoke her child care center license to Superior Court, but no longer challenges the DEL decision. Appellant's Brief at 1.

Ms. Marcum's challenge is two-pronged. She first asks this Court to find that WAC 388-15-009(5) is an invalid *legislative* rule, either for exceeding the statutory authority of DSHS or for being arbitrary and capricious. Second, should the Court find WAC 388-15-009(5) a valid *legislative* rule, Ms. Marcum asks the Court to reverse the decision in her

case for lack of substantial evidence in the record, an error of law, or because the DSHS decision is arbitrary and capricious.

The Court, however, should conclude that WAC 388-15-009(5) is a proper *interpretive* rule adopted by DSHS pursuant to its implied authority to interpret the statutes it is tasked with administering and enforcing to protect children from abuse and neglect. As a proper interpretive rule, this court should find it is not arbitrary and capricious. This Court should also conclude that the final decision is supported by substantial evidence, contains no errors of law and is not arbitrary and capricious. Ms. Marcum's actions constitute child neglect as defined in statute and interpreted in the rule.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Whether WAC 388-15-009(5) is a proper interpretive rule, authority for which is sufficiently implied by the legislative delegation to DSHS of authority to implement and administer Title 74 RCW and chapter 26.44 RCW.
2. Whether substantial evidence supports the administrative determination that Melinda Marcum negligently treated a child under RCW 26.44.020 and WAC 388-15-009(5).

## **III. COUNTER STATEMENT OF THE CASE**

### **A. Counterstatement of the Proceedings**

#### **1. DSHS Administrative Proceedings**

At approximately 1:30 p.m. on December 10, 2008, DSHS received a complaint that a young child had been observed locked alone in

Ms. Marcum's child care center. AR 089.<sup>1</sup> The complaint was assigned to DSHS Social Worker Gerad Lloyd to investigate. Mr. Lloyd's investigation led him to conclude that Ms. Marcum had indeed left two-year-old Marlon alone in the facility and recommended a finding be made against Ms. Marcum for negligent treatment of the child for her failure to adequately supervise him. AR 084-088.

Ms. Marcum was notified of the finding of negligent treatment of a child by certified letter dated December 31, 2008. AR 076-083. She timely requested the statutory internal DSHS review of the finding, which was upheld by certified letter dated February 17, 2009. AR 075. She then filed a timely request for an administrative hearing to contest the finding. AR 069.

By agreement of the parties, the DSHS matter was consolidated for hearing with the DEL licensing actions to suspend and to revoke Ms. Marcum's child care license, and to disqualify her from working in DEL licensed child care. The matters were tried to Administrative Law Judge Patricia L. Morgan on July 13-14, 2009, who issued her Initial Decision on September 4, 2009, affirming the finding of negligent treatment of a child for Ms. Marcum's failure to adequately supervise him. AR 046-061.

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<sup>1</sup> The DSHS and DEL cases were consolidated for hearing. All citations are to the DSHS hearing record.

Ms. Marcum timely petitioned for review to DSHS' review judge, who issued a review decision affirming the finding of negligent treatment of a child on February 3, 2010. AR 001-020.

**2. Department of Early Learning (DEL) Administrative Proceedings**

While Ms. Marcum no longer challenges the suspension and revocation of her license, or her disqualification from employment, a brief recitation of the procedural history of the DEL actions is helpful to place the DSHS matter in context. Melinda Marcum operated Prime Time Child Care, LLC, as owner, director, and staff member. During DSHS' investigation, she voluntarily closed her child care. DSHS AR 205-206. After the DSHS investigation concluded, DEL issued a letter summarily suspending Prime Time Child Care Center's child care center license to ensure the facility would not reopen. AR 131-134. By certified letter dated February 23, 2009, DEL revoked Prime Time's license. AR 125-129. Because this center was being operated by Ms. Marcum as a limited liability corporation, and as Ms. Marcum was herself the subject of the dual investigations by DSHS and DEL, DEL also disqualified Ms. Marcum from working in any capacity in any child care facility licensed by the Department of Early Learning. AR 135-137, 245.

Ms. Marcum filed timely requests for an administrative hearing to challenge the decisions of the Department of Early Learning. AR 138-139. As noted above, the hearing on licensing issues was consolidated with the hearing concerning the finding of neglect. ALJ Morgan's Initial Decision affirming the suspension and revocation of Ms. Marcum's license as well as her disqualification from working in DEL licensed child care was issued September 3, 2009. AR 046-061.

The DEL Review Judge issued a decision affirming the suspension and revocation of Ms Marcum's child care center license as well as her disqualification from working in DEL licensed facilities. Brief of Appellant at p. 7.

### **3. Consolidated Superior Court Proceedings**

Ms. Marcum filed timely petitions for judicial review challenging the decisions of both DSHS and DEL to the Thurston County Superior Court. By agreement of the parties, the matters were consolidated for oral argument which was held before Judge Christine Pomeroy on February 18, 2011. Judge Pomeroy denied both petitions, affirming the DSHS founded finding of neglect as well as the DEL licensing actions. CP 72

Ms. Marcum filed a timely notice of appeal to this court of the DSHS founded finding on June 21, 2011. In her notice of appeal, she unequivocally states she is appealing only the DSHS founded finding of

neglect. The DEL actions, including disqualifying Ms. Marcum from working in DEL licensed child care facilities, are not challenged and therefore are final.

**B. Counterstatement of the Facts**

Melinda Marcum closed her previously licensed family home child care in February 2007 and opened a child care center – Prime Time Child Care, LLC. AR 141-144. Her center was licensed to provide care for a maximum of seventeen children, ages one to twelve. AR 141. By December 10, 2008, Ms. Marcum’s enrollment was down to thirteen children, all of whom were preschoolers, aged thirty months through five years of age. AR 103.<sup>2</sup> Three of these children were enrolled in a Head Start program at the nearby elementary school. AR 112-124. Based on this enrollment, Ms. Marcum was often the only staff working in the center. AR 102. That was the situation on December 10, 2008, from the time the center opened at 5:00-5:30 a.m. until at least 1:00 p.m. when a second child care worker was due to arrive. RP 7/13/09 p. 90.<sup>3</sup>

Child care center licensor Desiree Eberhart testified DEL requires a one-to-ten staff-to-child ratio for preschoolers, as it becomes very

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<sup>2</sup> WAC 170-295-0010 defines a preschool aged child as “... a child thirty months old through five years of age not attending kindergarten or elementary school.”

<sup>3</sup> The court reporter at the administrative hearing did not number the transcript consecutively. Transcripts therefore are denoted as “RP 7/13/09” or “RP 7/14/09” to specify which day of the two-day hearing is cited.

difficult for a child care worker to keep track of the children, to provide accurate supervision, and to maintain a level of safety if there are more than ten children per child care worker. RP 7/13/09 p. 88. By noon on December 10, 2008, however, Ms. Marcum already had approximately ten preschoolers in her care before she left to pick up the three Head Start children at school. AR 011.<sup>4</sup>

On school days, Ms. Marcum was required to be at the local elementary school no later than 12:45 p.m. when the three children enrolled in the Head Start program would be escorted to the van where Ms. Marcum would buckle them up for the return to the daycare. AR 011. Her usual practice was to serve the children lunch, clear the table, get the children dressed to go outside, line them up, count them, walk them to the van, get them seat belted in their assigned seats, then go back to the house to lock the door. RP 7/14/09 pp. 24-25, 28, 47. She would then drive to the school, pick up the Head Start children, buckle them in, and return to the child care. AR 049-050. In order to keep track of the children, Ms. Marcum had procedures in place to monitor the children, including the use of the two-by-two buddy system wherein the children would hold hands and, if there was an odd number of children, a staff member held the

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<sup>4</sup> Because Ms. Marcum's sign in/out records were not accurate, the DSHS Review Judge was not able to determine exactly how many children Ms. Marcum had in care on December 10, 2008.

hand of that child. RP 7/13/09 p. 40. The Administrative Law Judge found the trip, from the time the door to the facility was locked until the children were all back inside the building, took at least ten minutes. AR 050.

Ms. Marcum testified that she followed her procedures to keep track of the children on December 10, 2008. She counted the children at their cubbies, after lunch, partnered them up, counted them again inside the building, counted them again outside, and then buckled them into their assigned seats. RP 7/14/09 p. 28. Somehow, despite all her protocols, Ms. Marcum drove off that afternoon, leaving two-year-old Marlon behind in the locked house when she left with all the other children to go to the school. Her only explanation for leaving Marlon behind was, "I ask you to envision 8 squirming, running kids and the excitement of putting up the Christmas tree that morning. All I can imagine is that Marlon stepped back inside the daycare after the final count." AR 095.

While Ms. Marcum was gone, a former employee, Tiffany Forrester, and a friend, Summer Rhodes, drove to Ms. Marcum's child care, arriving at the center no earlier than 12:40 p.m. and no later than 12:50 p.m. RP 7/13/09 p. 38. Ms. Forrester parked in front of the center, and as she was getting out of her car, she noticed Marlon sitting at the door, wearing his winter coat. RP 7/13/09 p. 35. She was able to see him

because the door has a full length glass window. RP 7/13/09 p. 35. Ms. Forrester discovered the door was locked. She looked through the window in the door and didn't see anyone. RP 7/13/09 p. 35. She returned to her car and got her keys, telling Ms. Rhodes that the door was locked and Marlon was sitting there. RP 7/13/09 p. 35. Ms. Forrester went back to the center, unlocked the door and went inside. RP 7/13/09 p. 35. Once inside she noticed a plate of food on a low table, within Marlon's reach. RP 7/13/09 p. 38. About two minutes later, Ms. Marcum drove up in her van and brought the other children inside. RP 7/13/09 pp. 35-36. Ms. Forrester testified she hadn't seen the children in two months, and things were chaotic. RP 7/13/09 p. 37. Not even when she returned to the child care that afternoon did Ms. Marcum realize she had left Marlon behind. RP 7/14/09 p 49. Ms. Rhodes called in a complaint to DSHS Child Protective Services (CPS) concerning Marlon being left alone, without mentioning Ms. Forrester's presence. RP 7/13/09.

At no time that day did Ms. Marcum realize she had left Marlon behind – not when buckling the other children into the van at the center, not when buckling the head start children in the van, not when unbuckling the children back at the child care, and not when she came back into the center and Marlon was there. RP 7/14/09 p. 47, 48, 49. It was not until DSHS investigator Gerad Lloyd contacted Melinda Marcum on December

11, 2008, that she learned she had left Marlon alone. AR 051; RP 7/13/09 p. 53.

The Review Judge specifically found that Marlon was left alone for at least ten minutes. AR 013. Ms. Marcum does not dispute that she did, indeed, leave Marlon alone for ten minutes. Mr. Lloyd testified, as an experienced CPS worker, as to the risks posed to a child as young as Marlon, age two, being left unsupervised, which included choking on food left in his reach, choking on other objects, a natural emergency, a house fire, access by a sex offender, an undiagnosed medical condition, climbing on furniture and falling, and that “just about anything could happen to unsupervised kids.” RP 7/13/09 pp. 64-65. Additionally, he ran a check for known registered sex offenders living within a half mile radius of Ms. Marcum’s center – the check returned sixty-eight names. AR 099-101.

Based upon all of the evidence in the record, the Review Judge found that Melinda Marcum had neglected Marlon when she failed to adequately supervise Marlon on December 10, 2008.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Ms. Marcum alleges WAC 388-15-009(5) is invalid because it exceeds DSHS’s authority. The party challenging a rule has the burden to

prove it is invalid. RCW 34.05.570(1)(a); *Association of Wash. Business v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 430 (2005). A court may declare an agency rule invalid if it: “(1) violates constitutional provisions, (2) exceeds statutory authority of the agency, (3) was adopted without compliance to statutory rule-making procedures, or (4) is arbitrary and capricious.” *Id.*, quoting *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003) (citing RCW 34.05.570(2)(c)). When examining the validity of a legislative rule for which a specific delegation of legislative authority is required, the extent of the agency's rule-making authority is a question of law that is reviewed de novo. *Association of Wash. Bus.*, 155 Wn.2d 430. However, where an interpretive rule is challenged, as here, the inquiry is not into the validity of the rule but its “correctness or propriety” – i.e., whether it conflicts with the legislative intent underlying the statute it interprets. *Id.* at 446; *Hegwine v. Longview Fiber Co., Inc.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007).

Ms. Marcum also challenges the administrative order. Relying on three of the standards in RCW 34.05.570(3), she alleges it was erroneous because it conflicted with RCW 26.44.020(14), was arbitrary and capricious and is unsupported by substantial evidence because it relied on WAC 388-15-009(5) rather than upon RCW 26.44.020(14). *See* RCW

34.05.570(3)(d), (e), (i). She has the burden of demonstrating the order is invalid. RCW 34.05.570(1)(a); *Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 270, 252 P.3d 920 (2011). This court sits in the same position as the superior court in reviewing an administrative decision. *Stewart* at 270.

Findings of fact are reviewed for substantial evidence. Substantial evidence to support a finding of fact exists where there is sufficient evidence in the record “to persuade a rational, fair-minded person of the truth of the finding.” *Hegwine v. Longview Fiber Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007), quoting *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to consider the entire record to determine whether there is substantial evidence to persuade a fair minded person of the truth of the declared premises. RCW 34.05.570(3)(e); *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006 (1996). The reviewing court will not weigh the evidence or substitute its view of the facts for that of the agency. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997); *Accord Chandler v. Ins. Comm'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007); *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006).

An alleged error of law is reviewed de novo, although courts grant substantial weight to an agency's interpretation of an ambiguous statute it administers, as long as the agency's interpretation does not conflict with the statute. *Pub. Util. Dist. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). This is especially true when the agency has expertise in a certain subject area. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-595, 90 P.3d 659 (2004); *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989).

The arbitrary and capricious test under RCW 34.05.570(3)(i) is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). A decision is arbitrary and capricious if it is willful and unreasoning and disregards the facts and circumstances. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (2009). Review of agency action under the arbitrary and capricious standard is very narrow. If there is room for two opinions, and the decision was made honestly and upon due consideration, it is not arbitrary and capricious. *Heinmiller*, 127 Wn.2d at 609; *Pierce Cy. Sheriff*, 98 Wn.2d. at 695. The harshness of sanctions imposed by the agency is not

the test for an arbitrary and capricious action. *Alpha Kappa*, 152 Wn. App. at 421, citing *Heinmiller*, 127 Wn.2d at 609.

**B. WAC 388-15-009(5) is a proper interpretative rule adopted by DSHS to administer and enforce statutes enacted to protect children.**

WAC 388-15-009(5) is a proper interpretive rule adopted by DSHS under its necessarily implied authority, which includes the power to adopt rules interpreting statutes that it is charged with administering or enforcing.<sup>5</sup>

Both the APA and Washington courts distinguish legislative rules from interpretative rules. Legislative rules adopt substantive law pursuant to delegated legislative authority; they must be consistent with the statutes the agency is charged with administering or enforcing and have the same force and effect as the statutes themselves. *Association of Wash. Bus.*, 155 Wn.2d at 438-439; RCW 34.05.328(5)(c)(iii). In contrast, an interpretive

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<sup>5</sup> “Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.” *Association of Wash. Bus.*, 155 Wn.2d at 437, quoting *Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124-125, 864 P.2d 1382 (1994). Agencies have implied authority to carry out their legislatively mandated purposes. When a power is granted to an agency:

Everything lawful and necessary to the effectual execution of the power is also granted by implication of law. Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. Agencies also have implied authority to determine specific factors necessary to meet a legislatively mandated general standard.

*Id.*, 155 Wn.2d at 438, n.3, quoting *Tuerk*, 123 Wn.2d at 125 (internal quotation marks omitted).

rule sets forth the agency's interpretation of the statutory provisions it administers and does not subject a person to a penalty or sanction apart from the statute. *Association of Wash. Bus.* 155 Wn.2d at 439; RCW 34.05.328(5)(c)(ii). An agency charged with the administration and enforcement of a statute may interpret ambiguities in the statutory language through the adoption of interpretive rules. *Id.*, 155 Wn.2d at 439, citing *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004).<sup>6</sup> An interpretive rule is based on the statute it is interpreting and the statutory mandate to administer and enforce that statute. *Id.*, 155 Wn.2d at 445.

The primary difference between a legislative rule and an interpretive rule is their effect on the courts: "Legislative rules bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure. Interpretive rules, however, are not binding on the courts at all." *Id.*, 155 Wn.2d at 446-447. They are afforded no deference other than the power of persuasion. *Id.* at 447.

Nevertheless, where an agency is statutorily charged with interpreting and enforcing a statute, it is appropriate for the court to look at the agency's interpretive rules when interpreting and enforcing that

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<sup>6</sup> The court in *Association of Wash. Bus.* also cited RCW 34.05.230(2) and RCW 42.17.250 (now codified as RCW 42.56.040) as evidence the Legislature intended agencies to adopt interpretive rules. *Association of Wash. Bus.*, 155 Wn.2d at 443.

statute. *Hegwine v. Longview Fiber Co., Inc.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007). So long as the agency's interpretations do not conflict with the legislative intent underlying the statute it interprets and enforces, the court will often give "great weight" to those interpretations. *Hegwine*, 162 Wn.2d at 349, quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). Like statutes, interpretive rules are to be interpreted and applied in accordance with their plain language to further the legislature's intent. *Id.* at 349, citing *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472-473, 70 P.3d 931 (2003).

"Technically, interpretive rules are not binding on the public"; rather, they provide "advance notice of the agency's position should a dispute arise and the matter result in litigation." *Association of Wash. Bus.*, 155 Wn.2d at 446-447. "Accuracy and logic are the only clout interpretive rules wield. If the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, but by authority of the statute." *Id.* at 447. Nevertheless, "[a]ccurate interpretive rules reflect statutory authority, and thus have legal effect on the public." *Id.* at 448. Accordingly, "[I]n the case of an interpretative rule, the inquiry is not into validity but is into correctness or propriety." *Id.* at 446, quoting Arthur Earl Bonfield, *State Administrative Rule Making* § 6.9.1, at 281 (1986).

To determine whether DSHS acted outside the scope of its implied authority in adopting this interpretative rule, it is necessary therefore not only for the court to consider the entire statutory scheme addressing the safety of children that DSHS administers, but also to consider the specific responsibilities assigned to DSHS with regard to the safety of children. This is especially important in reviewing a rule such as WAC 388-15-009(5) which interprets the definition in RCW 26.44.020(14), but does so as a part of DSHS's broader responsibility to implement protective services for children. This broader responsibility is imposed not only by chapter RCW 26.44, which is Ms. Marcum's sole focus, but also parts of Title 74 RCW.

Since 1939, DSHS has been the single state agency to administer public assistance programs in the State of Washington, including child protective services. RCW 74.04.050(3).<sup>7</sup> In 1949, the legislature enacted RCW 74.08.090, granting DSHS' predecessor agency rule making authority. Since 1969, this statute has provided: "The department is hereby authorized to make rules and regulations not inconsistent with the provisions of this title to the end that this title shall be administered

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<sup>7</sup> RCW 74.05.050 provides: "The department shall serve as the single state agency to administer public assistance. The department is hereby empowered to cooperate in the administration of such federal laws . . . as may be required to qualify for federal funds for . . . (3) Child welfare services."

uniformly throughout the state, and that the spirit and purpose of this title may be complied with.” RCW 74.08.090.

In 1965, chapter 26.44 RCW was added to provide for the reporting of child abuse or neglect to DSHS so that protective services could be provided in an effort to prevent child abuse/neglect and to safeguard children. RCW 26.44.010; RCW 26.44.030. In 1967, the legislature enacted RCW 74.13.031 requiring DSHS to investigate complaints of potential child abuse or neglect and to offer child protective services. In 1998, the legislature added a requirement that DSHS afford the opportunity for a due process hearing to those accused of child abuse or neglect. RCW 26.44.100; RCW 26.44.125. The legislature granted DSHS express authority to adopt rules to implement the hearing process. RCW 26.44.125(6).

It is against the background of this long history of the authority of DSHS to act to protect children that RCW 26.44.020(14) and WAC 388-15-009(5) must be interpreted.

The legislature defined child abuse to include negligent treatment of a child:

‘Abuse or neglect’ means . . . 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(1). It further defined negligent treatment of a child to include acts or omissions which constitute a clear and present danger to a child's health, welfare or safety:

'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, including but not limited to conduct prohibited under RCW 9A.42.100. . . .

RCW 26.44.020(14).<sup>8</sup>

The statute, however, does not define the terms "serious disregard of consequences of such magnitude" and "clear and present danger." The courts have provided some guidance as to what the term "clear and present danger" means in the context of child welfare cases. A failure to adequately supervise a child can constitute child neglect, as demonstrated in *Morgan v. DSHS*, 99 Wn. App. 148, 153-154, 992 P.2d 1023 (2000), *rev. denied* 141 Wn.2d 1014 (2000). In *Morgan*, a foster parent left a

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<sup>8</sup> RCW 26.44.020(14) also provides:

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.

This subsection was in effect as written in 2008, when the conduct at issue in this case occurred, but it was codified at RCW 26.44.020(13).

fourteen year old developmentally delayed child at a skating rink; the child functioned at approximately eight years of age and had a medical condition which made her susceptible to fainting. This court held it was negligent to leave the child without supervision by a person who could meet her needs. *Id.* Similarly, this court has held that the failure of an adult family home provider to provide supervision able to meet the needs of developmentally delayed adults in her care placed them in imminent danger, hence neglecting them. *Bond v. Dep't of Social and Health Services*, 111 Wn. App. 566, 572-573, 45 P.3d 1087 (2002).

The courts have also considered what constitutes a clear and present danger to children in the context of dependency cases. In *In re Frederiksen*, 25 Wn. App. 726, 734, 610 P.3d. 371 (1979), the court found that a newborn could be in clear and present danger of abuse and neglect, and a dependency petition filed on her behalf, due to her mother's history of neglect of her older siblings. Failure of a mother to protect her child from danger posed by a boyfriend with an extensive criminal history has been found to place a child in clear and present danger as well, providing a basis for a finding of dependency. *In re J. F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001). In *In re S.M.H.*, 128 Wn. App. 45, 115 P.3d 990 (2005), clear and present danger was found when the girl's mother failed to accept that the girl's father, a convicted sex offender, posed a serious risk to the

child. In *In re M.S.D.*, 144 Wn. App. 468, 481, 182 P.3d 978 (2008), the court found no clear and present danger to the child from the mother's boyfriend where ten years had passed from his conviction for assaulting his own child, the mother took steps to protect her child when she learned of the conviction, and the boyfriend had been involved in M.S.D.'s life for several years before the dependency petition was filed. In these dependency cases, the court focused on the parent's failure to perceive and protect her child from a present and known risk of harm. In the case before the court, Ms. Marcum failed to protect Marlon from the known or knowable risks posed by a temporary but total lack of supervision of a two-year-old.

While there is some case law addressing what conduct may place a child in clear and present danger, the phrase remains ambiguous because those decisions are fact-specific. And the cases do not provide any guidance as to what the legislature meant in using the term "serious disregard".

When a non-technical term is not defined in a statute, the court may refer to a dictionary to establish the meaning of the word. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). However, the need to resort to a dictionary to define words in a statute illustrates the ambiguity of the statutory language. For example, to "disregard" may

mean to treat without fitting respect or to give no thought to. *Webster's Third New International Dictionary of the English Language* at 655 (2002). And "serious" may mean "grave in disposition," "requiring considerable skill," "being earnest," or "important." *Id.* at 2073. Parsing the terms of the statute into its component words, then defining each word separately, as Ms. Marcum advocates, does not resolve the ambiguity in the statute and does not define what conduct on the part of a caregiver evidences such a serious disregard of consequences to a child's health, welfare or safety that the child is in clear and present danger.

As the agency charged with interpreting and enforcing chapter 26.44 RCW and title 74 RCW, DSHS properly adopted a rule, WAC 388-15-009(5), that interpreted RCW 26.44.020(14). WAC 388-15-009(5) provides, in part:

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 . . . caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes but is not limited to:

(a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. . . .

WAC 388-15-009(5) is a proper interpretative rule, properly interpreting ambiguous statutory language and notifying the public, including child care providers, as well as DSHS employees as to what conduct DSHS believes will violate the statute.

The rule first mirrors the language of the statute, citing to the “clear and present danger” language. It then makes it clear, consistent with case law, as discussed above, that a child can be in clear and present danger without suffering actual harm. It then provides a nonexclusive list of actions that, in its experience and expertise in protecting children from harm, creates a clear and present danger to a child’s health, welfare or safety. That list includes the failure to provide adequate (1) food; (2) shelter; (3) clothing; (4) supervision; or (5) health care.

As noted above, RCW 26.44.020(14) prohibits conduct by a caregiver that places a child in clear and present danger to his health, welfare and safety. Leaving a toddler completely unsupervised in a locked house places that child in clear and present danger. The interpretative rule adopted by DSHS provides that a failure to provide adequate supervision to a child constitutes child neglect. The rule is, therefore, consistent with the statute. The DSHS review judge did not act arbitrarily or capriciously or commit an error of law by relying on the rule to find Ms. Marcum had

neglected Marlon. DSHS fully considered the statutory language when it adopted the rule, as evidenced by the close correspondence between the statute and the rule. The DSHS review judge is entitled to rely on a properly adopted interpretive rule adopted by DSHS.

Courts have the final word on the interpretation of statutes. It is appropriate, however, for the court to give appropriate deference to WAC 388-15-009(5) as a proper interpretive rule adopted by the agency charged by the legislative with implementing and enforcing RCW 26.44.020(14), where the rule reflects the agency's decades of experience in child welfare.

**C. The Review Judge correctly applied the law, based her decision on substantial evidence in the record and did not act arbitrarily or capriciously**

Ms. Marcum argues that the Review Judge erred in relying upon the rule to affirm DSHS' determination that Ms. Marcum had neglected Marlon. This argument must fail. The Review Judge correctly applied the law to the facts and affirmed the finding of neglect. Her decision is based on substantial evidence in the record and was not arbitrary or capricious.

**1. The Review Judge correctly applied WAC 388-15-009(5) to the facts of this case**

As discussed above, WAC 388-15-009(5) is a proper interpretive rule that is consistent with the meaning and intent of RCW 26.44.020(14), as that statute has been understood and implemented by DSHS based on the agency's decades of experience regarding child welfare and the types of conduct that place children at risk of harm. The court therefore should give the rule "great weight" when it interprets the statute. *Hegwine*, 162 Wn.2d at 349 (when interpreting a statute, "this court will often give 'great weight'" to interpretive rules adopted by the agency charged with interpreting and enforcing the statute where the interpretation is consistent with the statute). The Review Judge therefore is also entitled to rely on the rule.

Second, pursuant to the DSHS hearing rules, the Review Judge was *required* to first apply the DSHS rules adopted in the Washington Administrative Code to the facts of the case in making a decision. WAC 388-02-0220(1).<sup>9</sup> In this case, the Review Judge properly applied the rule

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<sup>9</sup> WAC 388-02-0220 provides in part:

(1) ALJ's and review judges must first apply the department rules adopted in the Washington Administrative Code.

(2) If no department rule applies, the ALJ or review judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and court decisions.

Ms. Marcum does not challenge these provisions, which have been in effect since 2000.

first to the facts of this case, and concluded that Ms. Marcum's actions violated the rule. Because the rule is a permissible interpretation of RCW 26.44.020(14), the Review Judge properly treated a violation of the rule as a violation of the statute. Leaving a toddler completely unsupervised places that child in "clear and present danger."

Ms. Marcum also argues the DSHS Review Judge impermissibly interpreted WAC 388-15-009(5) as creating a per se negligence standard and then applied this erroneous standard to the facts of this case. This argument also fails. The rule did not create a negligence standard; that standard was established by statute. RCW 26.44.020(1) defines "abuse or neglect" of a child to include "the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." RCW 26.44.020(14) defined "negligent treatment or maltreatment" to include both action and inaction that constitutes "a clear and present danger to the child's health, welfare, or safety." By listing conduct that may constitute "a clear and present danger to the child's health, welfare, or safety," WAC 388-15-009(5) simply provides an accurate, authoritative and persuasive interpretation of the statute, properly adopted after formal discussion and debate by interested parties in the rule making process. *See* Appendix A.

That WAC 388-15-009(5) is not written in the form of a per se rule is demonstrated by its use of terms that must be applied in diverse factual

situations requiring the exercise of discretion and judgment by the fact finder. Whether a caregiver's conduct arises to the level of neglect necessarily requires an assessment of the facts. In the context of this case, the supervision that is adequate to safeguard a particular child is and must be a mixed question of law and fact, depending on the age and development of the child, the child's surroundings, and the specific circumstances surrounding a particular event. The level of supervision that is adequate to safeguard a child of twelve may be very different than the supervision needed to adequately safeguard a toddler. The level of supervision that is adequate to safeguard a child who is developmentally on target may be very different than the supervision needed to adequately safeguard a child with a medical condition or developmental disability.

In this case, it was not error for the Review Judge to rely on the rule. Two-year-old Marlon was left alone in a locked house for at least ten minutes, in circumstances involving multiple potential dangers. Ms. Marcum left him without any adult supervision, and she did not even realize that she had done so until the next day. A complete absence of supervision of a toddler scarcely qualifies as adequate supervision. Under WAC 388-15-009(5), a complete absence of supervision of a two-year-old child constitutes "negligent treatment or maltreatment" of a child. Under RCW 26.44.020(14), a complete absence of supervision of a two-year-old

child places the child in “clear and present danger” and thus constitutes “negligent treatment or maltreatment” of a child. In this case, the result is the same.

**2. Substantial Evidence in the Record Supports the Review Decision and Final Order**

Ms. Marcum no longer disputes she left two-year-old Marlon alone while she picked up the other children at school on December 10, 2008. While she argues that there is not substantial evidence in the record to find that her conduct placed Marlon in “clear and present danger,” the evidence is otherwise: (1) Marlon was only two years old; (2) he was left locked in the house with no way to escape in the event of an emergency; (3) there was a plate of food within his reach, creating a choking hazard; (4) the usual risks of a fall or other injury; (5) the length of time he was left, ten minutes, is sufficient time for a toddler to be seriously injured; (6) and he was visible to any person approaching the house, including persons who might do him harm. Finally, the clear and present danger was magnified because Ms. Marcum did not even realize she had left him behind – had harm befallen Marlon, Ms. Marcus would not have known and may not have provided a timely response. If he had found a way to leave the house or had suffered harm but was out of sight, there could have been significant delay in tending to him. As noted above, it is not necessary

that a child actually be harmed in order for his caregiver to be found negligent; failure to supervise a child can be sufficient. *Morgan*, 99 Wn. App. at 154.<sup>10</sup> There is substantial evidence in the record that Ms. Marcum had neglected Marlon as defined in statute and clarified in rule.

**3. The Review Decision and Final Order was not arbitrary or capricious**

Ms. Marcum argues that because the Review Judge relied on the interpretive rule her decision was arbitrary and capricious. This argument must fail. As noted above, a decision is arbitrary and capricious if it is willful and unreasoning and disregards the facts and circumstances. *Alpha Kappa*, 152 Wn. App. at 421. It was not willful and unreasoning for the review judge to apply WAC 388-15-009(5) to determine whether there was a violation of RCW 26.44.020(14). As explained above, the Review Judge was relying upon a properly adopted interpretive rule which is consistent with statute. Relying on the rule is tantamount to relying on the statute itself.

As also explained above, the same evidence that supports a violation of the rule supports a violation of the statute, and substantial evidence in the record supports the Review Judge's finding that

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<sup>10</sup> For this reason, even if the Review Judge erred by not specifically referencing the statute, that error is harmless. There is sufficient evidence in this record to find that Ms. Marcum's failure to supervise Marlon during the time he was left alone placed him in "clear and present danger" under RCW 26.44.020(14).

Ms. Marcum failed to supervise a toddler. The Review Judge did not disregard the facts and circumstances presented in this case. *Alpha Kappa*, 152 Wn. App. at 421. Given the child's very young age, the risks in the physical environment, the length of time he was alone, and his inability to escape the house in the event of an emergency, it is clear Ms. Marcum's failure to provide adequate supervision to Marlon placed him in clear and present danger. Accordingly the Review Judge correctly applied WAC 388-15-009(5), and through the rule, RCW 26.44.020(5), to the facts of this case.

**D. Ms. Marcum is not entitled to Attorney's Fees under the Equal Access to Justice Act**

In order for this court to award Ms. Marcum attorney's fees and costs associated with bringing this appeal pursuant to RCW 4.84.350, the Equal Access to Justice Act, this court must find that:

1. Ms. Marcum is a qualified party;
2. Ms. Marcum prevailed on her appeal; and
3. DSHS was not substantially justified in its actions.

For the reasons given in this brief, Ms. Marcum should not prevail on her appeal. In any event, however, DSHS had a reasonable basis in both law and fact to find Ms. Marcum had neglected Marlon, in violation of RCW 26.44.020. The agency properly adopted a rule interpreting a statute it enforces and implements. The Review Judge relied on that rule,

following established practice controlled by duly adopted rules of procedure. Substantial evidence supported her conclusion that Ms. Marcum's conduct violated the rule, and the same evidence supports a conclusion that her conduct violated the statute that the rule interprets. Because the agency decision had a reasonable basis in fact and law, sufficient to justify a reasonable person, the agency was substantially justified in its actions. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007); *H&H Partnership v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003).

This court should deny Ms. Marcum's request for an award of attorneys' fees and costs under RCW 4.84.350.

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**V. CONCLUSION**

The Department of Social and Health Services requests the order of the superior court denying Ms. Marcum's petition for judicial review and affirming DSHS' actions be affirmed. DSHS further requests that Melinda Marcum's request for attorneys' fees and costs be denied.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of December, 2011.

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# **APPENDIX A**



PREPROPOSAL STATEMENT OF INQUIRY

(RCW 34.05.310)

CR-101 (710/97)

Do NOT use for expedited repeal or adoption

Agency: Department of Social and Health Services, Children's Administration

Subject of possible rule making:

Revisions to and repeal of existing rules and new sections to update rules relating to social services for families and children, including Child Protective Services, foster care, adoption services, homemaker services, and family reconciliation services. And also to reflect principles of clear rule writing. Rules proposed for revision may include, but are not limited to, WAC 388-15-130, 388-15-132, 388-15-134, 388-15-150, 388-15-160, 388-15-220, 388-15-570

(a) Statutes authorizing the agency to adopt rules on this subject: RCW 74.13.031; RCW 74.04.050; RCW 74.04.055

(b) Reasons why rules on this subject may be needed and what they might accomplish:

The rules are proposed to update program standards, update or repeal out-of-date rules, and conform rules to clear writing standards per Executive Order 97-02.

(c) Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

The department will offer HHS, Region 10, staff the opportunity to participate in a stakeholder group to work on revising and repealing these rules and will provide proposed rules for review and comment.

(d) Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study
- Other (describe)

The Children's Administration, with input from the Attorney General's Office, will convene a work group consisting of department staff, Assistant Attorneys General, and stakeholders, including foster parents and their representatives to participate with Children's Administration in the review and development of revised rules. These draft rules will be distributed generally for review and comment before finalization.

(e) How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:

Interested parties may ask to participate in the stakeholder work group that will work with staff to develop the rules by contacting Jill Montgomery, Confidential Secretary to the Director, Division of Program and Policy Development, at (360) 902-7913 or e-mail [MONJ300@dshs.wa.gov](mailto:MONJ300@dshs.wa.gov). In addition, interest parties may provide recommendations for inclusion in the proposed rule. They may review and comment on the proposed rules in writing, by electronic mail, or by telephone. They may participate in and offer testimony in public hearings that will be scheduled for the purpose of soliciting comments on the proposed rules.

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*Marie Myerchin Redifer*

TITLE  
Manager, Rules and Policies Assistance Unit

DATE  
8-11-99



STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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January 9, 2002

TO: Laverne Lamoureux

FROM: Bruce Thomas  
Supervisor, Protection and Early Intervention Unit  
Program and Policy Development

SUBJECT: **Child Protective Services**  
**Washington Administrative Code (WAC) revision**

Attached is the draft of the proposed revision of the CPS WACs. These WACs will replace current WACs 388-15-130, 388-15-132, and 388-15-134. WAC 388-15-133 does not currently exist. The new WACs are written in question and answer format. They address the CPS program definitions, procedures and appeal process.

I have also attached documentation explaining the history of these WAC revisions and information outlining the significant changes made to the draft.

The Review and Approval For DSHS Rules And Administrative Policies form requires your signature of approval. The packet will then be sent to RPAU, by January 15, 2002, for the additional required signatures. I am hoping to meet the deadlines to get a public hearing scheduled for March 12, 2002.

Attachments



## Child Protective Services WACs

- CPS WACs 388-15-130 through 388-15-134 are being repealed and replaced with WAC 388-15-001 through 388-15-141. Because of many changes and additions to the current WACs, it was determined to repeal the current WACs and re-write the entire section relating to CPS.
- The entire section is titled Child Protective Services and is broken down into two parts. Part A is titled Program Description and Part B is titled Notification and Appeal of Findings.
- This is the second round of proposed changes to the existing WAC. The original group who developed the proposed CPS WACs included Ken Patis, CPS Program Manager; Carolyn Andersch, ARS Program Manager; Art Cantrall, WAC Coordinator, Edith Hitchings, Region 6 CPS Program Manager; Mike Tomquist, DLR/CPS Program Manager; Janice Langbehn, DLR/CPS Supervisor; and Beth Holmes, DLR.
  - The draft WACS were sent out for internal comment to the RA's in all DCFS regions. Comments were received from persons in regions 3,4,5, and 6.
  - Directors and supervisors in HQ were sent copies of the draft WACs for comment. No comments were received from HQ program staff other than those involved in the writing and review process. Jake Romo and Peggy Brown signed off as approving the WACs.
  - The draft WACs were sent to other DSHS administrations and divisions for review. A small number of comments were received.
  - Internal and external stakeholder submitted many comments. All comments were reviewed and assessed for inclusion in the WACs. It was not uncommon for comments from different individuals to be contradictory.
  - Persons who reviewed the comments individually and as part of a group included Ken Patis, Carolyn Andersch, Art Cantrall, Steve Hassett, Sharon Young, and the six regional CPS coordinators (including Mike Tomquist from DLR/CPS).
  - The proposed WACs , with comments incorporated as approved by the review group, were filed with the CR 102 and approved through public hearing, however the filing date for the CR 103 was missed and the WACs were not published.
- Stephanie Sarber, CPS Program Manager, and Stephen Hassett, Assistant Attorney General, made minor revisions to the final version of the original proposed WACs and sent them out again for review and comment.
- The draft WACS were sent out for internal comment to the RA's in all DCFS regions. Comments were received from region 5.

- Directors and supervisors in HQ were sent copies of the draft WACs for comment, including DLR management. No comments were received from HQ program staff other than those involved in the writing and review process. Dinah Martin did sign that she concurred with the proposed draft.
- The draft WACs were sent to other DSHS administrations and divisions for review. Some comments were received and assessed for inclusion in the WACs.
- Internal and external stakeholders submitted comments. All comments were reviewed and assessed for inclusion in the WACs. Again, it was not uncommon for comments from different individuals to be contradictory and/or inconsistent with RCW.
- Persons who reviewed the comments individually and as part of a group included Stephanie Sarber, Stephen Hassett, Bruce Thomas, Martha Holliday, Caroline Ford, Pat Wulf, and the six CPS regional coordinators.

## Significant Changes and Issues re: CPS WACs

- Current CPS WACs are repealed and re-written in question and answer format. New WACs reflect changes and additions to RCWs since the CPS WACs were last revised in 1993.
- Part A describes the CPS program. Revised definition of child abuse and neglect (CAN) are found in 388-15-009. The definitions of CAN were written to comply with the definitions found in RCW. CPS social workers will be making findings in relation to the WAC definitions of CAN.
- WAC 388-15-005 includes a definition for The Division of Child Care and Early Learning.
- Exposing a child to a pattern of domestic violence was a part of the definition of neglect in a prior draft. Concerns raised by the Coalition Against Domestic Violence and others resulted in this statement being removed from the final draft. It was felt that this statement was too broad and subject to interpretation to be included as a definition of CAN.
- WAC 388-15-017 states that CPS must investigate anonymous reports only as provided in RCW 26.44.030 (15). CA policy has been amended to interpret this WAC and RCW as investigating anonymous reports only when they are accepted at a 4 or 5 risk tag.
- WAC 388-15-021 (6) states that CPS must make reasonable efforts to have a third party present at a child interview unless the child objects so long as the third party does not jeopardize the interview. This is a near verbatim repeat of a statement in RCW 26.44/030 (10). A prior statement in 26.44.030 (10) states that CPS shall determine if the child wishes to have a third party present and if so, shall make reasonable attempts to do so. The RCW is confusing and several staff expressed concern about this section. The legislature added the statement about having a third party present to the RCW but did not strike the sentence about the child's wishes.
- WAC 388-15-025, the current WAC for CPS covers Indian children under WAC 388-15-131. In the original proposed revisions, this section was repealed to be replaced in a separate section of WAC that addresses Indian Child Welfare, however that section of WAC has not been completed and does not appear to be actively in progress. This was brought to my attention by the tribes through the review and comment process. I have made minor changes to the existing language of the prior ICW WAC to bring it up to date and added it into the proposed CPS WAC.
- WAC 388-15-033 discusses the use of the Child Protection Teams and mandatory staffing in accordance with executive order 95-04 and department procedure. It also specifies special staffing requirements for Indian children.

- **WAC 388-15-037 (2) describes the requirement for CPS to attempt to place a child with a relative willing and able to care for a child unless there is reasonable cause to believe that the health, welfare, or safety of the child would be jeopardized or that efforts to reunite the parent and child will be hindered.**
- **Part B of the CPS WACs contains the new WACs regarding the notification and appeals process (CAPTA hearings). While this process has been in place for about two years, these WACs will provide formal rules regarding the process. These WACs are contained in sections 388-15-061 through 388-15-129**



# RULE-MAKING ORDER

(RCW 34.05.360)

CR-103 (7/22/01)

Agency: Department of Social and Health Services, Children's Administration

- Permanent Rule
- Emergency Rule
- Expedited Rule Making

(1) Date of adoption: 8/14/02

(2) Purpose: Child Protective Services (CPS) seeks to delay the effective date of the rules covered by the CR-103 filed as WSR 02-15-098, on July 16, 2002. CPS must delay the effective date of these rules because the supporting technological updates have been delayed. See attachment A for rules affected by this Order.

(3) Citation of existing rules affected by this order:

- Repealed:
- Amended:
- Suspended:

(4) Statutory authority for adoption: RCW 74.13.031, 74.04.050

Other Authority: Chapter 26.44 RCW

### PERMANENT RULE ONLY (Including EXPEDITED RULE-MAKING)

Adopted under notice filed as WSR 02-03-118 on Jan. 22, 2002 (date).

Describe any changes other than editing from proposed to adopted version:

### EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

(5.3) Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?:

- Yes
  - No
- If Yes, explain:

(6) Effective date of rule:

- |  |   |
|--|---|
| <b>Permanent Rules<br/>or Expedited Repeal</b> <ul style="list-style-type: none"> <li><input type="checkbox"/> 31 days after filing</li> <li><input checked="" type="checkbox"/> Other (specify) 2/10/03*</li> </ul> | <b>Emergency Rules</b> <ul style="list-style-type: none"> <li><input type="checkbox"/> Immediately</li> <li><input type="checkbox"/> Later (specify)</li> </ul> |
|--|---|

\*(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

Name (Type or Print)

Brian H. Lindgren

Signature

Title

Manager, Rules & Policies Assistance Unit

Date

8/13/02

### CODE REVISER USE ONLY

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AUG 14 2002

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02-17-045

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**Attachment A to CR-103**  
**Delaying the effective date of permanent rules filed as**  
**WSR 02-15-098**

**List of New Rules Adopted By WSR 02-15-098**

**PART A – PROGRAM DESCRIPTION**

WAC 388-15-001 What is the child protective services program?

WAC 388-15-005 What definitions apply to these rules?

WAC 388-15-009 What is child abuse or neglect?

WAC 388-15-011 What is child abandonment?

WAC 388-15-013 Who may receive child protective services?

WAC 388-15-017 What is the responsibility of CPS regarding reports of abuse or neglect?

WAC 388-15-021 How does CPS respond to reports of alleged child abuse or neglect?

WAC 388-15-025 What special requirements must CPS follow for Indian children?

WAC 388-15-029 What information may CPS share with mandated reporters?

WAC 388-15-033 When will CPS involve local community resources?

WAC 388-15-037 Under what circumstances may CPS place a child in out-of-home care?

WAC 388-15-041 When will CPS involve the juvenile court?

WAC 388-15-045 What are the department's responsibilities regarding notification of the parent or legal custodian in child protective services cases?

WAC 388-15-049 When must the department notify the alleged perpetrator of allegations of child abuse or neglect?

WAC 388-15-053 What steps must the department take to provide an opportunity for the parent(s), guardian, or legal custodian(s) to review case information?

WAC 388-15-057 What limitations does the department have on the disclosure of case information?

**PART B – NOTIFICATION AND APPEAL OF FINDINGS**

WAC 388-15-061 What is the purpose of these rules?

**Attachment A to CR-103**  
**Delaying the effective date of permanent rules filed as**  
**WSR 02-15-098**

WAC 388-15-065 Does CPS have to notify the alleged perpetrator of the results of CPS investigation?

WAC 388-15-069 How does CPS notify the alleged perpetrator of the finding?

WAC 388-15-073 What information must be in the CPS finding notice?

WAC 388-15-077 What happens to unfounded CPS findings?

WAC 388-15-081 Can an alleged perpetrator challenge a CPS finding of child abuse or neglect?

WAC 388-15-085 How does an alleged perpetrator challenge a founded CPS finding?

WAC 388-15-089 What happens if the alleged perpetrator does not request CPS to review the founded CPS finding within twenty days?

WAC 388-15-093 What happens after the alleged perpetrator requests CPS to review the founded CPS finding of child abuse or neglect?

WAC 388-15-097 How does CPS notify the alleged perpetrator of the results of the CPS management review?

WAC 388-15-101 What happens if CPS management staff changes the founded CPS finding?

WAC 388-15-105 What happens if CPS management staff does not change the founded CPS finding?

WAC 388-15-109 What laws and rules will control the administrative hearings held regarding the founded CPS findings?

WAC 388-15-113 What effect does a petition for dependency have on an administrative hearing?

WAC 388-15-117 What factors must the ALJ consider in order for the alleged abused and/or neglected child to testify at the administrative hearing?

WAC 388-15-121 Are there issues the ALJ may not rule upon during an administrative hearing regarding a founded CPS finding?

WAC 388-15-125 Are the administrative hearings open to the public?

WAC 388-15-129 How does the ALJ make a decision regarding the founded CPS finding?

WAC 388-15-133 How will the appellant be notified of the ALJ's decision?

**Attachment A to CR-103**  
**Delaying the effective date of permanent rules filed as**  
**WSR 02-15-098**

WAC 388-15-135 What if the appellant or the department disagrees with the decision?

WAC 388-15-141 What happens if the ALJ rules against the department?

**LIST OF RULES REPEALED BY WSR 02-15-098**

- WAC 388-15-130 Child protective services – Authority
- WAC 388-15-131 Child protective services – Special requirements for Indian children
- WAC 388-15-132 Child protective services – Acceptance of reports – Eligibility for services and limits to authority
- WAC 388-15-134 Child protective services - Notification

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.

**The number of sections adopted in order to comply with:**

<b>Federal statute:</b>	New	Amended	Repealed
<b>Federal rules or standards:</b>	New	Amended	Repealed
<b>Recently enacted state statutes:</b>	New	Amended	Repealed

**The number of sections adopted at the request of nongovernmental entity:**

New	Amended	Repealed
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**The number of sections adopted in the agency's own initiative:**

New	Amended	Repealed
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**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New	<u>37</u>	Amended	Repealed	<u>4</u>
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**The number of sections adopted using:**

<b>Negotiated rule making:</b>	New	Amended	Repealed		
<b>Pilot rule making:</b>	New	Amended	Repealed		
<b>Other alternative rule making:</b>	New	<u>37</u>	Amended	Repealed	<u>4</u>



# RULE-MAKING ORDER

(RCW 34.05.360)

CR-103 (7/22/01)

Agency: Department of Social and Health Services, Children's Administration

- Permanent Rule
- Emergency Rule
- Expedited Rule Making

(1) Date of adoption: 7/12/02

(2) Purpose: To rewrite current CPS rules in a clear writing format, to comply with Executive Order 97-02 and to repeal outdated rules. See attachment A for a list of rules adopted by this order.

(3) Citation of existing rules affected by this order:

Repealed: WAC 388-15-130, 388-15-131, 388-15-132, and 388-15-134

Amended:

Suspended:

ADOPTION  
 PERMANENT  
 EMERGENCY  
**EFFECTIVE DATE:**  
8-16-02

(4) Statutory authority for adoption: RCW 74.13.031, 74.04.050  
 Other Authority: Chapter 26.44 RCW

### PERMANENT RULE ONLY (Including EXPEDITED RULE-MAKING)

Adopted under notice filed as WSR 02-03-118 on 1/22/02.  
 Describe any changes other than editing from proposed to adopted version: See attachment B.

### EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

(5.3) Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?:  
 Yes  No If Yes, explain:

(6) Effective date of rule:

<b>Permanent Rules or Expedited Repeal</b>	<b>Emergency Rules</b>
<input checked="" type="checkbox"/> 31 days after filing	<input type="checkbox"/> Immediately
<input type="checkbox"/> Other (specify) ___*	<input type="checkbox"/> Later (specify)

\*(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

Name (Type or Print)  
Brian H. Lindgren

Signature  
*Brian H. Lindgren*

Title  
Manager, Rules & Policies Assistance Unit

Date  
7/12/02

### CODE REVISER USE ONLY

CODE REVISOR'S OFFICE  
STATE OF WASHINGTON

JUL 16 2002

426

WSR 02-15-098 (PM)

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	Amended	Repealed
Federal rules or standards:	New	Amended	Repealed
Recently enacted state statutes:	New	Amended	Repealed

The number of sections adopted at the request of nongovernmental entity:

New	Amended	Repealed
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The number of sections adopted in the agency's own initiative:

New	Amended	Repealed
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>37</u>	Amended	Repealed	<u>4</u>
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The number of sections adopted using:

Negotiated rule making:	New	Amended	Repealed		
Pilot rule making:	New	Amended	Repealed		
Other alternative rule making:	New	<u>37</u>	Amended	Repealed	<u>4</u>

**Attachment A to CR-103**  
For Rules filed pursuant to WSR 02-03-118

**List of New Rules Adopted By This Order**

**PART A – PROGRAM DESCRIPTION**

- WAC 388-15-001 What is the child protective services program?
- WAC 388-15-005 What definitions apply to these rules?
- WAC 388-15-009 What is child abuse or neglect?
- WAC 388-15-011 What is child abandonment?
- WAC 388-15-013 Who may receive child protective services?
- WAC 388-15-017 What is the responsibility of CPS regarding reports of abuse or neglect?
- WAC 388-15-021 How does CPS respond to reports of alleged child abuse or neglect?
- WAC 388-15-025 What special requirements must CPS follow for Indian children?
- WAC 388-15-029 What information may CPS share with mandated reporters?
- WAC 388-15-033 When will CPS involve local community resources?
- WAC 388-15-037 Under what circumstances may CPS place a child in out-of-home care?
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- WAC 388-15-045 What are the department's responsibilities regarding notification of the parent or legal custodian in child protective services cases?
- WAC 388-15-049 When must the department notify the alleged perpetrator of allegations of child abuse or neglect?
- WAC 388-15-053 What steps must the department take to provide an opportunity for the parent(s), guardian, or legal custodian(s) to review case information?
- WAC 388-15-057 What limitations does the department have on the disclosure of case information?

**PART B – NOTIFICATION AND APPEAL OF FINDINGS**

- WAC 388-15-061 What is the purpose of these rules?
- WAC 388-15-065 Does CPS have to notify the alleged perpetrator of the results of CPS investigation?

**Attachment A to CR-103**  
For Rules filed pursuant to WSR 02-03-118

- WAC 388-15-069 How does CPS notify the alleged perpetrator of the finding?
- WAC 388-15-073 What information must be in the CPS finding notice?
- WAC 388-15-077 What happens to unfounded CPS findings?
- WAC 388-15-081 Can an alleged perpetrator challenge a CPS finding of child abuse or neglect?
- WAC 388-15-085 How does an alleged perpetrator challenge a founded CPS finding?
- WAC 388-15-089 What happens if the alleged perpetrator does not request CPS to review the founded CPS finding within twenty days?
- WAC 388-15-093 What happens after the alleged perpetrator requests CPS to review the founded CPS finding of child abuse or neglect?
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- WAC 388-15-125 Are the administrative hearings open to the public?
- WAC 388-15-129 How does the ALJ make a decision regarding the founded CPS finding?
- WAC 388-15-133 How will the appellant be notified of the ALJ's decision?
- WAC 388-15-135 What if the appellant or the department disagrees with the decision?
- WAC 388-15-141 What happens if the ALJ rules against the department?

Attachment B to CR-103  
 For Rules filed pursuant to WSR 02-03-118

Changes other than editing from the proposed to adopted version:

Rules as Proposed	Changes (additions underlined, deletions struck through)	Explanation of changes
<p>WAC 388-15-005            "Administrative law judge (ALJ) is an attorney and an impartial decision-maker who presides at an administrative hearing. The office of administrative hearings, which is a state agency, employs the ALJs.</p>	<p>"<u>Administrative law judge (ALJ)</u>" is <del>an attorney and</del> an impartial decision-maker who presides at an administrative hearing. The office of administrative hearings, which is a state agency <u>but not part of DSHS</u>, employs the ALJs.</p>	<p>Per comments received. Makes the definition accurate.</p>
<p>WAC 388-15-009 (5):            (5) Negligent treatment or maltreatment means an act, a failure to act, or a pattern of behavior on the part of a child's parent or guardian 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:</p>	<p>(5) Negligent treatment or maltreatment means an act, <u>or</u> a failure to act, <del>or a pattern of behavior</del> on the part of a child's parent, <u>legal custodian, or guardian, or caregiver</u> 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:</p>	<p>Per comments received. Makes this rule consistent with other rules.</p>

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<p>WAC 388-15-009 (5) (b)  (b) Actions, failures to act or omissions, or patterns of behavior 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</p>	<p>(b) Actions, failures to act or omissions, <del>or patterns of behavior</del> 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</p>	<p>Makes rule consistent with statute.</p>
<p>WAC 388-15-017  (3) CPS must conduct an investigation or assessment of all reports of alleged child abuse or neglect that meet the definitions of child abuse or neglect contained in this chapter or in chapter 26.44 RCW.</p>	<p>(3) CPS must <u>assess or investigate</u> <del>conduct an investigation and assessment</del> all reports of alleged child abuse or neglect that meet the definitions of child abuse or neglect contained in this chapter or in chapter 26.44 RCW.</p>	<p>Per comments received. Language clarifies rule.</p>
<p>WAC 388-15-021  (2) CPS must begin an investigation within twenty-four hours of receipt of a report alleging child abuse or neglect in which a child is alleged to be at risk of serious and immediate harm. Based upon information contained in the report and any collateral contacts the children's administration intake worker makes the assessment of risk of serious and immediate harm.</p>	<p><del>(2) CPS must begin an investigation within twenty four hours of receipt of a report alleging child abuse or neglect in which a child is alleged to be at risk of serious and immediate harm. Based upon information contained in the report and any collateral contacts the children's administration intake worker makes the assessment of risk of serious and immediate harm.</del></p>	<p>Per comments received. Language removed that is not covered in statute.</p>
<p>WAC 388-15-037  (2) CPS must attempt to place the child with a relative willing and available to care for the child, unless there is reasonable cause to believe that the health, safety or welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered (see RCW 13.34.060). If a</p>	<p>(2) CPS must attempt to place the child with a relative willing and available to care for the child, unless there is reasonable cause to believe that the health, safety <del>or</del> <u>and</u> welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered (see RCW 13.34.060). If a relative appears suitable and competent with good character to</p>	<p>Change makes rule consistent with statute.</p>

<p>relative appears suitable and competent with good character to provide adequate care, the background check and home study of a relative may be completed as soon as possible after the child is placed (see RCW 74.15.030).</p>	<p>provide adequate care, the background check <del>and home study</del> of a relative <del>may</del> <u>shall</u> be completed as soon as possible after the child is placed (see RCW 74.15.030).</p>	
<p>WAC 388-15-053  (1) Notify the person or persons legally responsible for the child of the address of the office where the case record information will be on file; and  (2) Give the person or persons legally responsible for the child the opportunity to read or obtain relevant parts of the case record, provided the person or persons have requested access to the information and the law does not otherwise prohibit such access (RCW 13.40.100).</p>	<p><del>(1) Notify the person or persons legally responsible for the child of the address of the office where the case record information will be on file; and</del>  <del>(2) Give the person or persons legally responsible for the child the opportunity to read or obtain relevant parts of the case record, provided the person or persons have requested access to the information and the law does not otherwise prohibit such access (RCW 13.40.100).</del></p>	<p>Per comments received. Change clarifies without changing the meaning.</p>
<p>WAC 388-15-065  CPS must make a reasonable and good faith effort to notify the alleged perpetrator in writing of any finding made by CPS in any investigation of suspected child abuse and/or neglect.</p>	<p>CPS <del>has the duty</del> <u>must make a reasonable and good faith effort</u> to notify the alleged perpetrator in writing of any finding made by CPS in any investigation of suspected child abuse and/or neglect.</p>	<p>Change is consistent with statute.</p>
<p>WAC 388-15-069  (2) In cases where certified mailing may not be either possible or advisable, the CPS social worker may personally deliver the CPS finding notice to the alleged perpetrator.</p>	<p>(2) In cases where certified mailing may not be either possible or advisable, the CPS social worker may personally deliver <u>or have served</u> the CPS finding notice to the alleged perpetrator.</p>	<p>Clarifies language without changing meaning.</p>

<p>WAC 388-15-073 The CPS finding notice must inform the alleged perpetrator of the following:</p>	<p>The CPS finding notice must inform the alleged perpetrator of the <u>Department's investigative finding, including the legal basis for the findings and sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded reports.</u> The notice must also <u>contain the following:</u></p>	<p>Changes per comments received.</p>
<p>WAC 388-15-073(3)(b) (b) If an alleged perpetrator is qualified to be employed by a child care agency;</p>	<p>(b) If an alleged perpetrator is qualified to be employed by a child care agency <u>or facility;</u></p>	<p>Change per comments received.</p>
<p>WAC 388-15-077: 1) According to RCW 74.15.130(2)(b), no unfounded CPS finding of child abuse or neglect may be used to deny employment in a child care facility or to deny a license to care for children. (2) According to RCW 26.44.020(19) no unfounded allegation of child abuse or neglect may be disclosed to a child placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW. (3) According to RCW 26.44.031, at the end of six years from the date of the report, the department must remove the unfounded finding from the department's records unless an additional child abuse and/or neglect report has been received regarding the same perpetrator or same family during those six years.</p>	<p>1) According to RCW 74.15.130(2)(b), no unfounded, <u>or inconclusive</u> CPS finding of child abuse or neglect may be used to deny employment in a child care facility or to deny a license to care for children. (2) According to RCW 26.44.020(19) no unfounded <u>or inconclusive</u> allegation of child abuse or neglect may be disclosed <u>as part of a background check</u> to a child placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW. (3) According to RCW 26.44.031, at the end of six years from the date of the report, the department must remove the unfounded finding from the department's records unless an additional child abuse and/or neglect report has been received regarding the same perpetrator <del>or same family</del> during those six years.</p>	<p>Per comment received. Change makes language more consistent with statute.</p>

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<p>WAC 388-15-089:</p> <p>1) If the alleged perpetrator does not submit a written request within twenty days for CPS to review the founded CPS finding, no further review or challenge of the finding may occur.</p> <p>(2) If an alleged perpetrator is unavailable to receive notice of the CPS finding when CPS sends the notice by certified mail to the alleged perpetrator's last known address, the alleged perpetrator shall not have further opportunity to request a review of the finding beyond thirty days from the time the notice is sent.</p>	<p>1) If the alleged perpetrator does not submit a written request within twenty <u>calendar</u> days for CPS to review the founded CPS finding, no further review or challenge of the finding may occur.</p> <p>(2) <del>If an alleged perpetrator is unavailable to receive notice of the CPS finding when CPS sends the notice by certified mail to the alleged perpetrator's last known address, the alleged perpetrator shall not have further opportunity to request a review of the finding beyond thirty days from the time the notice is sent. If the Department has exercised reasonable, good faith efforts to provide notice of the CPS finding to the alleged perpetrator, the alleged perpetrator shall not have further opportunity to request a review of the finding beyond 30 days from the time the notice was sent.</del></p>	<p>Change per comments received clarifies language without changing meaning.</p>
<p>WAC 388-15-097:</p> <p>CPS will notify the alleged perpetrator in writing of the results of the CPS management review. CPS will send this notice to the last known address of the alleged perpetrator by certified mail, return receipt requested.</p>	<p>CPS will notify the alleged perpetrator in writing of the results of the CPS management review. CPS will send this notice to the last known address of the alleged perpetrator by certified mail, return receipt requested. <u>The notice of the CPS management review decision will also contain information regarding how to request a hearing.</u></p>	<p>Changed per comment received. Sentence was moved from WAC 388-15-105(3).</p>

<p>WAC 388-15-105:</p> <p>(2) The request for a hearing must be in writing and sent to the following address:  Office of Administrative Hearings  P.O. Box 2465  Olympia, WA 98504</p> <p>(3) The office of administrative hearings must receive the written request for a hearing within thirty days from the date that the person requesting the hearing receives the CPS management review decision. The notice of the CPS management review decision will also contain information regarding how to request a hearing.</p>	<p>(2) The request for a hearing must be in writing and sent to  Office of Administrative Hearings  P.O. Box 2465  Olympia, WA 98504 <u>WAC 388-02-0025 lists the current address.</u></p> <p>(3) The office of administrative hearings must receive the written request for a hearing within thirty days from the date that the person requesting the hearing receives the CPS management review decision. <del>The notice of the CPS management review decision will also contain information regarding how to request a hearing.</del></p>	<p>Per comment received.</p>
<p>WAC 388-15-121:</p> <p><b>Are there issues the ALJ may not consider during your administrative hearing regarding a founded CPS finding?</b> In any administrative hearing regarding a founded CPS finding, an ALJ may not consider the following:</p> <p>(1) Decisions regarding the placement of the alleged abused or neglected child;</p> <p>(2) Risk assessments in making placement decisions regarding the alleged abused and/or neglected child; or</p> <p>(3) Service plans for the alleged perpetrator and/or alleged abused or neglected child.</p>	<p><b>Are there issues the ALJ may not <del>consider</del> <u>rule upon</u> during your <del>an</del> administrative hearing regarding a founded CPS finding?</b> In any administrative hearing regarding a founded CPS finding, an ALJ may not <del>consider</del> <u>rule upon</u> the Department's decisions regarding the following:</p> <p>(1) <del>Decisions</del> regarding the placement of the alleged abused or neglected child;</p> <p>(2) <del>Risk</del> <u>risk</u> assessments used in making placement decisions regarding the alleged abused and/or neglected child; or</p> <p>(3) <del>Service</del> <u>service</u> plans for the alleged perpetrator and/or alleged abused or neglected child.</p>	<p>Per comments received change clarifies the proposed language.</p>

<p>WAC 388-15-129:</p> <p>(1) The ALJ must determine if a preponderance of all the relevant information supports the determination by CPS that the alleged perpetrator is the person responsible for the alleged child abuse or neglect.</p> <p>(2) If the ALJ determines that a preponderance of all the relevant information supports the founded CPS finding, the ALJ must uphold the finding.</p> <p>(3) If the ALJ determines that the founded CPS finding is not supported by a preponderance of all the relevant information, the ALJ must remand the matter to the department for a change of the finding consistent with the ruling of the ALJ.</p>	<p>(1) The ALJ must <del>determine</del> <u>decide</u> if a preponderance of <u>the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abuse or neglect of a child.</u> <del>all the relevant information supports the determination by CPS that the alleged perpetrator is the person responsible for the alleged child abuse or neglect.</del></p> <p>(2) If the ALJ determines that a preponderance of <u>the evidence in the hearing record</u> <del>all the relevant information</del> supports the founded CPS finding, the ALJ must uphold the finding.</p> <p>(3) If the ALJ determines that the founded CPS finding is not supported by a preponderance of <u>the evidence in the hearing,</u> <del>all the relevant information,</del> the ALJ must remand the matter to the department for a change of the finding consistent with the ruling of the ALJ.</p>	<p>Per comment, partial change made to wording to clarify.</p>
<p>WAC 388-15-135:</p> <p><b>WAC 388-15-135 What if the appellant disagrees with the decision?</b> If the appellant disagrees with the ALJ's decision, the appellant may challenge this decision according to the procedures contained in chapter 34.05 RCW and chapter 388-02 WAC.</p>	<p><b>WAC 388-15-135 What if the appellant or the Department disagrees with the decision?</b> If the appellant <u>or the Department</u> <del>disagrees</del> with the ALJ's decision, <del>the appellant either party</del> may challenge this decision according to the procedures contained in chapter 34.05 RCW and chapter 388-02 WAC.</p>	<p>Per comment, partial change made to wording to clarify.</p>

<p>WAC 388-15-141</p> <p>What happens if the ALJ does not uphold the founded CPS finding? If the ALJ does not uphold the founded CPS finding, the department may challenge the ALJ's decision as provided in chapter 34.05 RCW and chapter 388-02 WAC. If the department does challenge the ALJ's decision, the department will not change the finding in the department's records and the finding will remain in effect pending the final decision from the department's challenge. If the department does not challenge the ALJ's decision, the department will correct the finding in the department's records.</p>	<p>What happens if the ALJ <del>does not uphold the founded CPS finding</del> <u>rules against the Department</u>? If the ALJ <del>does not uphold the founded CPS finding</del>, the department may <del>challenge the ALJ's decision as provided in chapter 34.05 RCW and chapter 388-02 WAC</del>. If the department <del>does</del> <u>challenges</u> the ALJ's decision, the department will not change the finding in the department's records and the finding will remain in effect pending the final decision from the department's challenge. If the department does not challenge the ALJ's decision, the department will correct the finding in the department's records <u>consistent with the ALJ's decision</u>.</p>	<p>Per comment, partial change made to wording to clarify.</p>
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# RULE-MAKING ORDER

## CR-103 (June 2004) (Implements RCW 34.05.360)

Agency: Department of Social and Health Services, Children's Administration

Permanent Rule  
 Emergency Rule

**Effective date of rule:**

**Permanent Rules**

31 days after filing.  
 Other (specify) \_\_\_\_\_ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

**Effective date of rule:**

**Emergency Rules**

Immediately upon filing.  
 Later (specify) \_\_\_\_\_

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

Yes  No If Yes, explain:

**Purpose:**

The department is amending WAC 388-15-009 What is child abuse or neglect? and WAC 388-15-049 When must the department notify the alleged perpetrator of allegations of child abuse or neglect? to meet the requirements from Chapter 512, Laws of 2005 (Engrossed Substitute Senate Bill 5922).

When effective, this permanent rule will supersede the emergency rule filed as WSR 07-10-057.

**Citation of existing rules affected by this order:**

Repealed: None  
Amended: WAC 388-15-009, 388-15-049  
Suspended: None

**Statutory authority for adoption:** RCW 74.08.090, 74.04.050

**Other authority:** Chapter 26.44 RCW, RCW 74.13.031, and Chapter 512, Laws of 2005

**PERMANENT RULE ONLY (Including Expedited Rule Making)**

Adopted under notice filed as WSR 07-08-095 on April 3, 2007 (date)  
Describe any changes other than editing from proposed to adopted version: None

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting: N/A

Name: \_\_\_\_\_ phone ( ) \_\_\_\_\_  
Address: \_\_\_\_\_ fax ( ) \_\_\_\_\_  
e-mail \_\_\_\_\_

**EMERGENCY RULE ONLY**

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

**Date adopted:**  
June 19, 2007

**NAME (TYPE OR PRINT)**  
Stephanie Schiller

**SIGNATURE**  
*Stephanie E Schiller*

**TITLE**  
DSHS Rules Coordinator

**CODE REVISER USE ONLY**

**OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED**

**DATE: June 22, 2007  
TIME: 9:48 AM**

**WSR 07-14-011**

(COMPLETE REVERSE SIDE)



# RULE-MAKING ORDER

## CR-103 (June 2004) (Implements RCW 34.05.360)

**Agency:** Department of Social and Health Services, Children's Administration (CA)

- Permanent Rule
- Emergency Rule

**Effective date of rule:**

**Permanent Rules**

- 31 days after filing.
- Other (specify) \_\_\_\_\_ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

**Effective date of rule:**

**Emergency Rules**

- Immediately upon filing.
- Later (specify) \_\_\_\_\_

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

- Yes
  - No
- If Yes, explain:

**Purpose:** To meet the requirements of Engrossed Substitute Senate Bill 5922 (Chapter 512, Laws of 2005), the department is amending:

- WAC 388-15-009 What is child abuse or neglect?; and
- WAC 388-15-049 When must the department notify the alleged perpetrator of allegations of child abuse or neglect?

**Citation of existing rules affected by this order:**

Repealed: None  
 Amended: WAC 388-15-009, -049  
 Suspended: None

**Statutory authority for adoption:** RCW 74.13.031, 74.04.050, and chapter 26.44 RCW

**Other authority :** Engrossed Substitute Senate Bill 5922 (Chapter 512, Laws of 2005)

**PERMANENT RULE ONLY (Including Expedited Rule Making)**

Adopted under notice filed as WSR \_\_\_\_\_ on \_\_\_\_\_ (date)  
 Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: \_\_\_\_\_ phone ( ) \_\_\_\_\_  
 Address: \_\_\_\_\_ fax ( ) \_\_\_\_\_  
 e-mail \_\_\_\_\_

**EMERGENCY RULE ONLY**

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare; and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: The new language is essential for CA to implement the legislature's intent in ESSB 5922 by its January 1, 2007 effective date. The new language is essential for determining what constitutes child abuse under the statute, and is necessary for the protection of health, safety and welfare of children. There is not time to complete the regular rule-making steps in chapter 34.05 RCW to adopt this new language by January 1 and still have adequate and effective public participation in the rule-making process. The department has initiated the regular rule-making process by publishing preproposal statements of inquiry as WSR 06-21-080 and WSR 06-21-081. The department has also filed a Proposed Rule Notice (CR-102) as WSR 07-08-095 and is holding a public hearing on May 8, 2007.

**Date adopted:**  
 April 20, 2007

**NAME (TYPE OR PRINT)**  
 Stephanie Schiller

**SIGNATURE**

**TITLE**  
 DSHS Rules Coordinator

**CODE REVISER USE ONLY**

**OFFICE OF THE CODE REVISER  
 STATE OF WASHINGTON  
 FILED**

**DATE: April 27, 2007  
 TIME: 9:31 AM  
 WSR 07-10-057**

(COMPLETE REVERSE SIDE)



# PROPOSED RULE MAKING

## CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Social and Health Services, Children's Administration

- Preproposal Statement of Inquiry was filed as WSR 06-21-080 and 06-21-081; or
- Expedited Rule Making—Proposed notice was filed as WSR \_\_\_\_\_; or
- Proposal is exempt under RCW 34.05.310(4).

- Original Notice
- Supplemental Notice to WSR
- Continuance of WSR

Title of rule and other identifying information: (Describe Subject)

WAC 388-15-009 What is child abuse or neglect?

WAC 388-15-049 When must the department notify the alleged perpetrator of allegations of child abuse or neglect?

### Hearing location(s):

Blake Office Park East – Rose Room  
 4500 – 10<sup>th</sup> Ave. SE  
 Lacey, Washington 98503  
 (One block north of the intersection of Pacific Ave. SE and Alhadeff Lane. A map or directions are available at <http://www1.dshs.wa.gov/msa/rpau/docket.html> or by calling 360-664-6097)

Date: **May 8, 2007** Time: **10:00 am**

### Submit written comments to:

Name: DSHS Rules Coordinator  
 Address: PO Box 45850, Olympia WA, 98504  
 Delivery: 4500 – 10<sup>th</sup> Ave. SE, Lacey, Washington 98503  
 E-mail: [fernaax@dshs.wa.gov](mailto:fernaax@dshs.wa.gov) Fax: (360) 664-6185  
 by 5:00 pm on **May 8, 2007**

Assistance for persons with disabilities: Contact Stephanie Schiller, DSHS Rules Consultant by May 4, 2007  
 TTY (360) 664-6178 or (360) 664-6097 or  
 by e-mail at [schilse@dshs.wa.gov](mailto:schilse@dshs.wa.gov)

Date of intended adoption: Not earlier than May 9, 2007.  
 (Note: This is **NOT** the effective date)

### Purpose of the proposal and its anticipated effects, including any changes in existing rules:

To meet the requirements from Engrossed Substitute Senate Bill 5922 (Chapter 512, Laws of 2005).

### Reasons supporting proposal:

The new language is essential for Children's Administration to implement the legislature's intent in Engrossed Substitute Senate Bill 5922, Chapter 512, Laws of 2005. The new language is essential for determining what constitutes child abuse under the statute, and is necessary for the protection of health, safety and welfare of children.

Statutory authority for adoption:  
 RCW 74.08.090, 74.04.050

Statute being implemented:  
 Chapter 26.44 RCW; RCW 74.13.031, Chapter 512, Laws of 2005

Is rule necessary because of a:

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION:

DATE  
 March 29, 2007

NAME (type or print)  
 Jim Schnellman

SIGNATURE

TITLE  
 Chief, Office of Administrative Resources

### CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER  
 STATE OF WASHINGTON  
 FILED

DATE: April 03, 2007  
 TIME: 12:43 PM

## WSR 07-08-095

(COMPLETE REVERSE SIDE)



# Washington State Department of Social and Health Services

## PUBLIC RULES HEARING

WASHINGTON STATE REGISTER (WSR): WSR 07-08-095

DATE: May 8, 2007

WASHINGTON ADMINISTRATIVE CODE (WAC): WAC 388-15-009, 049 Allegations of child abuse or neglect

-DEPARTMENT REPRESENTATIVE: Tina Stern

(Please Print Clearly)

Location of Hearing: Blake Office Park East -Rose Room, 4500 10<sup>th</sup> Ave. SE, Lacey, Washington

NAME	ADDRESS	ORGANIZATION (if any)	DO YOU WISH TO SPEAK?
PLEASE PRINT	No one offered testimony		
PLEASE PRINT			
PLEASE PRINT			246
PLEASE PRINT			

**Schiller, Stephanie E. (DSHS ASD)**

**From:** Schiller, Stephanie E. (DSHS ASD)  
**Sent:** Friday, May 18, 2007 4:45 PM  
**To:** Brockman, Kathleen  
**Cc:** Vasquez, Katherine I. (DSHS/ASD); SCHNELLMAN, Jim (DSHS ASD); Carter, Jim (DSHS ASD); Sayre, Kathy (DSHS/HRSA); Sullivan, Kevin (DSHS/HRSA); Stern, Tina; Grayum, Jenny E (DSHS); Boedigheimer, Wendy (DSHS/HRSA)  
**Subject:** May 8, 2007 Public Rules Hearing - No Testimony was offered  
**Attachments:** HearingTranscript\_May8\_2007.doc; image001.png; oledata.mso



STATE OF WASHINGTON  
 DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
 MANAGEMENT SERVICES  
 PO Box 45850 · Olympia, WA 98504-5850

**Rules and Policies Assistance Unit (RPAU)**  
 May 18, 2007

**To:** Robin Arnold-Williams, Secretary  
**Through:** Kathleen Brockman, Management Services Chief Administrative Officer  
**From:** Stephanie Schiller, Hearing Presiding Officer  
**Subject:** Summary of May 8, 2007 Public Rule-Making Hearing.

DSHS held a public rule-making hearing on May 8, 2007, 10:00 a.m. at the Blake Office Park East in Lacey on the following rules, grouped by their proposals:

<b>Proposed WAC</b> <i>Note: Selecting the link will open up the proposed rule, including the text of the rule.</i>	<b>Subject</b>	<b>Rule-writer responsible for WAC</b>	<b>Did anyone offer testimony at the hearing?</b>
WAC 388-550-1000, 2565, 2570, 2575, 2580, 2585, 2590, 2595 and 2596	Updating and clarifying the Long Term Acute Care hospital rules	Kathy Sayre, HRSA Medical Assistance	No
WAC 388-550-2501, 2511, 2521, 2531, 2541 and 2561	Updating and clarifying the Acute Physical Medicine and Rehabilitation hospital rules	Kathy Sayre, HRSA Medical Assistance	No
WAC 388-15-009 and 049	Clarifying what constitutes child abuse or neglect	Tina Stern, CA Policy and Program	No

5/18/2007

		Improvement	
WAC 388-492-0040	Allowing recipients to choose whether to participate in Washington Combined Application Project (WASHCAP) or to apply for Basic Food benefits in certain circumstances.	Jenny Grayum, ESA Division of Employment and Assistance Programs	No
WAC 388-532-050, 100, 110, 120, 520, 530, 700, 710, 720, 730, 740, 745, 750, 760, 780, and 790	Bringing the Reproductive Health/Family Planning Only/TAKE CHARGE program into compliance with special terms and conditions of the federal Centers for Medicare/Medicaid Services waiver.	Wendy Boedigheimer, HRSA Medical Assistance	No

This summary is provided under RCW 34.05.325 of the Administrative Procedure Act that directs the hearing presiding officer to provide a summary of each rule-making hearing to the agency head. A transcript of this hearing is also attached.

If you have questions about this hearing, please contact me at the Rules and Policies Assistance Unit, 664-6097, or by e-mail at [schilse@dshs.wa.gov](mailto:schilse@dshs.wa.gov).

Doug Porter, Assistant Secretary  
Cheryl Stephani, Assistant Secretary  
Deb Marley, Assistant Secretary  
Official rule-making file

### Stephanie Schiller

Department of Social and Health Services  
Rules and Policies Assistance Unit  
PO Box 45850, Olympia, WA 98504-5850  
MS: 45850  
Phone: (360) 664-6097 Fax: (360) 664-6185

**Transcript  
DSHS Public Rules Hearing  
May 8, 2007**

Good morning. Welcome to today's DSHS rules hearing. My name is Stephanie Schiller. With me is Fred Swenson. I'm the Presiding Officer for today's rules hearing, which is being held at the Blake Office Park East in Lacey at 10:00 a.m. on May 8, 2007.

This hearing is being conducted according to the Administrative Procedure Act, Chapter 34.05 RCW. The purpose of this hearing is to give the public an opportunity to testify, make recommendations, or present written comments about the proposed rules on today's hearing docket. Rules are also known as Washington Administrative Code - or WAC.

However, the sign-in sheets indicate that no one has signed in to testify about the proposed rules on today's hearing docket, and no one from the public is in attendance in the audience.

Submitting written comments is just as effective as testifying here today. You may give me your comments here today, or at the end of this hearing I'll provide information on how you can send written comments.

We have five proposals on today's docket:

The first proposal is the amendment of WAC 388-550-1000, 2565, 2570, 2575, 2580, 2585, 2590, 2595 and 2596, filed as WSR 07-08-107 on April 4, 2007. These amendments update and clarify language for the Long Term Acute Care program. Kathy Sayre of the Health and Recovery Services Administration, is here today to answer questions about this proposal.

The second proposal is the amendment of WAC 388-550-2501, 2511, 2521, 2531, 2541 and 2561, filed as WSR 07-08-106 on April 4, 2007. These amendments update and clarify language for the acute Physical Medicine and Rehabilitation program. Kathy Sayre of the Health and Recovery Services Administration, is here today to answer questions about this proposal.

The third proposal is the amendment of WAC 388-15-009 and 049, filed as WSR 07-08-095 on April 3, 2007. The amended language clarifies what constitutes child abuse or neglect. Tina Stern of the Children's Administration, is here today to answer questions about this proposal.

The fourth proposal is the amendment of WAC 388-492-0040, filed as WSR 07-08-056 on March 29, 2007. This amendment allows recipients to choose whether to participate in Washington Combined Application Project (WASHCAP) or apply for Basic Food benefits in certain circumstances. Jenny Egan-Grayum of the Economic Services Administration, is here today to answer questions about this proposal.

The fifth proposal is the amendment of WAC 388-532-050, 100, 110, 120, 520, 530, 700, 710, 720, 730, 740, 745, 750, 760, 780, and 790, filed as WSR 07-07-112 on March 19, 2007. These proposed changes bring the Reproductive Health/Family Planning Only/TAKE CHARGE program into compliance with special terms and conditions of the federal Centers for Medicare/Medicaid Services waiver. Wendy Boedigheimer of the Health and Recovery Services Administration, is here today to answer questions about this proposal.

Again, the sign-in sheets indicate that no one has signed up to testify about the proposed rules on today's docket, and no one from the public is in attendance in the audience.

The deadline for written comments is 5:00 PM, today. You may send written comments to fax number 360-664-6185, or by e-mail to [schilse@dshs.wa.gov](mailto:schilse@dshs.wa.gov).

The Department will consider all comments before adopting these rules. All persons who have testified, submitted written comments, or who request a copy will receive the department's written response to comments received on these proposed rules.

This hearing is adjourned at 10:17.



Management Services Administration

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## Rule-Making Hearing Docket

### CR-101 Filings

[Proposed Rules and Hearings \(CR-102\)](#)

[Permanent and Emergency Rules \(CR-103\)](#)

[Expedited Rules \(CR-105\)](#)

[How to Participate](#)

[DSHS Rules](#)

[Rule-Making Agenda](#)



**May 8, 2007 10:00 a.m.**  
**Blake Office Park ([driving directions](#))**

Select the WAC number to view or print a copy of the CR-102 form and the rule text. Send all comments on the rule to the [Rules Coordinator](#). If you have questions about the rule send a message to the contact person.

Rules Scheduled for Hearing	Contact Person	Washington State Register Citations
<p>WAC 388-550-1000, 2565, 2570, 2575, 2580, 2585, 2590, 2595 and 2596</p> <p>Amendments update and clarify language for the LTAC program.</p>	<p>Kathy Sayre (360) 725-1342</p>	<p>Preproposal notice filed as WSR 06-22-054                      Proposed rules filed as WSR 07-08-107  <b>Hearing date: May 8, 2007</b>                      Earliest adoption date: May 9, 2007</p>
<p>WAC 388-550-2501, 2511, 2521, 2531, 2541 and 2561</p> <p>Amendments update and clarify language for the acute PM&amp;R program.</p>	<p>Kathy Sayre (360) 725-1342</p>	<p>Preproposal notice filed as WSR 06-22-054                      Proposed rules filed as WSR 07-08-106  <b>Hearing date: May 8, 2007</b>                      Earliest adoption date: May 9, 2007</p>
<p>WAC 388-15-009 and 049</p> <p>To meet the requirements from Engrossed Substitute Senate Bill 5922 (Chapter 512, Laws of 2005).</p>	<p>Tina Stern (360) 902-0863</p>	<p>Preproposal notice filed as WSR 07-08-095                      Proposed rules filed as WSR 07-08-095  <b>Hearing date: May 8, 2007</b>                      Earliest adoption date: May 9, 2007</p>
<p>WAC 388-492-0040</p> <p>Can I choose whether I get WASHCAP food benefits or Basic Food benefits?</p>	<p>Jenny Grayum (360) 725-4583</p>	<p>Preproposal notice filed as WSR 07-03-146                      Proposed rule filed as WSR 07-08-056  <b>Hearing date: May 8, 2007</b>                      Earliest adoption date: May 9, 2007</p>
<p>WAC 388-532-050, 100, 110, 120, 520, 530, 700, 710, 720, 730, 740, 745, 750, 760, 780, and 790</p> <p>Reproductive Health/Family Planning Only/TAKE CHARGE. Revisions are necessary in order to bring the program into compliance with special terms and conditions of the new waiver set forth by the Centers for Medicare and Medicaid Services (CMS) for the state</p>	<p>Wendy Boedigeimer (360) 725-1306</p>	<p>Preproposal notice filed as WSR 06-22-093                      Proposed rules filed as WSR 07-07-102  <b>Hearing date: May 8, 2007</b>                      Earliest adoption date: May 9, 2007</p>

of Washington.

**Contact the DSHS Rules Coordinator to:**

- Ask questions about the hearing, a proposed rule, or the rule-making process;
- Confirm the day's calendar;
- Inquire about interpreter services or accommodations for disabilities at hearings;
- Inspect comments submitted by others; or
- Submit written comments.

Rules Coordinator

Rules and Policies Assistance  
Unit  
PO Box 45850  
Olympia, WA 98504

Phone: (360) 664-6094  
TTY: (360) 664-6178  
FAX: (360) 664-6185

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Modification date: 4/4/07. Contact the Rules Coordinator for more information about RPAU. For more ways to get in touch with the Department of Social and Health Services go to the DSHS Contact Information Web page. Technical site comments: DSHS Webmaster.

COURT OF APPEALS  
DIVISION II

NO. 42283-2-II

11 DEC -2 PM 2:06

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY Kim  
DEPUTY

MELINDA MARCUM,

Petitioner,

v,

DEPARTMENT OF SOCIAL &  
HEALTH SERVICES

Respondent.

DECLARATION OF MAILING

I, Kim Wilcox, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

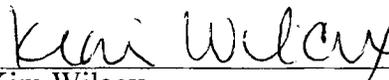
On December 2, 2011, I caused a true and correct copy of the Response Brief of the Department of Social & Health Services to be served as indicated below:

Original via hand-delivery to the Court of Appeals, Division II, and

Copy via U.S. Mail:

Alberto Casas  
Northwest Justice Project  
715 Tacoma Avenue South  
Tacoma, WA 98402

SIGNED in Tacoma, Washington, this 2nd day of December, 2011.



Kim Wilcox  
Legal Assistant  
1250 Pacific Ave, Suite 105  
PO Box 2317  
Tacoma, WA 98401