

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

OLYMPIC HEALTHCARE SERVICES II, LLC; GALINA BAIDA  
Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF  
WASHINGTON  
Respondent.

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**APPELLANTS' REPLY BRIEF**

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## TABLE OF AUTHORITIES

	<u>Page</u>
I. ANSWER TO COUNTER-STATEMENT OF THE CASE.....	1
II. Burden of Proof.....	6
1. Part I of the <i>Mathews</i> Tests: Nature of the Protected Interest.....	7
a. Part II of <i>Mathews</i> Test: Insufficient Procedural Safeguards.....	11
b. Part III of the <i>Mathews</i> Test, Government’s Interest.....	12
III. The review judge has no authority to ignore evidence in order to support the Department’s decision. ....	13
IV. CONCLUSIONS OF LAW .....	15
A. The Findings of Fact Are Not Verities. ....	15
B. Department’s citations.....	16
1. Overcapacity.....	16
C. Other citations. ....	18
V. CONCLUSION.....	18
Appendix A.....	21

### Cases

<i>Hardee v. Department of Social and Health Services</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	6, 7
<i>In Re Marriage of Meredith</i> , 148 Wn. App. at 903 .....	14
<i>In Re Marriage of Meredith</i> , 418 Wn. App. 887, 201 P.3d 1056 (2009).....	14
<i>Kabbae v. Department of Social &amp; Health Services</i> , 144 Wn. App. 432, 192 P.3d 903, 908 (2008).....	13
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).....	6, 8, 11, 12

<i>Nguyen v. Department of Health Medical Quality Assurance Commission</i> , 144 Wn.2d 516, 29 P.3d 689 (2001).....	8, 12
<i>Nims v. Washington Board of Registration</i> , 113 Wn. App. 499, 505, 53 P.3d 52 (2002).....	8, 12
<i>Skagit County v. Waldal</i> , 163 Wn. App. 284, 261 P.3d 164 (2011).....	14

**Statutes**

WAC 38-76-10120(2).....	9
WAC 388-76-10000.....	16, 17
WAC 388-76-10030.....	16, 17
WAC 388-76-10120(3).....	9
WAC 388-76-10120(3)(b) .....	9
WAC 388-76-10130.....	7
WAC 388-76-10130(8).....	7
WAC 388-76-10130(8)(a)-(e).....	7
WAC 388-76-10950.....	17
WAC 388-76-10960.....	18
WAC 388-76-10960(16).....	17
WAC 388-76-125(5).....	9
WAC 388-76-960.....	18
WAC 388-78A-00030.....	1
WAC 388-78A-270(2).....	10
WAC 388-78A-3160.....	10

WAC 388-78A-3170(1)(a).....10

WAC 388-97-4220(1)(f).....10

**Rules**

RCW Chapter 18.79.....7

RCW 34.05.570(3).....18

RCW 34.05.570(3)(e).....15

Appellants respond to the Department's brief as follows.

**I. ANSWER TO COUNTER-STATEMENT OF THE CASE**

Critical to the Department's decision to revoke the adult family home license of appellant Olympic Healthcare Services II ("House II") was whether it operated at "overcapacity," meaning that House II had more than six residents, people living there, who also needed personal care. The Department concedes, Brief page 3, that of the eight non-staff people observed by the Department's complaint investigator during her visit on November 2, 2009, only six were residents of Olympic Healthcare II, and two were "residents from Ms. Baida's other adult family home, Olympic Healthcare I." This crucial fact is uncontested.

The error in both the Department's arguments on this appeal and the Review Decision from which this appeal is taken is its position that an adult family home may not allow on premises visitors who are adult family home residents elsewhere. However, the licensed capacity regulation, WAC 388-78A-00030, has two elements, not just the one that the Department argues. The Department ignores that the regulation requires that for a home to be in excess of its licensed capacity it must be: (a) the home of more than 6 people actually living there and (b) these residents must be in need of personal care. The Department's case errs in considering only the second element.

The Initial Decision found that the House I residents were just visitors to House II for whom the staff of House II had no more responsibility than to other visitors. AR 262.

The Department claims that Finding of Fact 59, AR 54-55, finds that extra residents were in Olympic Healthcare II because there was no caregiver in Olympic Healthcare I. Finding of Fact 59 does not state that. The Department also claims that the finding has Ms. Baida stating that, as soon as the caregiver from the other adult family home returned, that residents would go back to their own home. The finding also does not state that. AR 54-55. Finding of Fact 6, AR 32, finds that the residents of House II on November 2, 2009, and November 13, 2009, the dates of the complaint investigation and full licensing inspection, were six individuals.

Finding of Fact 7, AR 32 33, finds that there were five residents at House I. Tami Shumake, a caregiver at House II and witness for the Department, testified that residents from House I would come across the street to House II on their own and unaccompanied. (PR p. 92, 93.) She also testified that they would come over and talk and play puzzles with the residents of House II or otherwise socialize and write. *Id.* This testimony conflicts with Finding of Fact 49, AR 50, which states that the Appellant regularly sent residents from House I over to House II. Neither Tami Shumake nor Thilynn Smith, the resident manager before

Gary Otterness, cared for any residents at House I, and they could not testify to facts that the “Appellant regularly sent residents from House I over to House II.”

Ms. Shumake also testified that House I residents would not stay long (TR. I: 95). She also testified that she was not involved in the negotiated care plans of the House I residents. She testified that she arrived at House II on November 2 “between 1:30 and 2:00 in the afternoon.” (TR I: 191.) At that time there were two additional residents from the adult family home across the street. (*Id.*) She also testified that two more residents from across the street arrived at about 3:00 and a fifth resident came from across the street between 3:30 and 4:00. Ms. Corey did not testify how long the residents of House I stayed at House II, yet Finding of Fact 48 said there were two “residents who had been there for many hours” (AR 50).

The residents of House I were independent and higher functioning than the House II residents. (FF 7, AR 33.) The Findings of Fact omit several important facts about the residents of House I. First, FF 49 states that Ms. Baida regularly sent residents from House I over to House II. This statement was attributed to Thilynn Smith, but she also testified that she worked only at House II and was not present at House I before residents from House I came over to House II. (TR III: 33.) There was no way for her to know whether the House I residents were

sent or they came on their own volition. Next, one of the House I residents, Walter, was a friend of House II resident Mary. Mary helped him with his writing and his spelling. Walter liked to write. (TR III: 34.) Walter would come over and visit with a part-time resident of House II, Bob, when Bob was there. Walter liked Mary and liked it when she helped him with his writing and spelling. (TR III: 35.) Walter also liked to look at magazines at House II. (TR III: 36.)

Ms. Smith testified:

Sometimes they [residents of House I] would come over, and it would only be for a half hour or hour. Then Nadia would return, and the residents would go back over there -- back to their house, yes.

(TR III: 39.) She also testified that the residents from House I would sometimes come over just to check in with Galina and then leave. Contrary to the assertion of the Department, Brief p. 4, Ms. Smith did not think that she was a caregiver to the residents who came over for a short time. (*Id.*) She testified that there weren't any specific days that residents came over and that four of the five residents from House I worked. One works in the morning and then is either home at House I for the afternoon or at school. Dennis and Heidi worked in the morning, and Terry and Milton would work in the afternoon. (TR III: 40.) The residents of House I would go bowling on their own. Terry and Milton also liked to go to the store or to the library. (TR III: 42.) Finally,

Nadia, Ms. Baida's mother, worked at House I seven days per week, 24 hours per day, and the only time that she wasn't there was when she went to church or to doctors' appointments. (*Id.*) In summary, Ms. Smith testified that primarily the residents of House I took care of themselves. (TR III: 44.) Ms. Baida testified that if there was any resident of House I scheduled to be home, she would have a staff person there for the resident, either Nadia or herself. (TR IV: 199-200, 202-3) No one contradicted his testimony.

Thilynn Smith did not testify that "the Appellant sent the House I residents to House II for respite time for her mother or when her mother had a medical appointment," as stated in Findings of Fact 51. Further, Ms. Baida flatly denied that she sent any residents from House I to House II. (TR IV: 203)

She testified to the attachment between the House I residents and the House II residents that started when they were housed together in a shelter as result of the Centralia floods. (TR IV:194 – 97) They also all lived together after the shelter in House II. (TR 197)

Terry and Milton went to an advocacy organization called People First on Saturdays when Ms. Baida and Nadia went to church.

Findings of Fact 61 incorrectly summarizes the testimony, because there were not adult family home residents from House I

requiring care and supervision at House II for long periods of time. This finding is unsupported by the evidence from both the Department's witnesses and the Appellants' witnesses.

Finally, Ms. Smith's testimony concerning Walter, a resident at House I, was contradictory. (TR III: 19.) About Walter not liking to be at House II is contradicted (TR III: 34-36) that he liked coming over to House II and that he would bring his own books and magazines. Consequently, FF 54, AR 52-53 is incorrect.

The Department argues that Appellants did not challenge the Findings of Fact on judicial review. Actually, the Appellant challenged all of the Findings of Fact as rewritten by the review judge and argued for the retention of the Findings of Fact as originally established in the initial decision, AR 185-265. (CP 5)

## **II. Burden of Proof**

The parties concur that the applicable analysis of the constitutional standard for the burden of proof on the Department is the three-part test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), applied in *Hardee v. Department of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011).

1. Part I of the *Mathews* Tests: Nature of the Protected Interest.

The Department argues that an adult family home license and home child care license are very similar. They are not. The Department cites WAC 388-76-10130 for the proposition that they are site licenses that do not require any particular professional license to obtain them. Unless a prospective licensee has a physician license, physician assistant license, RN, ARNP or LPN license under RCW Chapter 18.79, the adult family home licensee must have completed at least 1,000 hours of successful direct care experience in the previous 60 months obtained after age 18 to vulnerable adults in a licensed or contracted setting before operating or managing a home. WAC 388-76-10130(8). This regulation itself equates the on-the-job training in another health care setting before licensure with the professional licenses specified in WAC 388-76-10130(8)(a)-(e). A daycare center has no such qualification. Consequently, the initial argument of the Department as to the preponderance of evidence is incorrect. This case falls within the requirement of a higher burden of proof because of the professional licenses involved, both for Olympic Healthcare Services II, LLC and for Ms. Baida, as we have explained in our opening brief.

The court's analysis in *Hardee v. Department of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011), is distinguishable

on the facts of this case. The court's analysis of the three factors of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), turned first on the fact that a child care license requires only 20 hours of training. As noted above, the adult family home license requires 1,000 hours or a professional physician or nursing license. Accordingly, the nature of the license itself is within the professional license category protected in *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), and *Nims v. Washington Board of Registration*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002) (professional engineer).

The Appellants' due process claims as to the burden of proof are based upon both the revocation of the professional license of the adult family home and the impact upon the LPN license of Galina Baida. The Department argues that there is no evidence that Ms. Baida's LPN credentials have been negatively impacted. (Brief, p. 13) The negative impact is in the law and regulations. The Appellants' argument is based upon what will happen to both the entity and to Ms. Baida under the rules related to adult family home licensing and her LPN license.

The Department attempts to avoid responsibility for its actions by saying that another state agency regulates LPN licenses. (Brief, p. 13) However, an adverse ruling in this case could be collateral estoppel in any subsequent proceeding as to her LPN license. Further, the entity and

Ms. Baida will be barred for ten years from holding an adult family home license, which is regulated by DSHS.

WAC 388-76-10120(3)(b) requires that an adult family home license must be denied where the applicant or the applicant's partner, officer, director, managerial employee or majority owner of the applying entity:

(b) Has prior violations of federal and state laws or regulations relating to residential care facilities resulting in revocation, suspension or nonrenewal of a license or contract with the Department within the past ten years; ....

Emphasis added. As the Department must concede, WAC 388-76-10120(3) and WAC 388-76-125(5) both bar Olympic Healthcare Services II, LLC and Galina Baida, as an own, manager, officer, or director of Olympic Healthcare Services II or any other entity, from licensure as an adult family home. If the applicant were to surrender its license, the penalty applies for 20 years under WAC 38-76-10120(2). Therefore, if the license were to be revoked, both of the Appellants would be subject to a denial of a license for at least ten years.

Revocation of the adult family home license also will prevent issuance of a license for other types of facilities for the elderly. The Department can deny an assisted living facility license to any person who is found to have a history of significant noncompliance with federal or state laws or regulations in providing care services to vulnerable

adults or frail elders as a licensee, contractor, managerial employee or otherwise. WAC 388-78A-3160; WAC 388-78A-270(2); and WAC 388-78A-3170(1)(a).

The nursing home licensing regulations are substantially the same. The Department can deny a nursing home license to an applicant when the Department finds that the applicant, any partner, officer, director, managing employee, owner of 5% or more of the licensee or the assets of the nursing home, proposed or current administrator, or employee or individual providing nursing home care or services, has previously held a license to operate any facility for the care of vulnerable adults, and that license has been revoked, or suspended, or the licensee did not seek renewal of the notice following written notification of the licensing agency's initiation of revocation or suspension of the license. WAC 388-97-4220(1)(f). In summary, revocation of an adult family home license is nothing like a child care license as in the *Hardee* case. The sanctions involve not just the license at the adult family home but also the ability of the licensee and its owners and managers to work in the long term care industry as a professional.

The preponderance of the evidence standard is insufficient to protect the interests of the individuals involved in this case. It must be the clear, cogent and convincing standard, which was not applied by the review judge.

a. Part II of *Mathews* Test: Insufficient Procedural Safeguards.

This case demonstrates precisely why a higher standard is necessary. Under the Department's regulations, the review judge has all the authority of the initial reviewing officer, and independent administrative law judge. However, the review judge does not have the independence of that administrative law judge, because she is an employee of the Department. Adult family home licensees, such as the Appellants in this case, need to be protected from the potential of the review judge acting as the Department's advocate, as this review judge did.

Where there was not a regulation or evidence, the review judge made up arguments for the Department to support the Department's revocation. To support a fair and impartial hearing, as the Appellants are entitled to have, the higher standard of proof is necessary. Not only did the review judge rewrite all of the Findings of Fact entered by the Administrative Law Judge in the Initial Decision, she created arguments to support the Department's decision.

Finally, the Department on page 16 argues the negative, claiming that the Appellants have failed to provide any evidence that a higher standard of proof would have been valuable to her in this case. The answer is simple: a higher standard of proof was not applied, and as a

consequence the revocation must be reversed. A higher standard of proof is always a benefit to a party whose rights are threatened to be revoked. The Department's argument fails to take into account the matters that are raised on the second *Mathews* test in our opening brief.

b. Part III of the *Mathews* Test, Government's Interest

The government's interest in protecting its citizens in an adult family home is the same as to protecting them from a doctor (*Nguyen*) or an engineer (*Nims*). In each case the doctor, engineer, or adult family home is caring for individuals and providing for their needs on a professional basis.

There is no evidence that anyone at House I did not have his or her needs met. The families testified uniformly to the excellent care provided to their family members who were the residents of House II. The third *Mathews* factor does not trump the interest in protecting the private property rights of the Appellants.

Accordingly, this case belongs in the category of licenses for which a higher standard of proof must be applied. Without it, the Appellants' ability to pursue her professional career and its business of care-giving in long term care is severely jeopardized. The adult family home license is not a site license, because its revocation bars licensure at every location.

### **III. THE REVIEW JUDGE HAS NO AUTHORITY TO IGNORE EVIDENCE IN ORDER TO SUPPORT THE DEPARTMENT'S DECISION.**

On pages 18-19 of the Department's brief, the Department urges that the review judge has the authority to do the wholesale revision of the initial decision under the authority of *Kabbae v. Department of Social & Health Services*, 144 Wn. App. 432, 192 P.3d 903, 908 (2008). The Department claims that its petition to the BOA for review raised issues of multiple conflicting Findings of Fact. Nothing in *Kabbae* is authority for the Review Judge to act as an advocate for the Department by re-writing findings and creating issues of law not argued by the Department's representative.

Despite the fact that the Department's petition for review of the Initial Decision challenged only nine of the 223 findings in the initial order (AR 164), none of which was dispositive of an issue, the Review Judge re-wrote them all so that they would tend to support the Department's revocation decision.<sup>1</sup>

In summary, only a small fraction of the initial findings were contested. Yet the review decision re-wrote them all. Where there was no challenge from the Department to adjudicate, there was no need to

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<sup>1</sup> Appendix A summarizes the 9 findings in the Initial Decision that the Department challenged in its Petition for Review.

change the findings unless the review judge was attempting to support the decision of the Department.

The application of the Appearance of Fairness Doctrine, as delineated in *In Re Marriage of Meredith*, 418 Wn. App. 887, 201 P.3d 1056 (2009) and *Skagit County v. Waldal*, 163 Wn. App. 284, 261 P.3d 164 (2011), in and of itself requires reversal of the Department's Review Decision. The test for the validity of a judicial or administrative proceeding is whether "a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial and neutral hearing." *In Re Marriage of Meredith*, 148 Wn. App. at 903. Thus, the test is objective and not based only upon whether a decision maker had a personal interest in the matter.

The Department is simply wrong in asserting, page 21, that the doctrine "does not allow for the inference of judicial bias based solely on the content of the Judge's ultimate findings." Moreover, the Appellants challenge the process used by the review judge to create a decision and to adjudicate issues that were not raised by the parties as to the Findings of Fact as being violative of the doctrine. It cannot be gainsaid that the Appellants failed to receive a fair and impartial hearing where the decision maker acted as an advocate.

#### IV. CONCLUSIONS OF LAW

##### A. The Findings of Fact Are Not Verities.

The Appellants have challenged all of the 223 Findings of Fact in the Review Decision, both before the Superior Court and before this Court. (CP 5). the initial decision but for nine were not at issue. Further, the Appellants have challenged the refusal to consider evidence and the deletion of findings that reflected evidence favorable to the Appellants' position and have provided multiple citations to the record in support thereof. Ms. Baida has challenged the findings.

The Department's discussion of substantial evidence on pages 22-23 of its brief overstates the rule. Individual Findings may be upheld if supported by substantial evidence, but substantial evidence for a finding does not mean that the revocation of the license must be upheld. The entire order must be supported by substantial evidence from the record as a whole.

RCW 34.05.570(3)(e) applies and lists as a basis for reversal:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.

**B. Department's citations.**

1. Overcapacity.

There is no issue that six residents lived at House II, at issue in this case, and another five lived at House I. The Adult Family Home rules from 2009 are contained in Exhibit D-13. The Department argues, pp. 24-27 of its brief, that if people in need of personal or special care were at House II, and the number was greater than six at any given time, the house would be overcapacity under the Department's regulations.

Again, the Department ignores in its argument the second element that the persons in need of special or personal care must be actually living at the adult family home, and that the regulations contain no language that says that persons in need of personal care or special care cannot visit at a home where there are six persons living and are residents of the adult family home under the license.

This fundamental error of law stems from no analysis of the Department's rules as to what capacity is governing. Simply stated, capacity means the number of "residents" in the adult family home, a term defined in WAC 388-76-10000. The term means:

"Resident" means any adult unrelated to the provider who lives in the adult family home and who is in need of care.

Emphasis added. The licensed capacity of an adult family home is specified in WAC 388-76-10030, "License Capacity," which provides:

1. The Department will only issue an adult family home license for more than one but not more than six residents.

[Emphasis added]. The regulation goes on to specify in subsection (2) that the Department in determining the home's capacity must consider the total number of people living in the home who require personal or special care and the ability of the home to safely evacuate all people living in the home. The plain language of the regulation states that only six residents may be at the home, and those must be people who are both living at the home and are in need of personal or special care.

WAC 388-76-10960(16) permits the Department to revoke an adult family home if the any of the persons listed in WAC 388-76-10950, including the licensee or an owner,

(16) Exceeded licensed capacity in the operation of an adult family home;....

Of course, the specific regulation relating to License Capacity is WAC 388-76-10030, which in turn depends on the definition of "resident" in WAC 388-76-10000. The Department's argument that license capacity is violated if persons in need of personal or special care happen to come over to an adult family home where six residents are present finds no basis in the regulation. There must be more than 6 residents living at the facility.

This was the sole basis for revocation among the 22 reasons for revocation listed in WAC 388-76-960 (“exceeded license capacity in the operation of an adult family home”). Because the revocation action is not based upon a correct interpretation of the law, as to the substance of the claim violation and as to the authority of the Department to issue a revocation order, the revocation order must be reversed.

**C. Other citations.**

Appellants have addressed the other citations in their opening brief. The Appellants dispute the claims of violation. There is no need to repeat the arguments here. Further, even if there were violations, they would not justify a revocation order, because none is listed as a basis for a decision of revocation in WAC 388-76-10960.

**V. CONCLUSION**

The Department’s decision to revoke the adult family home license of Olympic Health Services II, LLC must be reversed under RCW 34.05.570(3) because of: Improper application of burden of proof under standards of due process; violation of the appearance of fairness doctrine because the Review Judge acted as the Department’s advocate; failure to support the decision by substantial evidence; error of law as to the application of WAC 388-76-10960 and the standards governing licenses of adult family.

Respectfully submitted this 18<sup>th</sup> day of July, 2012.

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**DECLARATION OF SERVICE**

I declare that on the 18<sup>th</sup> day of July, 2012, I caused to be filed with the Court, as addressed below the following documents:

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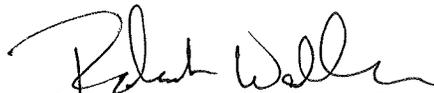
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Dated: July 18, 2012

Place: Seattle, WA



Robert Walker

## Appendix A

### **Nine Initial Decision Findings Challenged by the Department**

The Department's Petition for Review challenged 9 findings in the Initial Decision. AR 164-65. Three of the Initial Decision findings, FF 4.116, 4.27 and 4.221 related to Ms. Baida and her mother going to church one of the time or when the residents were at People First. Findings of Fact 4.16, 4.27 and 4.221 do not conflict with findings 4.111, 4.119 or 4.220. Next, AR 164, the Department claimed that FF 4.24 was contrary to what Ms. Baida told the complaint investigator during the complaint investigation, citing to FF 4.192 (AR 241). Actually, both Thilynn Smith and Ms. Baida testified that all of the residents had negotiated care plans before Ms. Corey came into the building for her investigation.

Next, the Department's petition for review, AR 164, challenged initial decision finding, FF 4.25, about when residents from House I were at People First. The finding correctly stated that all of the House I residents participated in activities through People First, an advocacy organization for people with disabilities. The finding did not state, as alleged, that all residents attended People First events when Ms. Baida and her mother were both at church. The Department challenged Finding 4.27, which found that House I residents have never been required to go to House II. That was consistent with the testimony of

Ms. Baida. The ALJ recognized that House I residents choose where they go and so found.

The Department challenges FF 4.28 in the initial order that the Department does not contend that there are any licensing issues regarding House I. It did so by reference to the testimony of Donna Andrews-Dennehy as to licensing issues in the past. It also conceded, AR 165, that any issues that Olympic Healthcare won were not at issue in the present case. The Department next challenged Finding of Fact 4.146 as being inconsistent with 4.195. Both findings are in fact consistent, because both Mr. Otterness (facility staff) and investigator Corey observe resident Don coughing.

The Department next challenged FF 4.149 as counter to the testimony of Candace Corey and FF 4.194. FF 194 summarizes the testimony of Ms. Corey related to her investigation and FF 4.149 reflects the testimony of Mr. Otterness as to what he saw when Ms. Baida rolled John away from the lunch table before he started eating to measure his blood glucose level.

Finally, the Department challenged FF 4.161 as conflicting with FF 4.202 and 4.205. Actually, there was no conflict, as the findings reflect the testimony of Gary Otterness and Candace Corey, respectively. The Department did not say what was the conflict.