

NO. 48828-1

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

JERRY PETERSON, as guardian for T.P., a minor,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWERING BRIEF

ROBERT W. FERGUSON
Attorney General

ELIZABETH A. BAKER, WSB No. 31364
OID No. 91023, Assistant Attorney General
Attorney for Defendant State of Washington
PO BOX 40126, Olympia, WA 98504-0126
(360) 586-6368, ElizabethB3@atg.wa.gov

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUES ON APPEAL.....	2
III.	RESTATEMENT OF THE CASE.....	3
	A. DSHS Investigates Allegations of Child Abuse and Neglect Pursuant to RCW 26.44 and has Immunity for Emergent Placement Investigations Unless Grossly Negligent.....	3
	B. DSHS Investigated Three Referrals Alleging Sexual Abuse of T.P., Resulting in Law Enforcement Taking Her into Protective Custody and DSHS Placing Her in Foster Care.....	4
	1. Ms. O’Keefe’s July 11, 2003 Referral.....	4
	2. Ms. Seeds’ July 28, 2003 Referral.....	5
	3. Ms. Calapp’s July 29, 2003 Referral.....	5
	C. DSHS Filed a Dependency Petition on T.P.’s Behalf and the Court Ordered T.P. into Shelter Care.....	8
	D. T.P.’s Parents Stipulated to Her Dependency, Which the Court Did Not Dismiss Until April 2006.....	10
	E. DSHS Supported Placing T.P. With Her Aunt, But the Court Denied That Request.....	11
	F. While T.P. Was in Foster Care, DSHS Updated the Court as Information Became Available.....	11
	G. While in Foster Care, T.P. Had Ongoing Contact With DSHS, Her parents, School Staff, and a Counselor.....	12

H.	The Halls Were Licensed Foster Parents and No Allegation Against Them Warranted Action Against Their License	13
I.	Procedural history	15
IV.	ARGUMENT	16
A.	Standard of Review.....	16
B.	DSHS Has Statutory Immunity Under RCW 4.24.595(1) for Placing T.P. in Foster Care During its Emergent Placement Investigation.....	16
1.	The DSHS Investigation of Alleged Abuse of T.P., Including Placing Her in Foster Care, Was an Emergent Placement Investigation as Defined by RCW 4.24.595(1)	17
2.	Because DSHS Did not Act with Gross Negligence During its July 2003 Emergent Placement Investigation, it has Statutory Immunity for Placing T.P. in Foster Care During that Investigation.....	19
C.	T.P.'s Negligent Investigation Claim was Properly Dismissed as a Matter of Law Because She Failed to Show that DSHS Conducted a Biased or Incomplete Investigation Resulting in a Harmful Placement	25
1.	On Appeal T.P. Fails to Argue it was Error to Dismiss her Negligent Investigation Claim on the Merits-the Court Should Affirm Dismissal on that Basis Alone.....	26
2.	Negligent Investigation of Child Abuse is a Narrow Statutory Cause of Action Requiring a Biased or Incomplete Investigation Resulting in a Harmful Placement	26
3.	DSHS' Investigation of the July 2003 Referrals Was Not Biased or Incomplete.....	28

4.	DSHS' Investigation of the July 2003 Referrals Did Not Result in a Harmful Placement.....	29
a.	T.P. Does Not Claim That Her Removal From Her Father Was Itself a Harmful Placement	29
b.	T.P. Cannot Show That Her Placement in Foster Care Was a Harmful Placement Resulting From a Negligent Investigation	30
c.	T.P. Cannot Show That Her Placement With the Halls Was a Harmful Placement Resulting From a Negligent Investigation	31
(1)	In July 2003, DSHS Had no Reason Not to Place T.P. With the Halls	31
(2)	Before December 10, 2003, DSHS Had no Reason to Remove T.P. From the Halls	31
5.	DSHS' Investigation of the Abuse Referrals Was Not the Factual or Legal Cause of T.P.'s Claimed Injuries	33
a.	T.P. Cannot Show That DSHS' Investigation Was the Cause in Fact of Her Claimed Injuries.....	34
b.	T.P. Fails to Show That DSHS' Investigation Was the Legal Cause of Her Claimed Injuries.....	36
D.	T.P. Fails to Identify a Common Law Duty Owed to Her by DSHS on the Facts of This Case.....	37
1.	The Cases on Which T.P. Relies do not Support the Existence of a Common Law Owed Duty to Her by DSHS	38
2.	T.P. Fails to Show That Her Alleged Abuse by the Halls Was Foreseeable to DSHS	44

3.	T.P. Fails to Show That the Facts Here Satisfy the Special Relationship Exception to the Public Duty Doctrine	45
E.	Because T.P. Fails to Show That DSHS Owed Her a Common Law Duty of Protection Based on the Facts of This Case, T.P. Cannot Show Breach.....	51
V.	CONCLUSION	51

TABLE OF AUTHORITIES

Cases

<i>Albertson v. State</i> , 191 Wn. App. 284, 361 P.3d 808 (2015).....	27
<i>Bader v. State</i> , 43 Wn. App. 223, 716 P.2d 925 (1986).....	21, 22, 23
<i>Blackwell v. DSHS</i> , 131 Wn. App. 372, 127 P.3d 752 (2006).....	27
<i>Bordon v. Dep't of Corr.</i> , 122 Wn. App. 227, 95 P.3d 764 (2004).....	34
<i>Braam v. State</i> , 150 Wn.2d 689, 81 P.3d 851 (2003).....	27, 43, 44
<i>Caulfield v. Kitsap Cty</i> , 108 Wn. App. 242, 29 P.3d 738 (2001).....	49, 50, 51
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986).....	16
<i>Curran v. City of Marysville</i> , 53 Wn. App. 358, 766 P.2d 1141 (1989).....	42, 43
<i>Donohoe v. State</i> , 135 Wn. App. 824, 142 P.3d 654 (2006).....	46, 47, 48
<i>Honcoop v. State</i> , 111 Wn.2d 182, 759 P.2d 1188 (1988).....	46, 48
<i>Hutchins v. 1001 Fourth Ave. Assocs.</i> , 116 Wn.2d 217, 802 P.2d 1360 (1991).....	49
<i>Jackson v. Quality Loan Serv. Corp.</i> , 186 Wn. App. 838, 347 P.3d 487 (2015), <i>review denied sub nom.</i> , 184 Wn.2d 1011, 360 P.3d 817 (2015).....	26, 30

<i>M.H. v. Corp. of Catholic Archbishop of Seattle,</i> 162 Wn. App. 183, 252 P. 3d 914 (2011).....	41, 42
<i>M.W. v. Dep't of Soc. & Health Servs.,</i> 149 Wn.2d 589, 70 P.3d 954 (2003).....	16, 27, 28, 34, 38, 39
<i>McBride v. Walla Walla Cnty.,</i> 95 Wn. App. 33, 975 P.2d 1029 (1999).....	16
<i>Miller v. Likins,</i> 109 Wn. App. 140, 34 P.3d 835 (2001).....	34
<i>Minahan v. W. Washington Fair Ass'n,</i> 117 Wn. App. 881, 73 P.3d 1019 (2003).....	34, 37
<i>Mudarri v. State,</i> 147 Wn. App. 590, 196 P.3d 153 (2009).....	16
<i>Nist v. Tudor,</i> 67 Wn.2d 322, 407 P.2d 798 (1965).....	20
<i>Petcu v. State,</i> 121 Wn. App. 36, 86 P.3d 1234 (2004).....	28, 34
<i>Petersen v. State,</i> 100 Wn.2d 421, 671 P.2d 230 (1983).....	21, 22, 23
<i>Roberson v. Perez,</i> 156 Wn.2d, 33, 123 P.3d 844 (2005).....	27
<i>Schooley v. Pinch's Deli Market, Inc.,</i> 134 Wn.2d 468, 951 P.2d 749 (1998).....	36
<i>Sheikh v. Choe,</i> 156 Wn.2d 441, 128 P.3d 574 (2006).....	27, 51
<i>Taggart v. State,</i> 118 Wn.2d 195, 822 P.2d 243 (1992).....	47
<i>Taylor v. Bell,</i> 185 Wn. App. 270, 340 P.3d 951 (2014).....	34

<i>Taylor v. Stevens County</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	46
<i>Terrell C. v. State</i> , 120 Wn. App. 20, 84 P.3d 899 (2004).....	50
<i>Tyner v. State</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	23, 27
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	40, 41, 45
<i>Wilbert v. Metro. Park Dist.</i> , 90 Wn. App. 304, 950 P.2d 522 (1998).....	37
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	16

Statutes

Laws of 1987, Ch. 450 § 7.....	3
Laws of 2001, Ch. 192 § 1, ¶ (5)	33
RCW 4.24.595	2, 23
RCW 4.24.595(1).....	ii, 1, 3, 16, 17, 18, 19, 23, 25, 30, 51
RCW 4.92.090	38
RCW 13.34.050	3
RCW 13.34.060(1).....	3, 8, 30, 43
RCW 13.34.060(2).....	30, 43
RCW 13.34.065	2, 3, 17, 18
RCW 13.34.065(1)(a)	18
RCW 26.44	i, 3, 17, 20

RCW 26.44.050	3, 7, 27, 28, 31, 33, 37, 39
RCW 74.13.031	32, 33
RCW 74.13.031(5).....	33
RCW 74.13.031(6).....	32
RCW 74.13.250	27
RCW 74.13.280	27
RCW 74.14A.050.....	27

Rules

CR 56(e).....	16
RAP 10.3(a)(6).....	26

Other Authorities

<i>Restatement (Second) of Torts</i> § 315	47
<i>Restatement (Second) of Torts</i> § 315 (1965).....	47

APPENDIX

RCW 4.24.595	
Laws of 2001, Ch. 192	

I. INTRODUCTION

Between July 11 and 29, 2003, the Department of Social and Health Services (DSHS) received three referrals alleging sexual abuse of T.P. by her father, Mr. Petersen.¹ On July 29, 2003, law enforcement took T.P. into protective custody and transferred custody to DSHS, which placed T.P. in foster care. On July 31, 2003, DSHS filed a dependency petition on T.P.'s behalf. The next day the court ordered T.P. into shelter care. T.P. remained in foster care until her return to Mr. Petersen in April 2004.

Mr. Petersen sued the State of Washington (State) on T.P.'s behalf, alleging negligent investigation and common law negligence.² CP 10-11. These claims were properly dismissed on summary judgment on multiple grounds. With respect to negligent investigation, first, under RCW 4.24.595(1), DSHS has statutory immunity for its acts or omissions during its emergent placement investigation of T.P.'s alleged abuse, including placing her in foster care. Second, T.P. cannot show that the investigation of the abuse referrals was biased or incomplete. Third, T.P. cannot show that her placement with the Halls resulted from a negligent investigation.

¹ Appellants refer to themselves as T.P. For the convenience of the Court, the State does the same. No disrespect is intended. Mr. Petersen's name was misspelled in the original caption in the superior court. The state has maintained that caption and refers to Mr. Petersen by the correct spelling of his name throughout this brief.

² T.P. also claimed general negligence, negligent infliction of emotional distress and respondeat superior, but as she did not appeal dismissal of those claims, they are not discussed further.

Fourth, the manner in which T.P. alleges the investigation was negligent was not and could not be the proximate cause of her alleged damages.

T.P.'s common law negligence claim also fails for multiple reasons, including sovereign immunity and the public duty doctrine. This Court should affirm dismissal in favor of the State.

II. RESTATEMENT OF THE ISSUES ON APPEAL

1. RCW 4.24.595 provides immunity to DSHS for emergent placement investigations conducted prior to a shelter care hearing under RCW 13.34.065. Should T.P.'s negligent investigation claim against the State be dismissed because DSHS is entitled to immunity under RCW 4.24.595 for its investigation of the three July 2003 referrals alleging sexual abuse of T.P. and for placing T.P. in foster care, all prior to a shelter care hearing?

2. Should T.P.'s negligent investigation claim against the State be dismissed because as a matter of law, T.P. cannot show that the State's investigation of the July 2003 referrals was biased or incomplete or that the manner in which the investigation was allegedly negligent resulted in a harmful placement?

3. Should T.P.'s negligent investigation claim against the State be dismissed because as a matter of law, T.P. cannot show that the State's investigation of the abuse referrals caused her claimed injuries?

4. Should T.P.'s common law negligence claim against the State be dismissed because as a matter of law it is not a cognizable claim?

III. RESTATEMENT OF THE CASE

A. **DSHS Investigates Allegations of Child Abuse and Neglect Pursuant to RCW 26.44 and has Immunity for Emergent Placement Investigations Unless Grossly Negligent**

Upon receiving a report alleging possible child abuse or neglect, DSHS and law enforcement agencies must investigate and where necessary refer the report to the court. RCW 26.44.050.³ Law enforcement may take a child into custody if it has probable cause to believe the child is abused or neglected and would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. RCW 26.44.050. When law enforcement takes a child into custody, it then transfers the child to DSHS for placement pending a shelter care hearing. RCW 13.34.060(1).

The Legislature granted DSHS statutory immunity for its acts and omissions during emergent placement investigations of child abuse and neglect under chapter 26.44 RCW, unless the act or omission constitutes gross negligence. RCW 4.24.595(1). Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065. RCW 4.24.595(1).

³ The State refers to the current version of RCW 26.44.050 because during all times relevant to this case, the pertinent language of the statute has remained substantively unchanged. *See* Laws of 1987, c. 450, § 7.

B. DSHS Investigated Three Referrals Alleging Sexual Abuse of T.P., Resulting in Law Enforcement Taking Her into Protective Custody and DSHS Placing Her in Foster Care

T.P. was born on August 14, 1998, to Jerry Petersen and Tina O'Keefe, who never married. CP 47, ¶ 2. In July 2003, T.P. lived with Mr. Petersen, partially because Ms. O'Keefe was in jail. CP 174. Between July 11 and 29, 2003, DSHS received and accepted for investigation three referrals, made on different days, by different sources, alleging sexual abuse of T.P. by Mr. Petersen. CP 62-65, 502-3.

1. Ms. O'Keefe's July 11, 2003 Referral

On July 11, 2003, Ms. O'Keefe called DSHS. She said that Mr. Petersen's new girlfriend Angela ("last name not known") told her that T.P. disclosed that while in a back bedroom of his home, Mr. Petersen rubbed lotion on T.P.'s vaginal area; that T.P. said her bottom was sore; and that Mr. Petersen hit T.P. CP 495-97. Ms. O'Keefe also reported that Mr. Petersen used drugs and had a history of domestic violence. CP 496. This referral was assigned a risk tag of 3/Moderate and an emergent response time. CP 497. The response time was later reduced to "non-emergent" but the investigation remained "high standard." CP 497. Child Protective Services (CPS) investigator Evelyn Larsen was assigned to

investigate.⁴ CP 70. On July 24, 2003, Ms. Larsen tried to contact T.P. at Mr. Petersen's home and left her card. CP 534.

2. Ms. Seeds' July 28, 2003 Referral

While investigating Ms. O'Keefe's referral, DSHS received a second referral alleging abuse of T.P. by Mr. Petersen. CP 502-04. On July 28, 2003, Pixie Seeds told DSHS she had been monitoring visits between T.P. and Ms. O'Keefe and believed Mr. Petersen had assaulted T.P. based on the child's "hysterical behavior when she is told she must return to" him. CP 503. Ms. Seeds also said that Mr. Petersen's current girlfriend told Ms. O'Keefe that Mr. Petersen had sexually abused T.P. CP 503. Ms. Seeds said Mr. Petersen was a "very violent man." CP 503.

3. Ms. Calapp's July 29, 2003 Referral

The next morning, July 29, 2003, at approximately 9:00 a.m., Mr. Petersen called Ms. Larsen and asked why she was trying to reach him. CP 509. Ms. Larsen said that DSHS received a referral concerning T.P. and asked to speak with T.P. before discussing the referral with him. CP 509. Mr. Petersen said he suspected Ms. O'Keefe made the referral and called it "malicious." CP 510. Mr. Petersen said that T.P. attended Karousel Daycare but was not there that day. CP 510. He said he was in

⁴ Ms. Larsen is not a named Defendant in this case.

Kent and offered to bring T.P. to Ms. Larsen's office later that day. CP 509-10. Mr. Petersen also said that he had a restraining order against Ms. O'Keefe, that she had left him threatening messages, and that she had "threatened to turn him into CPS" and to kidnap T.P. CP 510.

At approximately 9:24 a.m., Angela Calapp called Ms. Larsen and said that T.P. told her that Mr. Petersen put lotion on T.P.'s "private area," made T.P. rub lotion on his "private area," laid on top of T.P., and "sticks his private in her and it hurts and makes her sad." CP 65. Ms. Calapp said that T.P. also reported seeing "white stuff" come out of Mr. Petersen and go "all over the bed." CP 65. Ms. Calapp said that she relayed T.P.'s disclosure of "the lotion incident" to Ms. O'Keefe. CP 65. Ms. Calapp said that she and Ms. O'Keefe were not friends and had met for the first time the day before. CP 65. Ms. Calapp also said that T.P. previously attended Mother Goose Daycare and that about a year ago, T.P. told the daycare owner's sister that Mr. Petersen was rubbing lotion on T.P.'s private area but that this was not reported to DSHS. CP 65.

About an hour later, Ms. Larsen faxed the Snohomish County Sheriff's Office her notes from her call with Ms. Calapp and Ms. O'Keefe's July 11, 2003 referral. CP 65, 545-49. Detective Link was assigned to the case. CP 665. Ms. Larsen spoke with Det. Link, relayed

her conversations with Ms. Calapp and Mr. Petersen, and said she had confirmed that T.P. was at Karousel daycare that day. CP 666.

Only law enforcement can take a child into protective custody without a court order. RCW 26.44.050, CP 48. Around 1:00 p.m. that day, Det. Link met Ms. Larsen at Karousel Daycare, where Det. Link took T.P. into protective custody and transferred custody to DSHS. CP 67, 512, 666. Det. Link's report states: "I made that decision based on the disclosure that had been made to Angela Calapp and the possibility that an abusive situation existed."⁵ CP 666. That day, Det. Link spoke with the Karousel Daycare owner, who said that T.P. had not disclosed anything sexually inappropriate to her. CP 666-67. Det. Link called Mr. Petersen to advise him that T.P. had been taken into protective custody. CP 667.

That same day, at Det. Link's request, Ms. Larsen transported T.P. to the Sherriff's Office for a forensic interview. CP 667. T.P. made no disclosure of sexual abuse but said that Ms. O'Keefe was physically abusive the last time they were together. CP 667. Ms. Larsen was not present during that interview. CP 512, 659. The results of that interview were likely disclosed to DSHS on a later date. CP 653. Following that

⁵ T.P. concedes that she was taken into protective custody by law enforcement. Opening Br. of Appellant T.P. (T.P. Br.) at 7. Det. Link's report refutes T.P.'s claim that she was taken into protective custody "on the decision of DSHS investigator Evelyn Larson." T.P. Br. at 31.

interview, Ms. Larsen took T.P. to the hospital for a physical examination and placed her in the foster home of Dan and Doreen Hall. CP 507, 512.

The next day, a hospital nurse called Det. Link and said that the results of T.P.'s physical exam were "non-specific" for sexual abuse and that T.P. disclosed no abuse during the exam. CP 667. The record does not indicate when that information was shared with DSHS but shows that as of August 14, 2003, Det. Link had not received the hospital's report. CP 667.

On August 1, 2003, Det. Link interviewed the owner of Mother Goose Daycare, who said she had heard that T.P. told an unknown boy at the daycare that Mr. Petersen had rubbed lotion on T.P.'s private area, but that T.P. never disclosed anything sexual to her and she did not believe T.P. had made any disclosures to her sister, who also worked there. CP 668. Det. Link asked the owner to have her sister call him, but the sister did not call. CP 668. On August 14, 2003, Det. Link interviewed Ms. Calapp, who repeated what she told Ms. Larsen on July 29, 2003. CP 668.

C. DSHS Filed a Dependency Petition on T.P.'s Behalf and the Court Ordered T.P. into Shelter Care

When law enforcement takes a child into protective custody and transfers custody to the State, DSHS has just 72 hours to file a dependency petition if out-of-home placement is sought. RCW 13.34.060(1). On July 29, 2003, Det. Link took T.P. into protective custody and transferred

custody to DSHS. CP 67. Two days later, DSHS filed a dependency petition on T.P.'s behalf. CP 532-38.

The petition included all information then known to DSHS. CP 654. It alleged that T.P. had no parent capable of adequately caring for her and was "in circumstances which constitute a danger of substantial damage to the child's psychological or physical development." CP 533. The allegations quoted the referrals from Ms. O'Keefe, Ms. Seeds, and Ms. Calapp; and described multiple allegations of verbal, physical, and sexual abuse of T.P. by her father and claims that her father had been violent toward Ms. O'Keefe and others. CP 532-38. The petition also detailed Ms. O'Keefe's and Mr. Petersen's CPS history; Ms. O'Keefe's known criminal history, alleged drug use, and alleged threats to report Mr. Petersen to CPS and to kidnap T.P.; an ongoing, contentious custody battle between Ms. O'Keefe and Mr. Petersen; and Mr. Petersen's restraining order against Ms. O'Keefe and his opinion that her referral was "malicious." CP 532-38. The petition also described the services previously offered to T.P.'s parents, including parenting classes and counseling for drugs and alcohol, anger management, and domestic violence. CP 535. The petition also stated that DSHS had requested criminal background checks on Ms. O'Keefe and Mr. Petersen. CP 537.

On August 1, 2003, the dependency court held a shelter care hearing, found that DSHS had made reasonable efforts to prevent or eliminate the need for removal of T.P. from her home, and held that returning T.P. to her home would seriously endanger her health, safety, and welfare. CP 77-83. On August 4, 2003, after a contested hearing, the court ordered T.P. to remain in out-of-home care.⁶ CP 85-91.

D. T.P.'s Parents Stipulated to Her Dependency, Which the Court Did Not Dismiss Until April 2006

On September 16, 2003, T.P.'s parents stipulated to dependency and the court ordered her to remain in out-of-home care. CP 117-24. On October 15, 2003, DSHS determined that the allegations against Mr. Petersen were "inconclusive." CP 588. However, the court did not dismiss the dependency. CP 165-68. On April 15, 2004, the court ordered T.P. placed in an in-home dependency with Mr. Petersen.⁷ CP 54 ¶ 30, 243-45. In April 2006, the court dismissed the dependency. CP 417-21.

⁶ T.P. claims that Ms. Larsen used "unsubstantiated 'evidence' of abuse to keep T.P. in foster care and away from her father." T.P. Br. at 11. The record clearly shows that the court ordered T.P. into shelter care and continued out-of-home care, even after DSHS advised the court that the allegations against Mr. Petersen appeared to be false and the court found that Mr. Petersen did not sexually abuse T.P. CP 77-91, 96-97, 117-24, 165-68, 191-93, 200-201, 211-212, 234-41.

⁷ T.P. implies that after she was removed from Mr. Petersen, DSHS should not have considered placing her with Ms. O'Keefe. T.P. Br. at 7-8, 22. However, the record shows that T.P. was never returned to Ms. O'Keefe. CP 243-45.

E. DSHS Supported Placing T.P. With Her Aunt, But the Court Denied That Request

After placing T.P. in foster care, DSHS approved Mr. Petersen's sister, Vicki Lopez, to supervise his visits with T.P. CP 673. On November 5, 2003, DSHS interviewed Ms. Lopez as a possible placement for T.P. CP 674. The record does not state when placement with her was first suggested. On December 2, 2003, Mr. Petersen asked the dependency court to place T.P. with his sister. CP 178-82. DSHS supported that request, but the court denied it. CP 185-86, CP 191-93.

F. While T.P. Was in Foster Care, DSHS Updated the Court as Information Became Available

While T.P. was in foster care, DSHS provided updates to the court. CP 99-115, 152-53, 184-86, 200-01, 214-32, 246-49. In September 2003, DSHS told the court that the results of T.P.'s physical examination were "non-specific" and that Ms. Hall reported T.P. exhibiting sexualized behaviors (including "amorously kissing" and lying on top of Ms. Hall's four year old son while T.P.'s pajamas were unzipped) and smearing feces on her pillow. CP 112. DSHS told the court that Ms. Hall discussed these behaviors with T.P.'s counselor, who said these were typical signs of sexual abuse. CP 112. DSHS also advised the court that T.P. was in kindergarten and continued to have visitation with each parent. CP 112.

On February 9, 2004, DSHS advised the court there was no physical evidence that T.P. had been abused, T.P. had not disclosed abuse to law enforcement or to her counselor, and T.P. consistently maintained her father had not abused her. CP 200. DSHS also told the court that T.P.'s counselor "felt the child had no apparent issues that needed to be addressed in therapy" and recommended suspending therapy. CP 200. DSHS also told the court that Mr. Petersen's sexual deviancy evaluation concluded "more likely than not that Mr. Petersen did not sexually molest his daughter." CP 201.

On February 20, 2004, DSHS updated the court that T.P. had completed counseling and made no disclosures of abuse; moved to a new foster home where she was doing well; and changed schools, with no academic or behavior problems. CP 227. DSHS also told the court that T.P.'s counselor felt she had been misquoted and that the behaviors Ms. Hall relayed to her did not necessarily indicate sexual abuse. CP 227.

G. While in Foster Care, T.P. Had Ongoing Contact With DSHS, Her parents, School Staff, and a Counselor

T.P. lived with the Halls July 29 - December 10, 2003.⁸ CP 49 ¶ 8, 931. Ms. Larsen had face-to-face contact with T.P. on July 29 and October

⁸ T.P. was in the Hayes foster home from December 10, 2003 to April 15, 2004, then returned to her father. CP 931, 243-45. T.P. makes no claim related to her placement in the Hayes foster home. CP 5-11.

24, 2003. CP 512, 1277. Social worker Carla Pirkle had face-to-face contact with T.P. on August 6, 2003, eight days after T.P. was placed with the Halls. CP 514. In October 2003, T.P.'s case was transferred to Cyndi Black, who had face-to-face contact with T.P. on November 30, 2003 and February 10, 2004. CP 752, 1208. DSHS home support specialist Dian McCone supervised T.P.'s visits with her parents and had face-to-face contact with T.P. on August 6, 11, and 20; September 3; October 15, 22 and 29; November 12 and 26; and December 5 and 10. CP 1174, 1183-86, 1190-93, 1195, 1206, 1213, 1217-24. While in foster care, T.P. also had ongoing contact with her parents (CP 371-91, 1217-24), school staff (CP 384-85, 970), and a counselor (CP 1058, 1095).

H. The Halls Were Licensed Foster Parents and No Allegation Against Them Warranted Action Against Their License

DSHS licensed the Halls as foster parents May 8, 2001. CP 1032.

Prior to T.P.'s placement with them, DSHS was told the following about the Halls, none of which triggered action against their foster license:

- **August 30, 2002:** Ms. Hall called DSHS and reported seeing her 5-year-old foster daughter lying on the bed with her legs spread open while her 3-year-old son stood looking at the ceiling fan; the boy said "we're going to get on top of each other;" and Ms. Hall told the girl her behavior was "not okay." CP 1281. DSHS considered the referral and concluded that Ms. Hall "intervened appropriately by separating [the] children and increasing supervision" and properly reported the event to DSHS and the social worker. CP 1282.

- **September 5, 2002:** DSHS interviewed the Halls preceding their adoption of two foster children. The Halls noted that their son, G.H., was entering puberty and “has had some struggles” relating to his parents fostering three children and adopting one, but did not elaborate or allege any abuse. CP 1051.
- **February 13, 2003:** The. Hall told DSHS they had adopted another foster child and that when current placement of the only girl in the home ended, they would prefer to accept boys only. CP 1024.
- **March 14, 2003:** DSHS was told that a Hall foster child cried every night before going to bed, that Ms. Hall yelled in the girl’s face and threatened to put a blanket over the girl’s face if she did not stop, and that G.H. yelled at the girl to leave the home. CP 1037. DSHS interviewed Ms. Hall, who denied the allegation and said it was “payback” for her asking that the girl be moved. CP 1035. DSHS found the referral “inconclusive” for abuse or neglect but moved the child to a new foster home. CP 1035. Ms. Hall agreed to attend training concerning this issue. CP 1035.

While T.P. was placed at the Halls, the following occurred:

- **September 3, 2003:** During a supervised visit, T.P. told DSHS home support specialist McCone that the Hall’s dog bit her. CP 1185. Ms. McCone saw a “slightly puffy” “small puncture” on T.P.’s arm. CP 1185. Ms. McCone told Mr. Petersen that Ms. Hall had reported the bite to her and said that the dog bit T.P. after she pulled its hair. CP 1185. Ms. Hall said they told T.P. she could not go near the dog until she learned not to pull its hair. CP 1185. Mr. Petersen asked T.P. if she pulled the dog’s hair and T.P. said yes. CP 1185. T.P. and Mr. Petersen continued to play until the visit ended. CP 1185. The Halls’ foster care licenser also discussed the bite with Ms. Larsen. CP 1033. The record contains no evidence of the dog biting other children.
- **November 18, 2003:** Ms. Hall told DSHS social worker Ms. Black that T.P. and G.H. had a “strained relationship” and asked that T.P. be moved, but did not elaborate. CP 1028.
- **December 10, 2003:** Ms. Black relayed to DSHS a third-hand allegation that G.H. might have inappropriately touched T.P. CP 964-67. DSHS accepted the referral for investigation, assigned it a 72-hour

response time, and immediately removed T.P. from the home. CP 964, 970. Two days later, DSHS interviewed T.P., who denied any sexual abuse but said that G.H. hit, kicked, and pinched her. CP 971-73. T.P. also said that she wanted to stay with the Halls, she was not afraid in their home, and Ms. Hall “helps” her. CP 971-73. DSHS also interviewed G.H., who denied hitting T.P. and said she “lies and makes up stories.” CP 976. DSHS also interviewed Ms. Hall, who denied any sexual touching but said that the children “don’t like each other” and that G.H. “could have hit” T.P. CP 974-75. T.P. was never returned to the Hall foster home. CP 53 ¶ 23. Although finding that this allegation did not rise to the level of child abuse or neglect, DSHS issued a “stop placement” on the Hall foster home. CP 977.

The record shows that before the December 10, 2003 referral, DSHS had no reason for concern about T.P.’s placement with the Halls. When DSHS received that referral, it immediately removed T.P. from the Halls’ home and did not return her to it.⁹ CP 964-67.

I. Procedural history

T.P. filed suit in 2014. CP 8. At her 2015 deposition, T.P. alleged being denied food once by Ms. Hall and kicked down the stairs by Mr. Hall. T.P. Br. at 14. At his deposition, Mr. Petersen said that T.P. did not disclose this alleged abuse to him until after she left the Halls. CP 796 p. 47-49. T.P. abandoned some claims and the trial court dismissed the rest on summary judgment. CP 939-41, 1119-20. This appeal followed.

⁹ In March 2004, three months after T.P. left the Hall home, DSHS received a referral alleging that a foster mother, “Miss Susan,” had locked a child in a closet. CP 1099-1101, 1241-44. DSHS investigated and determined the allegation unfounded as to Doreen and Dan Hall. CP 1101. The Halls, who had adopted two foster sons and had no current foster children, allowed their foster home license to expire. CP 1100.

IV. ARGUMENT

A. Standard of Review

On review of an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). “An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.” *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999). But ““a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”” *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986)). The appellate court may affirm the trial court’s ruling on any alternative ground that the record adequately supports. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2009).

B. DSHS Has Statutory Immunity Under RCW 4.24.595(1) for Placing T.P. in Foster Care During its Emergent Placement Investigation

The Legislature has provided that DSHS is “not liable in tort for

any of [its] acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW . . . , unless the act or omission constitutes gross negligence.” RCW 4.24.595(1).¹⁰ This statutory immunity defeats T.P.’s claims against DSHS related to its investigation of the July 2003 abuse allegations resulting in T.P.’s placement in foster care because that investigation was an emergent placement investigation during which DSHS was not grossly negligent.

1. The DSHS Investigation of Alleged Abuse of T.P., Including Placing Her in Foster Care, Was an Emergent Placement Investigation as Defined by RCW 4.24.595(1)

RCW 4.24.595(1) defines emergent placement investigations as “those conducted prior to a shelter care hearing under RCW 13.34.065.” RCW 4.24.595(1). Prior to the August 1, 2003, shelter care hearing, DSHS received and investigated three referrals alleging that Mr. Petersen had sexually abused T.P. During that investigation, DSHS:

- spoke with Ms. O’Keefe, Ms. Seeds, Ms. Calapp, and Mr. Petersen;
- reviewed Ms. O’Keefe’s and Mr. Petersen’s CPS and known criminal history;
- coordinated with law enforcement;
- received a transfer of custody of T.P. from law enforcement;
- took T.P. to the Sheriff’s Office for a forensic interview;
- took T.P. to a hospital for a physical examination;
- **placed T.P. into foster care;**
- requested criminal history on Ms. O’Keefe and Mr. Petersen; and

¹⁰ See statutory appendix.

- filed a dependency petition on T.P.'s behalf, which quoted the referrals; detailed Ms. O'Keefe's CPS history and known criminal history, alleged drug use, and alleged threats to report Mr. Petersen to CPS, and to kidnap T.P.; described an ongoing, contentious custody battle between Ms. O'Keefe and Mr. Petersen; and stated Mr. Petersen's opinion that Ms. O'Keefe's referral was "malicious."

CP 62-63, 65, 502-04, 509-12, 532-38. As the trial court correctly found, because this investigation and T.P.'s placement in foster care occurred prior to the shelter care hearing, these actions by DSHS were part of an emergent placement investigation for which DSHS has immunity under RCW 4.24.595(1). CP 1260, ln. 11-20.

T.P. claims DSHS is not entitled to RCW 4.24.595(1) immunity because it did not complete its investigation of her alleged abuse "during the 72 hours between when a child is removed from a home and when a shelter care hearing is held." T.P. Br. at 18 (citing RCW 13.34.065). T.P.'s reliance on RCW 13.34.065 is unavailing. That statute does not define emergent placement investigation, it simply provides that "[w]hen a child is taken into custody, the court shall hold a shelter care hearing within seventy-two hours." RCW 13.34.065(1)(a). The Legislature expressly defined emergent placement investigations for purposes of RCW 4.24.595(1) as "conducted prior to a shelter care hearing under RCW 13.34.065." The law does not require emergent placement investigations to be conducted within 72 hours of a child being removed from her home.

Equally flawed is T.P.'s claim that because DSHS did not label Ms. O'Keefe's *referral* emergent, the *investigation* of the three July 2003 referrals cannot be an emergent placement investigation. T.P. Br. at 17. T.P. cites no authority for her contention that DSHS must label a *referral* "emergent" before it can receive RCW 4.24.595(1) immunity for the emergent placement *investigation* of that referral. Likewise unsupported is her contention that the decision to change Ms. O'Keefe's *referral* from emergent to non-emergent is an "admission" by DSHS that its *investigation* of the three July 2003 referrals was not an emergent placement investigation as defined by RCW 4.24.595(1). Last, even if DSHS did not label Ms. O'Keefe's referral emergent, its response to Ms. Calapp's referral clearly was emergent. See § III(B)(3) above.

Because DSHS' investigation of the abuse referrals regarding T.P. meets the definition of an emergent placement investigation under RCW 4.24.595(1), the trial court's ruling that DSHS had immunity for its acts and omissions during that investigation should be affirmed.

2. Because DSHS Did not Act with Gross Negligence During its July 2003 Emergent Placement Investigation, it has Statutory Immunity for Placing T.P. in Foster Care During that Investigation

RCW 4.24.595(1) provides that DSHS has statutory immunity for its acts or omissions in emergent placement investigations of child abuse

or neglect under chapter 26.44 RCW “unless the act or omission constitutes gross negligence.” In Washington, “gross negligence means the failure to exercise slight care.” *Nist v. Tudor*, 67 Wn.2d 322, 324, 407 P.2d 798 (1965). It requires “negligence substantially and appreciably greater than ordinary negligence.” *Id.* at 324. There can be no gross negligence without “substantial evidence of serious negligence.” *Id.* at 332.

T.P. identifies several alleged omissions by DSHS she contends constituted gross negligence, but the factual record shows that, as to each, no reasonable person could conclude DSHS’ conduct was negligent, much less grossly negligent. For example, T.P. claims that the emergent placement investigation was grossly negligent because DSHS “made no effort to look into” a restraining order between her parents or Ms. O’Keefe’s alleged threats. T.P. Br. at 20. But the record shows that DSHS first learned of the restraining order and alleged threats on July 29, 2003, mere hours before law enforcement took T.P. into protective custody. CP 509-12. And, both the restraining order and the alleged threats were mentioned in the dependency petition. CP 532-38; *see supra* III(C).

T.P. further claims that DSHS was grossly negligent in failing to investigate “Ms. O’Keefe’s history of animosity toward Mr. Petersen” or to “read DSHS’ prior entries.” T.P. Br. at 20. But the record shows that

DSHS spoke with Ms. O’Keefe, Ms. Seeds, Ms. Calapp, and Mr. Petersen; and reviewed Ms. O’Keefe’s and Mr. Petersen’s CPS history and known criminal history, all of which referenced animosity between Ms. O’Keefe and Mr. Petersen, and were discussed in the petition. CP 532-38.

T.P. also claims DSHS was grossly negligent because between July 11 and 29, it should have “uncovered an obviously concocted story” between Ms. O’Keefe and Ms. Calapp. T.P. B. at 20. But the record shows that in those eighteen days, DSHS received three referrals alleging sexual abuse of T.P. by her father, from different callers, on different days, and that Ms. Calapp said she and Ms. O’Keefe were not friends. CP 65. T.P. fails to show that between the first referral and her placement in foster care, DSHS had reason to believe the abuse allegations were false.

T.P. also argues that “[f]ailing to consider the obvious can constitute gross negligence,” relying on *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) and *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986). T.P. Br. at 19. Those cases stand for the proposition that gross negligence may be found when one fails to act in the face of actual knowledge of affirmative facts evidencing a foreseeable risk of harm to another. In *Petersen*, a hospital psychiatrist released a patient despite knowing the patient had “an extensive history of drug abuse, including the

frequent use of ‘angel dust’ during the previous year;” was “gravely disabled as a result of his drug abuse;” “was likely to continue having delusions” especially if he quit taking medication the patient was reluctant to take; and was apprehended driving in a reckless fashion on hospital grounds the night before. *Petersen*, 100 Wn.2d at 424, 428. The court found that the psychiatrist had actual knowledge which required “reasonable precautions to protect those who might foreseeably be endangered by [the patient’s] drug-related mental problems.” *Id.* at 428-29.

In *Bader*, a mental health center had a client’s order of acquittal and conditional release, stating the was a “substantial danger to others and likely to commit felonious acts jeopardizing public safety,” and requiring him to take medications, contact the center, and follow its treatment instructions. *Bader*, 43 Wn. App. at 228-29. The center also knew the client had missed several appointments, was not taking his medications, and was exhibiting paranoid behaviors. *Id.* at 229. The court concluded the center had a duty to protect anyone “foreseeably endangered by [the client’s] mental problems,” and that a question of fact existed as to what “action the center should have taken once it became aware [the client] was violating the conditions of his court-ordered release.” *Id.* at 228-229.

Here, by contrast, when T.P. was placed in foster care, the only

affirmative facts known by DSHS and Ms. Larsen-the “obvious”-were the existence of three sexual abuse referrals naming Mr. Petersen, Mr. Petersen’s denial of those allegations, and his false statement that T.P. was not at daycare. Rather than bolstering T.P.’s claim, *Petersen* and *Bader* support the conclusion that it could have been gross negligence for DSHS to ignore what it knew and take no action to protect T.P.

Finally, T.P. argues that DSHS is not entitled to immunity because it “failed to supply all material information to the court in the dependency proceedings.” T.P. Br. at 22.¹¹ This claim also fails. First, RCW 4.24.595(1) explicitly immunizes DSHS for omissions in emergent placement investigations, unless the omission is grossly negligent. Second, the record shows T.P.’s contention is factually inaccurate. For example, T.P. falsely claims that “[a]s CPS investigator Larsen admitted, DSHS moved for dependency based solely on the fact that they had received an allegation of sexual abuse.” T.P. Br. at 22. But Ms. Larsen testified the dependency was filed because “there was enough concern that the police put [T.P.] into custody,” forcing DSHS to file the petition and the court to

¹¹ T.P.’s reliance on *Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (2000) is misplaced. As T.P. herself explains, the *Tyner* Court held that where “DSHS had failed to supply all material information to the court, any order arising therefrom could not constitute a superseding intervening cause.” T.P. Br. at 21-22 (citing *Tyner*, 141 Wn.2d at 88). *Tyner* did not address immunity under RCW 4.24.595, nor does this statutory immunity turn on a court order being a superseding intervening cause.

determine “is that enough information to warrant . . . keeping the child in protective custody. And at that time it did.” CP 651.

T.P. also claims DSHS failed to give the dependency court Ms. O’Keefe’s criminal record, the DSHS record, or “any of the records from the earlier custody dispute.” T.P. Br. at 6, 22. But as Ms. Larsen testified: “Anything that I was given is in that petition.” CP 651 ln. 24, 654 ln. 4-6, 19-20. The petition contained quotes from the July 2003 referrals and Ms. Larsen’s calls with Ms. O’Keefe and Mr. Petersen, and described Ms. O’Keefe’s prior CPS and known criminal history, drug and alcohol use, alleged assault on Mr. Petersen, prior alleged false allegations about Mr. Petersen, the current protection order between the parties, and that Ms. O’Keefe and Mr. Petersen were “in a custody battle.” CP 532-38. DSHS was not grossly negligent because it did not receive T.P.’s parents’ police reports, the restraining order or custody dispute records, or the results of T.P.’s forensic interview, her physical exam, or her parents’ criminal background checks before T.P. was placed in foster care.¹²

¹² Moreover, the record shows that while T.P. was in foster care, DSHS diligently updated the court as more information became available, including T.P.’s non-disclosure of sexual abuse, the “non-specific” physical exam results; T.P.’s and her parents’ treatment progress, DSHS’ support for placing T.P. with Ms. Lopez, T.P.’s counselor’s opinion on whether T.P. was sexually abused, that “the allegations that initiated the child’s removal appear to be false,” and that DSHS supported T.P.’s return to her father. CP 112-13, 152-53, 184-86, 200-01, 214-32. Ms. O’Keefe, Mr. Petersen and

T.P.'s claims that DSHS withheld material information from the dependency court are unfounded. As the trial court correctly found, DSHS gave the dependency court all material information in its possession. CP 1259; 532-38, 651, 654. Even taken in the light most favorable to T.P., the record shows that DSHS did not commit gross negligence during its emergent placement investigation. The trial court correctly found that DSHS was entitled to immunity for that investigation under RCW 4.24.595(1) and that ruling should be affirmed.

C. T.P.'s Negligent Investigation Claim was Properly Dismissed as a Matter of Law Because She Failed to Show that DSHS Conducted a Biased or Incomplete Investigation Resulting in a Harmful Placement

As a threshold matter, because on appeal T.P. fails to challenge the dismissal of her negligent investigation claim on the merits, this Court may affirm on that basis alone. To the extent the Court elects to consider T.P.'s negligent investigation claim on its merits, dismissal is also warranted because T.P. cannot show that DSHS' investigation of the July 2003 referrals was biased or incomplete; that the alleged negligence in the investigation resulted in a harmful placement; or that DSHS' alleged negligence was the proximate cause of her injuries.

T.P.'s guardian ad litem also provided updated information to the court. CP 134-50, 172-82, 195-98, 203-09.

1. On Appeal T.P. Fails to Argue it was Error to Dismiss her Negligent Investigation Claim on the Merits-the Court Should Affirm Dismissal on that Basis Alone

On appeal T.P. fails to argue that the trial court erred in dismissing her negligent investigation claim on the merits. An appellant's brief must contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). An appellate court will not consider a claim of error that a party fails to support with legal argument in her opening brief." *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487, 491 (2015) (internal citations omitted), *review denied sub nom.*, 184 Wn.2d 1011, 360 P.3d 817 (2015).

The trial court dismissed T.P.'s negligent investigation claim on several alternative bases, including "an insufficient showing that DSHS's investigation was negligent" (CP 866) and failure to establish proximate cause (CP 868). On appeal, T.P. does not challenge these bases through reasoned argument, supported by legal authority and references to the record. This Court may affirm dismissal on that basis alone.

2. Negligent Investigation of Child Abuse is a Narrow Statutory Cause of Action Requiring a Biased or Incomplete Investigation Resulting in a Harmful Placement

A negligent investigation claim is a narrow statutory cause of

action that arises from the State's duty under RCW 26.44.050 to investigate alleged child abuse. *Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *M.W.*, 149 Wn.2d at 601. To prevail on a negligent investigation claim, a plaintiff must prove **both** (1) that DSHS conducted a biased or incomplete investigation **and** (2) that the investigation's deficits resulted in a "harmful placement" decision by the State. *M.W.*, 149 Wn.2d at 591; *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015). A harmful placement can occur if a child is removed from a non-abusive home, placed into an abusive home, or left in an abusive home by the State. *M.W.*, 149 Wn.2d at 597-98, *Roberson v. Perez*, 156 Wn.2d, 33, 45, 123 P.3d 844 (2005). Washington does not recognize a stand-alone cause of action for negligent placement.

Washington courts have repeatedly declined to expand this narrow cause of action beyond its statutory confines¹³ and "rejected the proposition that an actionable breach of duty occurs every time the state

¹³ See *M.W.*, 149 Wn.2d at 600, 602 (rejecting argument that "DSHS has a general duty of care to act reasonably when investigating child abuse, which includes following correct procedures"); *Roberson*, 156 Wn.2d at 46-48 (rejecting request to enlarge the negligent investigation cause of action to include harms caused by "constructive placement decisions"); *Blackwell v. DSHS*, 131 Wn. App. 372, 378-79, 127 P.3d 752 (2006) (rejecting expansion of the class who can sue for negligent RCW 26.44.050 investigations to include foster parents); *Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003) (no private cause of action can be implied from RCW 74.13.250, RCW 74.13.280, or RCW 74.14A.050); *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006) (no private cause of action can be implied from three WAC regulations pertaining to dependent children).

conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.” *Petcu v. State*, 121 Wn. App. 36, 59, 86 P.3d 1234 (2004); *M.W.*, 149 Wn.2d at 601-02. Thus, the negligent investigation cause of action derived from RCW 26.44.050 does not create a blanket duty for DSHS to protect all children from all possible harm but is limited to harm flowing from the specific duty imposed by RCW 26.44.050—the investigation of a referral of child abuse and neglect. *M.W.*, 149 Wn.2d at 595, 600-01.

3. DSHS’ Investigation of the July 2003 Referrals Was Not Biased or Incomplete

T.P. fails to show that DSHS’ investigation of the July 2003 referrals was biased or incomplete. The record shows that between July 11 and 29, 2003, DSHS received three referrals, on different days, from different sources, alleging sexual abuse of T.P. by Mr. Petersen. See § III(B) above. Before the shelter care hearing, DSHS spoke with each referent and Mr. Petersen; took T.P. to a forensic interview and a physical exam; reviewed T.P.’s parents’ CPS and known criminal history; and coordinated with law enforcement, which interviewed T.P. and her daycare providers. See § III(B) and (C) above. DSHS had no indication that the referents fabricated the allegations against Mr. Petersen. DSHS provided all known information to the dependency court including Ms.

O'Keefe's CPS, drug and alcohol abuse, domestic violence, and arrest history and her threats against Mr. Petersen and his current restraining order against her, and updated that information each time the court considered whether to keep T.P. in foster care. See § III(C) above.

T.P. implies that before the dependency petition was filed, DSHS knew the contents of her July 29, 2003 law enforcement forensic interview, including her claim that her mother was abusive during visitation, and failed to act on that allegation. T.P. Br. at 7, 11. But T.P.'s own exhibit shows that Ms. Larsen was not present during that interview (CP 659) and T.P. fails to show that DSHS had the results of that interview before filing the petition.

In sum, the trial court properly found that DSHS' investigation of the July 2003 referrals was not biased or incomplete. CP 1259 ln. 7-18.

4. DSHS' Investigation of the July 2003 Referrals Did Not Result in a Harmful Placement

Just as T.P. cannot show that DSHS' investigation was negligent, she cannot show that the allegedly negligent investigation *resulted in* a harmful placement decision.

a. T.P. Does Not Claim That Her Removal From Her Father Was Itself a Harmful Placement

On appeal, T.P. does not claim that her removal from her father was itself a harmful placement decision. T.P. Br. at 2, 38. Thus, that

argument is waived. *Jackson*, 186 Wn. App. at 845. Even if T.P. had made such a claim, she could not show that DSHS' allegedly negligent investigation *resulted in* her removal from Mr. Petersen, as she concedes that law enforcement - not DSHS - removed her from her father. T.P. Br. at 7; CP 67, 666.

b. T.P. Cannot Show That Her Placement in Foster Care Was a Harmful Placement Resulting From a Negligent Investigation

When law enforcement transferred custody of T.P. to the State, DSHS was required to place her in shelter care pending a hearing. RCW 13.34.060(1). T.P. claims she should have been placed with her aunt. T.P. Br. at 9, 32. T.P. ignores the dependency court's denial of that request, despite DSHS' support. CP 185-86, CP 191-93. Due to the allegations against Ms. O'Keefe and Mr. Petersen, and the lack of an identified suitable relative, DSHS had to place T.P. in foster care.¹⁴ RCW 13.34.060(2).

¹⁴ Moreover, because T.P.'s placement with the Halls occurred during DSHS' emergent placement investigation, the trial court correctly found DSHS has immunity for that act. RCW 4.24.595(1), See § IV(B) above.

c. T.P. Cannot Show That Her Placement With the Halls Was a Harmful Placement Resulting From a Negligent Investigation

(1) In July 2003, DSHS Had no Reason Not to Place T.P. With the Halls

T.P. claims that before placing her with the Halls, DSHS should have “reviewed DSHS’ history on the Halls, assessed T.P.’s needs as a foster child, [and] determined the suitability of the Hall home.” T.P. Br. at 10-11. But T.P. fails to cite any authority requiring DSHS to do what she now claims was required. Further, DSHS vetted and licensed the Halls as foster parents in 2001, they had cared for several children (including girls) before T.P., were licensed to care for children during emergent placement investigations, and agreed to foster her. Also, none of the prior concerns about the Halls warranted action against their license or alerted DSHS that placing T.P. with them would not be in her best interest. In sum, T.P. fails to show that DSHS was negligent in placing her with the Halls.

(2) Before December 10, 2003, DSHS Had no Reason to Remove T.P. From the Halls

DSHS’ duty to investigate allegations of child abuse or neglect is triggered by a report of abuse or neglect. RCW 26.44.050. Here, DSHS received only one referral alleging abuse or neglect of T.P. at the Hall home: the December 10, 2003 referral alleging that G.H. touched T.P.

Only on receipt of that referral did DSHS have a reason or duty to investigate possible abuse of T.P. at the Hall home.¹⁵ On receipt of that referral, DSHS immediately removed T.P. from the home, interviewed her, G.H., and Ms. Hall, and despite finding that the allegations did not constitute abuse or neglect, issued a “stop placement” on the home and did not return T.P. to it. See § III(H) above. T.P. does not dispute that DSHS fully and properly investigation this referral.

T.P. claims that “no one from DSHS ever visited the Hall home during the entire time that T.P. resided there.” T.P. Br. at 14. Notably, T.P. fails to cite any authority to support her premise that in 2003, DSHS was required to visit her *at the foster home*. Instead, she cites the *current* version of RCW 74.13.031, which requires DSHS to conduct “monthly visits with children and caregivers to whom it is providing child welfare services.” RCW 74.13.031(6); T.P. Br. at 36-37. But the 2001 version, in effect when T.P. lived with the Halls, simply required DSHS to “[m]onitor out-of-home placements, on a timely and routine basis . . .” and did not

¹⁵ T.P. reported being bitten once by the Halls’ dog. CP 704, 1185. T.P.’s own exhibits show that Ms. Hall reported the bite to DSHS, Ms. McCone discussed the bite with Ms. Hall, T.P., and Mr. Petersen, DSHS determined that the Halls properly addressed the issue, and the Halls’ foster care licensor discussed the bite with Ms. Larsen. CP 1185, 1032-33. Notably, T.P. omitted from the record the next page of that report, which contained the content and result of the latter conversation. CP 1033.

require visits to occur in the caregiver's home. RCW 74.13.031(5).¹⁶ T.P. cannot show that DSHS failed to comply with the version of RCW 74.13.031 in effect when she lived with the Halls.

T.P. now claims that Ms. Hall denied her food for three days and that Mr. Hall threw her down the stairs. T.P. Br. at 14. **T.P. concedes that DSHS did not know of this alleged abuse until after she left the Hall home.** *Id.* Similarly, in 2015, T.P. testified that her foster brothers “tormented” her by trying to get her to kiss them (T.P. Br. at 14) but cites no evidence to show that DSHS knew of that allegation before she filed suit in 2014. DSHS cannot be held liable for not investigating alleged abuse of which it had no knowledge.

In sum, even when the evidence is viewed in the light most favorable to her, T.P. fails to raise a genuine issue of material fact showing that DSHS conducted a biased or incomplete investigation resulting in a harmful placement decision as required under RCW 26.44.050 and long-established precedent. The trial court properly dismissed T.P.'s negligent investigation claim and that ruling should be affirmed.

5. DSHS' Investigation of the Abuse Referrals Was Not the Factual or Legal Cause of T.P.'s Claimed Injuries

T.P. also cannot show that the allegedly negligent investigation

¹⁶ See statutory appendix, Laws of 2001 Ch. 192 § 1, ¶ (5).

caused her claimed injuries. “To prevail [on a negligent investigation claim], the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.” *Petcu*, 121 Wn. App. at 56 (citing *M.W.*, 149 Wn.2d at 597, 601). Proximate cause is a two-part analysis consisting of “cause in fact, the ‘but for’ consequences of an act, and legal causation, whether liability should attach as a matter of law.” *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (other citations omitted). To prove causation, T.P. must prove that *the way in which the investigation was negligent* was both the factual and legal cause of her alleged damages. T.P. cannot meet this burden.

a. T.P. Cannot Show That DSHS’ Investigation Was the Cause in Fact of Her Claimed Injuries

Cause in fact is the actual “but for” cause of an injury. *Minahan v. W. Washington Fair Ass’n*, 117 Wn. App. 881, 887-88, 73 P.3d 1019 (2003). Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). While cause in fact is usually a question for the jury, it can be determined by the Court “as a matter of law if reasonable minds could not differ.” *Taylor v. Bell*, 185 Wn. App. 270, 287, 340 P.3d 951 (2014). It is reversible error to deny summary judgment when speculation is required to find cause in fact. *Miller*, 109 Wn. App. at

146-47 (evidence that defendant's actions *might* have caused plaintiff's harm can only be characterized as speculation or conjecture and is insufficient to withstand summary judgment).

Thus, to establish cause in fact, T.P. must show that but for *the way in which the investigation was biased or incomplete*, she would not have been injured. But T.P. offers no reliable evidence, through declarations, deposition testimony, or otherwise, to show what information, if any, DSHS would have learned had it investigated the July 2003 referrals differently. Given that deficiency, she is unable to show how the alleged investigation deficits caused her placement in foster care.

Specifically, T.P. claims that DSHS should have discovered that Ms. O'Keefe, Ms. Seeds, and Ms. Calapp had fabricated the allegations against Mr. Petersen before placing T.P. in foster care. T.P. Br. at 6. DSHS received Ms. Calapp's referral on July 29, just hours before law enforcement took T.P. into protective custody, forcing DSHS to place T.P. in foster care. T.P. fails to show that if DSHS had investigated the referrals differently, it would have uncovered the alleged "lies" by Ms. O'Keefe, Ms. Seeds, and Ms. Calapp before placing T.P. in foster care.

T.P. also claims that DSHS was negligent in not obtaining records from her parents' custody dispute, Ms. O'Keefe's criminal record, police

reports from her threats and alleged assaults of Mr. Petersen, and the restraining order on Ms. O’Keefe. T.P. Br. at 6. But DSHS learned of most of those records on July 29. CP 512. T.P. fails to show that DSHS could have obtained those records the day she was placed in foster care, or that the contents of those records would have caused law enforcement not to take T.P. into protective custody or DSHS not to place her in foster care.

T.P. also claims that DSHS was negligent in not interviewing her daycare providers. T.P. Br. at 6. The record shows that on July 29 and August 1, 2003 Det. Link spoke with T.P.’s current and former daycare providers, each of whom denied any abuse disclosure by T.P. CP 667-68. T.P. fails to show that had DSHS investigated differently, the providers would have said something different than what they told Det. Link.

b. T.P. Fails to Show That DSHS’ Investigation Was the Legal Cause of Her Claimed Injuries

Just as T.P. cannot show that DSHS was the cause in fact of her claimed damages, she cannot show that DSHS was the legal cause. As the Washington Supreme Court has held:

The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.

Schooley v. Pinch’s Deli Market, Inc., 134 Wn.2d 468, 478-79, 951 P.2d

749 (1998) (internal citations omitted). Legal cause is a question of law for the court to decide. *Minahan*, 117 Wn. App. at 888.

Here, no policy supports extending liability to DSHS on the facts of this case. First, doing so would not further the policies expressed in the child protection statutes, as RCW 26.44.050 does not create a duty to conduct a “perfect” investigation of alleged abuse. Second, T.P. cannot support her theory that, had DSHS investigated the July 2003 referrals differently, law enforcement would not have removed her from Mr. Petersen and DSHS would not have placed her with the Halls. Thus, any claimed connection between DSHS’ emergent placement investigation of the July 2003 referrals and T.P.’s alleged injuries is too remote, insubstantial, and speculative to impose legal liability in this case. *See Wilbert v. Metro. Park Dist.*, 90 Wn. App. 304, 950 P.2d 522 (1998) (dismissing wrongful death claim for lack of legal causation where plaintiff argued failure to close alcohol-serving venue earlier resulted in victim’s death but presented no evidence that either the victim or the assailants were drinking or otherwise violating venue’s alcohol policy, or that the deadly assault was caused by any violation of that policy).

D. T.P. Fails to Identify a Common Law Duty Owed to Her by DSHS on the Facts of This Case

T.P. argues that DSHS owed a sweeping common law duty “to

protect [her] from harm.” T.P. Br. at 30. But here, DSHS’ actions resulted from the execution of its statutory responsibilities under the child welfare laws. Those statutory responsibilities have no private sector analog and therefore the State has not waived its sovereign immunity in tort with respect to them. RCW 4.92.090. (The State “shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”) Further, the cases on which T.P. relies do not support the existence of a common law duty owed to her by DSHS on the facts of this case. Nor does T.P. satisfy the special relationship exception to the public duty doctrine.

1. The Cases on Which T.P. Relies do not Support the Existence of a Common Law Owed Duty to Her by DSHS

T.P. cites several cases to support her claim that DSHS owed her a common law duty of protection. None of those cases support that claim.

T.P. first cites *M.W.*, 149 Wn.2d 589. T.P. Br. at 22-24. There, DSHS employees who were not trained to physically examine children for sexual abuse viewed and touched the genitals of a child alleged to have been abused. *Id.* at 592. The Washington Supreme Court held that the negligent investigation cause of action did not encompass the examination of the child, as the facts “do not give rise to finding that DSHS conducted

an incomplete or biased child abuse investigation that resulted in a harmful placement decision.” *Id.* at 601.

T.P. highlights one sentence of *M.W.*: “Our conclusion not to expand the cause of action of negligent investigation is bolstered by our determination that DSHS has an existing common law duty of care not to negligently harm children.” *Id.* at 600, T.P. Br. at 23. T.P. claims this language recognized a common law duty on DSHS, separate from the statutory cause of action for negligent investigation under RCW 26.44.050. But a thorough reading of *M.W.* shows that the court did not intend to recognize a broad common law duty on DSHS to protect all children. In fact, the Supreme Court said: “A careful reading of [RCW 26.44.050’s] statement of purpose gives no indication that when the legislature created the duty to investigate child abuse, it contemplated protecting children from all physical or emotional injuries that may come to them directly from the negligence of DSHS investigators.” *Id.* at 598. Contrary to T.P.’s claim, *M.W.* simply recognized that when a person’s affirmative physical act toward a child is negligent, liability may attach. Here, however, neither T.P.’s removal from her father or her placement with the Halls is the type of affirmative physical act contemplated by the *M.W.* dicta T.P. cites.

T.P. next cites *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013). T.P. Br. at 26. There, Ms. Roznowski obtained an antiharassment order against her boyfriend, Kim, prohibiting him from contacting her and being at her home. *Id.* at 739. Roznowski asked that the order be served on Kim and completed a form stating that Kim lived with her, had a history of assault, did not know she had obtained the order, and would likely react violently to its service. *Id.* at 739. Roznowski also said that Kim spoke limited English and asked that an interpreter be present when service occurred. *Id.* at 740. Instead, an officer served the order on Kim, in Roznowski's presence, without an interpreter, leaving her to explain the order to Kim. *Id.* at 740. Shortly thereafter, Kim killed Roznowski. *Id.* Roznowski's daughters sued the city and the trial court denied the city's summary judgment motion. The Supreme Court affirmed, recognizing a narrow common law duty "where the actor's own affirmative act has created or exposed the other to a recognizably high degree of risk of harm through such misconduct." *Id.* at 757-78. Although restating that "[c]riminal conduct is generally unforeseeable" and "there is generally no duty to prevent third parties from causing criminal harm to others," the court found that based on the facts presented, the officer had a duty to act reasonably and to protect Roznowski from Kim's criminal

conduct, as the officer knew or should have known that he was serving the order at Roznowski's home, that Kim had a history of violence, and that Kim might react violently when served. *Id.* at 757, 759-61. Thus, the officer's actions affirmatively created the risk that Kim would harm Roznowski, making her death foreseeable.

But here, none of the prior complaints about the Halls put DSHS on notice that the Halls might physically abuse T.P. *See* § III(H) above. Thus, T.P. cannot show that by licensing the Halls, or by placing her with them, DSHS affirmatively created the risk that the Halls might abuse her. Had DSHS returned T.P. to Mr. Petersen (whom DSHS was investigating for sexual abuse) or to Ms. O'Keefe (who was known to physically abuse her), DSHS might have created a risk of harm to T.P. But that did not occur.

T.P. next cites *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P. 3d 914 (2011), which is also distinguishable. T.P. Br. at 26-27. There, the Catholic Archdiocese placed Fr. Boyle in a church where he would have contact with children. *Id.* at 187. Fr. Boyle arranged a picnic with five-year-old M.H., her mother, and other adults he knew. *Id.* He took the other adults to M.H.'s home, introduced them to M.H. and her mother, and told the mother it "would be a good idea" for M.H. to ride with one of the men to get supplies and to the picnic. *Id.* With

that assurance, the mother agreed. *Id.* On the way to the picnic, the man sexually abused M.H. *Id.* M.H. disclosed the abuse to Fr. Boyle, who told her not to tell anyone else and did not report it to authorities. *Id.*

M.H.'s mother sued and the trial court dismissed the case, finding no connection between the church and M.H.'s abuser. *Id.* at 188. The appellate court reversed and held that despite Fr. Boyle's "known history of sexual misconduct with children," the church placed him where he "was able to establish a position of trust with M.H.'s mother and exercise authority and control over M.H." *Id.* at 192. Based on the church's actual knowledge of Fr. Boyle's sexual misconduct with children, and his affirmative acts of planning the picnic, inviting M.H.'s abuser to attend, introducing the abuser to M.H. and her mother, and vouching for the abuser when he offered to drive M.H. to the picnic, the court found a connection between the church, Fr. Boyle and M.H.'s abuser. *Id.* at 192.

But here, the Halls were duly licensed foster parents whom DSHS had no reason to believe might physically abuse T.P. In contrast to *Washburn* and *M.H.*, T.P. cannot show that merely by placing her with the Halls, DSHS affirmatively created a risk that they might abuse her.

T.P. also cites *Curran v. City of Marysville*, 53 Wn. App. 358, 766 P.2d 1141 (1989) to support her claim that DSHS owed her a common law

duty because it “voluntarily assumed her care.” T.P. Br. at 30-31, 33. In *Curran*, a mother sued her father after he volunteered to take her daughter to a park, where the child was injured. *Id.* at 359. The court found a duty to exercise reasonable care to protect a child when a person “voluntarily assumes responsibility” for that care of that child. *Id.* at 365.

But DSHS did not “voluntarily assume responsibility” for T.P.’s care. When law enforcement took her into protective custody and transferred custody to the State, DSHS had a statutory duty to place T.P. in shelter care. RCW 13.34.060(1). With the allegations against Ms. O’Keefe and Mr. Petersen, and no identified suitable relative, DSHS was required by law to place T.P. in foster care. RCW 13.34.060(2).

T.P. cites *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003), also inapposite. There, plaintiffs sought to reduce the number of times children are moved during foster placement. *Id.* at 693. But T.P. does not dispute that she was placed in only two foster homes. Further, while T.P. cites the holding that “foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety,” she fails to mention another of that court’s holdings: to prove a violation of that right, “[s]omething more than negligence is required.” *Id.* at 700. The court adopted a professional judgment standard under which

DSHS is liable for a “violation of a foster child’s substantive due process right to be free from unreasonable risk of harm and to reasonable safety only when his or her care, treatment, and services “substantially depart from accepted professional judgment, standards or practice.”” *Id.* at 704.

Here, on the information known to DSHS about the Halls, T.P. cannot show that DSHS violated her substantive due process right, as she cannot prove either that DSHS failed to affirmatively take reasonable steps to provide for her care and safety or that DSHS’ decision to place her in the Hall’s licensed foster home “substantially departed from accepted professional judgment, standards or practice.” *Id.*

2. T.P. Fails to Show That Her Alleged Abuse by the Halls Was Foreseeable to DSHS

T.P. claims that “it was readily foreseeable that [she] would be harmed by her removal from the only home she had ever known and placement with the Halls.” T.P. Br. at 31. If this were true, the foster care system would not exist, as DSHS would be liable in tort every time a child was removed from a potentially abusive home and placed in foster care. Clearly, the Legislature did not intend for a child’s removal and placement in foster care to be itself grounds for liability.

T.P. also claims that DSHS owed a sweeping duty “to protect [her] from harm” because her alleged abuse by the Halls was foreseeable.

T.P. Br. at 30. This argument also fails. First, DSHS acted reasonably in its licensure of the Halls. They met the criteria for licensure and DSHS had no legal basis to restrict or revoke their license. Second, none of the complaints against the Halls warranted action against their foster home license, and T.P. fails to show that those complaints created a common law duty on DSHS to protect her from all harm. Third, T.P. admits that DSHS did not know of her alleged abuse by the Halls until after that placement had ended. T.P. Br. at 14.

T.P.'s argument also ignores the Washington Supreme Court's holding that criminal conduct is generally unforeseeable and that unforeseeable intervening acts "break the chain of causation" between negligence and alleged injury. *Washburn*, 178 Wn.2d at 761. The alleged abuse by the Halls was criminal and unforeseeable to DSHS and broke any causal chain between T.P. and DSHS. Even when taken in the light most favorable to her, T.P. fails to raise a genuine issue of material fact showing that in this case, her alleged abuse by the Halls was foreseeable to DSHS.

3. T.P. Fails to Show That the Facts Here Satisfy the Special Relationship Exception to the Public Duty Doctrine

The public duty doctrine embodies the principle that regulatory and social welfare legislation is generally intended to improve the area

being regulated *as a whole*, not to charge the government with a duty to protect the interests of particular citizens. “The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens County*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988); *see also Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006). The doctrine’s premises are that (1) it is better to have some regulation to protect the public (even if imperfect) than to have no public protection, and (2) government’s well-intentioned efforts to improve conditions in regulated business and industry should not be discouraged by imposing liability for imperfect regulation. *See Donohoe*, 135 Wn. App. at 834 (citing *Taylor*, 111 Wn.2d at 170). Accordingly, the public duty doctrine provides that “regulatory statutes impose a duty . . . owed to the public as a whole, and that such a statute does not impose any actionable duty that is owed to a particular individual.” *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

T.P. implicitly concedes that the public duty doctrine applies to this case by arguing that DSHS owed her a duty under a “special relationship.” T.P. Br. at 32. “The question whether an exception to the public duty doctrine applies is thus another way of asking whether the

State had a duty to the plaintiff.” *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). The existence of a special relationship is one exception to the public duty doctrine.¹⁷ That exception consists of two analytically distinct exceptions: one based on express assurance and the other derived from section 315 of the *Restatement (Second) of Torts*.¹⁸

The special relationship exception derived from the *Restatement (Second) of Torts* § 315 represents an exception to the general rule that an actor has no duty to prevent a third person from injuring another. *Donohoe*, 135 Wn. App. at 836. This exception may arise where either “(a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relationship exists between the actor and the other which gives to the other a right to protection.” *Id.* (quoting *Restatement (Second) of Torts* § 315 (1965)). Neither existed here.

The (a) variation did not arise here because DSHS’ licensure of the Halls did not create a duty on DSHS to control the Halls’ day-to-day conduct. This case is similar to *Donohoe*, where an elderly, vulnerable adult DSHS client’s family placed her in a nursing home licensed by

¹⁷ Because T.P. does not allege the other exceptions to the public duty doctrine, they are not discussed here.

¹⁸ T.P. does not allege that DSHS made express assurances to her in licensing the Hall foster home or in placing her there. Thus this exception cannot apply.

DSHS. *Donohoe*, 135 Wn. App. at 838. After her death, her estate sued, alleging negligence by DSHS in failing to assure that the nursing home followed state regulations. *Id.* at 831. The court rejected the estate's claim that a special relationship existed between Mrs. Donohoe and DSHS on several grounds, including because "apart from its general public duty to regulate nursing homes, DSHS did not employ, supervise, or otherwise oversee Mrs. Donohoe's care or treatment [by the licensee.]" *Id.* at 842.

Here, as in *Donohoe*, DSHS' relationship with the Halls was limited to licensing and monitoring them for regulatory compliance with their foster home license. The State met this statutory responsibility by fully vetting and duly licensing the Halls and ensuring their ongoing compliance with licensure requirements. But mere "regulatory control over a third party is not sufficient to establish the necessary control that can give rise to an actionable duty." *Honcoop*, 111 Wn.2d at 193.

Further, DSHS had no duty to control any conduct of the Halls of which it had no notice. As shown above, T.P. did not allege abuse by the Halls until after that placement had ended. T.P. Br. at 14. The only referral DSHS received alleging abuse of T.P. at the Halls' was made December 10, 2003, resulting in DSHS removing T.P. from the home. But DSHS had no duty to control the Halls' conduct of which it had no knowledge.

The (b) variation is also inapplicable. It arises only on an established special relationship between the actor and the injured other, typically “protective in nature, historically involving an affirmative duty to render aid.” *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991). Under this variation, Washington courts have held that “a school has a duty to protect students in its custody from reasonably anticipated dangers” and innkeepers owe a duty “to protect guests from the criminal actions of third parties.” *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 253-54, 29 P.3d 738 (2001).

Citing *Caulfield*, T.P. claims a special relationship with DSHS because she was a dependent child. T.P. Br. at 33. Mr. Caulfield was disabled, unable to get out of bed or reach the phone to call for help. *Id.* at 256. After receiving 24-hour care in a nursing home, DSHS authorized him to return home and receive one-on-one in-home care from Mr. Sellars, a caregiver hired by DSHS. *Id.* at 245-46. A county case manager was charged with overseeing Mr. Sellars, and was notified when the case was transferred to her by the DSHS caseworker that Mr. Caulfield’s condition had deteriorated after his first month home. *Id.* at 246. The court found a special relationship based on an “entrustment” between Mr. Caulfield and the county due to the “dependent and protective nature of the

relationship.” *Id.* at 256. The court held that the county case manager owed “a duty to use reasonable care . . . to protect Caulfield from Sellars’ tortious actions,” “especially when a case manager knows or should know that serious neglect is occurring.” *Id.* at 256.

T.P.’s case is unlike *Caulfield*. First, DSHS had no knowledge of T.P.’s alleged abuse by the Halls until after she left their home. T.P. Br. at 14. Second, DSHS is not responsible for the day to day care dependent children receive in licensed foster care – the foster parents are. “The statutory scheme does not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate services in accord with the child's best interests and the need of the family.” *Terrell C. v. State*, 120 Wn. App. 20, 28, 84 P.3d 899 (2004). Third, DSHS fulfilled this role by having ongoing face-to-face meetings with T.P., facilitating visits between T.P. and her parents, and ensuring that T.P. saw a counselor and attended school. Fourth, by properly licensing the Halls and ensuring their ongoing compliance with regulatory requirements, DSHS also fulfilled its statutory responsibility to “monitor” the home’s “general, regulatory-compliance status and licensing, a duty DSHS owed to the public in general, but not to [T.P.] individually.” T.P. cannot show that DSHS failed to fulfill either

role. Further, DSHS or its social workers do not stand *in loco parentis* with foster children. *Aba Sheikh*, 156 Wn.2d at 445. In contrast to *Caulfield*, once T.P. was placed with the Halls, she was in their daily care and control. Any special relationship she had was with them, not DSHS.

E. Because T.P. Fails to Show That DSHS Owed Her a Common Law Duty of Protection Based on the Facts of This Case, T.P. Cannot Show Breach

T.P. argues that DSHS breached its common law duty to protect her by placing her with the Halls. T.P. Br. at 34-37. But as shown, on the facts of this case, T.P. fails to show that DSHS owed a common law duty to protect her from all harm or that the prior allegations against the Halls were improperly investigated, warranted action against their license, or put DSHS on notice that placing T.P. with the Halls might be inappropriate.

V. CONCLUSION

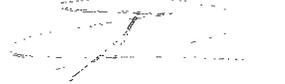
T.P.'s negligent investigation claim was properly dismissed because (1) under RCW 4.24.595(1), DSHS has statutory immunity for its acts or omissions during its emergent placement investigation of T.P.'s alleged abuse, including placing her in foster care; (2) T.P. cannot show that the investigation of the July 2003 referrals was biased or incomplete; (3) T.P. cannot show that her placement with the Halls resulted from a negligent investigation; and (4) the manner in which T.P. alleges the investigation

was negligent cannot be the proximate cause of her alleged damages.

T.P.'s common law negligence claim also fails for multiple reasons, including sovereign immunity and the public duty doctrine. This Court should affirm dismissal in favor of the State.

RESPECTFULLY SUBMITTED this 8th day of September, 2016.

ROBERT W. FERGUSON



ELIZABETH A. BAKER, WSB No. 31364
OID No. 91023, Assistant Attorney General
Attorney for Defendant State of Washington
PO BOX 40126, Olympia, WA 98504-0126
(360) 586-6368, ElizabethB3@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Email per Eservice Agreement

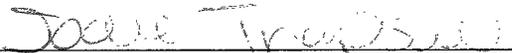
Tyler Firkins: TFirkins@vansiclen.com

Diana Butler: diana@vansiclen.com

State Campus Delivery

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

DATED this 8th day of September, 2016, at Tumwater, WA.



JODIE THOMPSON, Legal Assistant
PO BOX 40126, Olympia, WA 98504-0126
(360) 586-6319, JodieT@atg.wa.gov

APPENDIX

RCW 4.24.595

Liability immunity—Emergent placement investigations of child abuse or neglect—Shelter care and other dependency orders.

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter **26.44** RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under **RCW 13.34.065**.

(2) The department of social and health services and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of social and health services are entitled to the same witness immunity as would be provided to any other witness.

[2012 c 259 § 13.]

NOTES:

Family assessment response evaluation—Family assessment response survey—2012 c 259: See notes following **RCW 26.44.260**.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1259

Chapter 192, Laws of 2001

57th Legislature
2001 Regular Legislative Session

FOSTER CARE--INDEPENDENT LIVING SERVICES

EFFECTIVE DATE: 7/22/01

Passed by the House April 16, 2001
Yeas 90 Nays 0

FRANK CHOPP
Speaker of the House of Representatives

CLYDE BALLARD
Speaker of the House of Representatives

Passed by the Senate April 5, 2001
Yeas 48 Nays 0

BRAD OWEN
President of the Senate

Approved May 7, 2001

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

We, Timothy A. Martin and Cynthia Zehnder, Co-Chief Clerks of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1259** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER
Chief Clerk

TIMOTHY A. MARTIN
Chief Clerk

FILED

May 7, 2001 - 1:34 p.m.

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 1259

AS AMENDED BY THE SENATE

Passed Legislature - 2001 Regular Session

State of Washington 57th Legislature 2001 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Tokuda, Boldt, Kagi, Schual-Berke, Kenney, Lambert and Edwards; by request of Department of Social and Health Services)

Read first time . Referred to Committee on .

1 AN ACT Relating to providing services for persons through twenty
2 years of age, who are or who have been in foster care; amending RCW
3 74.13.031; and adding a new section to chapter 74.13 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 74.13.031 and 1999 c 267 s 8 are each amended to read
6 as follows:

7 The department shall have the duty to provide child welfare
8 services and shall:

9 (1) Develop, administer, supervise, and monitor a coordinated and
10 comprehensive plan that establishes, aids, and strengthens services for
11 the protection and care of runaway, dependent, or neglected children.

12 (2) Within available resources, recruit an adequate number of
13 prospective adoptive and foster homes, both regular and specialized,
14 i.e. homes for children of ethnic minority, including Indian homes for
15 Indian children, sibling groups, handicapped and emotionally disturbed,
16 teens, pregnant and parenting teens, and annually report to the
17 governor and the legislature concerning the department's success in:

18 (a) Meeting the need for adoptive and foster home placements; (b)
19 reducing the foster parent turnover rate; (c) completing home studies

1 for legally free children; and (d) implementing and operating the
2 passport program required by RCW 74.13.285. The report shall include
3 a section entitled "Foster Home Turn-Over, Causes and Recommendations."

4 (3) Investigate complaints of any recent act or failure to act on
5 the part of a parent or caretaker that results in death, serious
6 physical or emotional harm, or sexual abuse or exploitation, or that
7 presents an imminent risk of serious harm, and on the basis of the
8 findings of such investigation, offer child welfare services in
9 relation to the problem to such parents, legal custodians, or persons
10 serving in loco parentis, and/or bring the situation to the attention
11 of an appropriate court, or another community agency: PROVIDED, That
12 an investigation is not required of nonaccidental injuries which are
13 clearly not the result of a lack of care or supervision by the child's
14 parents, legal custodians, or persons serving in loco parentis. If the
15 investigation reveals that a crime against a child may have been
16 committed, the department shall notify the appropriate law enforcement
17 agency.

18 (4) Offer, on a voluntary basis, family reconciliation services to
19 families who are in conflict.

20 (5) Monitor out-of-home placements, on a timely and routine basis,
21 to assure the safety, well-being, and quality of care being provided is
22 within the scope of the intent of the legislature as defined in RCW
23 74.13.010 and 74.15.010, and annually submit a report measuring the
24 extent to which the department achieved the specified goals to the
25 governor and the legislature.

26 (6) Have authority to accept custody of children from parents and
27 to accept custody of children from juvenile courts, where authorized to
28 do so under law, to provide child welfare services including placement
29 for adoption, and to provide for the physical care of such children and
30 make payment of maintenance costs if needed. Except where required by
31 Public Law 95-608 (25 U.S.C. Sec. 1915), no private adoption agency
32 which receives children for adoption from the department shall
33 discriminate on the basis of race, creed, or color when considering
34 applications in their placement for adoption.

35 (7) Have authority to provide temporary shelter to children who
36 have run away from home and who are admitted to crisis residential
37 centers.

38 (8) Have authority to purchase care for children; and shall follow
39 in general the policy of using properly approved private agency

1 services for the actual care and supervision of such children insofar
2 as they are available, paying for care of such children as are accepted
3 by the department as eligible for support at reasonable rates
4 established by the department.

5 (9) Establish a children's services advisory committee which shall
6 assist the secretary in the development of a partnership plan for
7 utilizing resources of the public and private sectors, and advise on
8 all matters pertaining to child welfare, licensing of child care
9 agencies, adoption, and services related thereto. At least one member
10 shall represent the adoption community.

11 (10) Have authority to provide continued foster care or group care
12 for individuals from eighteen through twenty years of age to enable
13 them to complete their high school or vocational school program.

14 (11) Have authority within funds appropriated for foster care
15 services to purchase care for Indian children who are in the custody of
16 a federally recognized Indian tribe or tribally licensed child-placing
17 agency pursuant to parental consent, tribal court order, or state
18 juvenile court order; and the purchase of such care shall be subject to
19 the same eligibility standards and rates of support applicable to other
20 children for whom the department purchases care.

21 Notwithstanding any other provision of RCW 13.32A.170 through
22 13.32A.200 and 74.13.032 through 74.13.036, or of this section all
23 services to be provided by the department of social and health services
24 under subsections (4), (6), and (7) of this section, subject to the
25 limitations of these subsections, may be provided by any program
26 offering such services funded pursuant to Titles II and III of the
27 federal juvenile justice and delinquency prevention act of 1974.

28 (12) Within amounts appropriated for this specific purpose, provide
29 preventive services to families with children that prevent or shorten
30 the duration of an out-of-home placement.

31 (13) Have authority to provide independent living services to
32 youths, including individuals eighteen through twenty years of age, who
33 are or have been in foster care.

34 NEW SECTION. Sec. 2. A new section is added to chapter 74.13 RCW
35 to read as follows:

36 Independent living services include assistance in achieving basic
37 educational requirements such as a GED, enrollment in vocational and
38 technical training programs offered at the community and vocational

1 colleges, and obtaining and maintaining employment; and accomplishing
2 basic life skills such as money management, nutrition, preparing meals,
3 and cleaning house. A baseline skill level in ability to function
4 productively and independently shall be determined at entry.
5 Performance shall be measured and must demonstrate improvement from
6 involvement in the program. Each recipient shall have a plan for
7 achieving independent living skills by the time the recipient reaches
8 age twenty-one. The plan shall be written within the first thirty days
9 of placement and reviewed every ninety days. A recipient who fails to
10 consistently adhere to the elements of the plan shall be subject to
11 reassessment by the professional staff of the program and may be
12 declared ineligible to receive services.

Passed the House April 16, 2001.

Passed the Senate April 5, 2001.

Approved by the Governor May 7, 2001.

Filed in Office of Secretary of State May 7, 2001.

WASHINGTON STATE ATTORNEY GENERAL

September 08, 2016 - 3:13 PM

Transmittal Letter

Document Uploaded: 3-488281-Respondent's Brief.pdf

Case Name: Peterson v. State of Washington et al.

Court of Appeals Case Number: 48828-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Respondent's Answering Brief

Sender Name: Elizabeth A Baker - Email: ElizabethB3@atg.wa.gov

A copy of this document has been emailed to the following addresses:

ElizabethB3@atg.wa.gov

JodieT@atg.wa.gov

TFirkins@vansiclen.com

diana@vansiclen.com