

FILED
Court of Appeals
Division II
State of Washington
3/15/2018 12:55 PM
NO. 51371-4-II

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

ANA GARCIA; CARMEN PACHECO-JONES; and NATALYA
SEMENENKO

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
STATE OF WASHINGTON; SECRETARY OF THE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

BRIEF OF APPELLANTS

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I. INTRODUCTION

When an agency denies a benefit or privilege to a person for a period of time, it must engage in rulemaking. This case concerns DSHS's directive to retain and report the records of people with CPS findings of abuse or neglect. This retention disqualifies the Appellants from employment with vulnerable adults for 35 years or more. Yet, DSHS did not engage in rulemaking when it increased this disqualification period from 6 to 35 years. This violated the Administrative Procedure Act.

DSHS established this directive based on irrational speculation, disregarding important information and alternatives that public rulemaking might have provided. DSHS already has and uses a process to evaluate the suitability of people with other background issues to work with minors and vulnerable adults. The agency's policy and directives unfairly affect people like the Appellants who have old findings of abuse or neglect but are suitable for work with children and vulnerable adults.

The administrative record shows that DSHS intended that a 35-year retention policy would disqualify people with CPS findings. They knew that it would impair the ability to work, and they considered 35 years to be an appropriate sanction. DSHS's directive altered a benefit available to the Appellants under state law. The agency should have gone through the

rulemaking process to permit the public to participate in the outcome of decisions that affect them.

Additionally, the agency violated the APA and the federal and state constitutions by establishing rules that bar the appellants from employment because their findings occurred after January 1, 1999. Because there is no rational basis for this distinction in the administrative record, the rules are invalid. This Court should invalidate DSHS's actions regarding the retention of findings, direct DSHS to engage in rulemaking, and remand this matter back to the agency.

II. ASSIGNMENTS OF ERROR

1. DSHS erred by creating a 35-year bar to employment for persons with founded findings of abuse or neglect without engaging in public rulemaking under the Administrative Procedures Act.
2. DSHS erred in its determination that RCW 74.39A.056 mandates it to permanently retain and disclose founded findings of abuse or neglect.
3. The agency's decision, and the trial court's conclusion, that the DSHS FamLink database is a "registry" for purposes of RCW 74.39A.056 is not supported by substantial evidence and is arbitrary and capricious. (Conclusion of Law 4).
4. The agency's argument that RCW 74.39A.056 only applies to persons with founded findings entered into FamLink after October 1, 1998 has no basis in that statute or other law.
5. The agency's decision to permanently bar Appellants from employment in their chosen fields rather than exercise its discretion to retain and disclose these records for shorter periods or to establish a process for individualized determination of qualifications to work

in care providing employment is unconstitutional because it is irrational.

6. The trial court erred when it dismissed Appellants' claim for relief under 42 U.S.C. § 1983 because the claim was "not properly pled".
7. Appellants are entitled to their attorney fees and costs.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Agency violate the Administrative Procedure Act when it imposed a 35-year employment disqualification without promulgating rules? (Assignment of Error 1)
2. Did the Agency's authority to promulgate rules under RCW 43.43.832 and RCW 26.44.031 require it to promulgate a rule when it decided to permanently maintain founded findings of abuse or neglect for the purposes of disqualifying a person from employment? (Assignment of Error 1)
3. Does RCW 74.39A.056 mandate that founded findings of child abuse or neglect be permanently retained and reported in the DSHS database, FamLink? (Assignment of Error 2)
4. Is the statement of the agency in the administrative record that there is "no central registry or database of individuals who have been found to have committed child abuse and neglect in the state of Washington" dispositive as to whether FamLink constitutes a registry under RCW 74.39A.056? (Assignment of Error 3)
5. Is it arbitrary and capricious to promulgate a rule that permanently bars some persons with founded findings from employment but not others based solely on the date of the finding, when no other explanation appears in the rulemaking file? (Assignment of Error 4)
6. Is it irrational, and therefore unconstitutional, for the agency to permanently bar some persons with founded CPS findings but not others based on the date of the allegation rather than the substance of the allegation? (Assignment of Error 5)
7. Did the plaintiffs adequately plead a cause of action in their second claim for relief under 42 U.S.C. § 1983 by alleging that the Secretary of DSHS acted under color of state law to deprive the plaintiffs of

their constitutional rights to equal protection of the law through an irrational classification? (Assignment of Error 6)

IV. STATEMENT OF THE CASE

The following statement is based on the administrative record (AR) filed by the agency, as well as the 545-page supplemental administrative record (SR) admitted by the trial court on April 14, 2017. Also filed with the Court are the Report of Proceedings for the December 16, 2016 summary judgment hearing, May 25, 2017 trial on the merits, and August 23, 2017 oral ruling dismissing the matter by the trial court.

A. Identity of the Appellants

Appellants are three women who have been disqualified from working in long-term care providing assistance with daily tasks to vulnerable adults. DSHS disqualified the Appellants from this work because each has a “founded finding” of abuse or neglect of a child that appears in the Department’s FamLink database. However, the Appellants believe they are suitable for jobs they want caring for vulnerable adults, and they want to demonstrate this suitability to DSHS. DSHS denied them the opportunity to demonstrate their suitability to work in these settings, stating that all of the Appellants are “ineligible ... for 35 years” from the date of their findings for certain state-regulated employment. SR 517-519.

Appellant Ana Garcia has a Child Protective Services (CPS) finding of neglect for being charged with driving under the influence with her minor child in the car. Ms. Garcia's criminal charge was dismissed for compliance with probation and treatment, yet her DSHS finding remains on her record. CP 387-388, 404-405 (comparing Amended Petition *and* Answer, ¶¶ 13, 14, 16, 20). DSHS determined the finding automatically disqualified her for work as a paid care provider in the DSHS Medicaid Personal Care program. SR 517-519.

Appellants Carmen Pacheco-Jones and Natalya Semenenko similarly have CPS findings on their background records. DSHS found Ms. Pacheco-Jones to be negligent based on her arrest for drug possession. SR 533. At the time she was addicted to drugs but has since rehabilitated herself. She pleaded with DSHS to reverse the finding, citing the ways in which she had corrected her course and demonstrated her rehabilitation. SR 540. DSHS denied her request as untimely. SR 541. Likewise, Ms. Semenenko did not receive a hearing due to a confusion about the hearing process and a failure to timely request a hearing. *Semenenko v. Dep't Soc. Health Svcs.*, 182 Wn. App. 1052, *2 (2014) (unpublished). These three women, and many others like them, have no other recourse to remove these findings and qualify themselves to work in long-term care.

B. Regulatory Overview of CPS Founded Findings

Respondent DSHS is a state agency tasked with responding to allegations of child abuse or neglect. *See generally* RCW 26.44.¹ As part of this responsibility, DSHS investigates such allegations. When DSHS determines an act more likely than not was abuse or neglect, it makes a “founded” finding of abuse or neglect. RCW 26.44.125; WAC 388-15-129. Unless otherwise indicated, the term “finding” refers to “founded findings” under RCW 26.44. DSHS maintains findings in its FamLink database system. SR 25.

An accused person has an administrative hearing right to challenge the imposition of a finding. RCW 26.44.125. The hearing concerns the sole issue of whether, by a preponderance of the evidence, the accused committed child abuse or neglect as defined in RCW 26.44.020. SR 9-10. The hearing officer is not permitted to consider the appropriate penalty, the length of time any sanction should be imposed, or whether any mitigating circumstances exist. *Id.*

RCW 26.44.031 governs DSHS’s authority regarding the maintenance of records relating to child abuse or neglect investigations. It

¹ Certain roles within DSHS, including child abuse and neglect investigations, will be transferred to the new Department of Children, Youth, and Families on or after July 1, 2018.

directs DSHS to destroy records of unfounded allegations after six years. RCW 26.44.031 (2). The statute directs DSHS to maintain founded findings as it determines by rule. RCW 26.44.031 (3). The statute is silent as to the period of time for which founded findings should be retained or used for any purpose. Pursuant to this authority, DSHS promulgated a rule stating that it “shall retain records relating to founded reports of child abuse and neglect as required by DSHS records retention policies.” WAC 388-15-077 (5). The Department’s operations manual requires the destruction of these records and removal of findings from FamLink when DSHS destroys the record as required by the retention policy. SR 467-469. *See also* SR 507 (“Pursuant to the DSHS Records Retention Schedule (Version 1.6 September 2015), founded allegations of child protective services case files are retained for 35 years after case closure and then the records are destroyed.”).

RCW 43.43.832 gives DSHS authority to promulgate rules regarding background checks for certain positions. This authority includes discretion to determine how “civil adjudication proceedings” should impact background checks for employment. RCW 43.43.830 defines civil adjudication proceedings to include all founded child abuse or neglect findings that become final. If a finding is maintained in FamLink, DSHS sends a record of it to the Department’s Background Check Central Unit

(BCCU). SR 345. BCCU's duties include processing requests for background checks for various state-regulated employment opportunities. BCCU queries the data sent from FamLink when performing a background check. SR 58-59. If the history of a finding is not reported to BCCU, then it would not appear on a background check performed by BCCU. *Id.*

DSHS currently retains records of findings for 35 years. DSHS recommended the 35-year retention period to the State Records Committee for the first time on December 9, 2008. SR 470-476. Previously, DSHS retained these records for six years. SR 231. The Committee meets to review recommended changes to retention policies submitted by state agencies. SR 22; *see also* RCW 40.14.050. Internally, DSHS staff expressed concern that they were only retaining and disclosing findings for seven years. SR 465. DSHS staff saw the retention schedule process as an opportunity to prevent persons with findings from obtaining employment, in their view, prematurely. *Id.*

DSHS recommended, and the State Records Committee approved, a retention schedule of 35 years for founded CPS findings. SR 46, 489. Neither DSHS nor the Records Committee utilized the APA rule-making procedures of RCW 34.05 to adopt the records retention directive at issue.

The supplemental administrative record provides some of DSHS's rationales for the change in retention periods. One of the stated reasons to increase the retention schedule was for the protection of the public.

[I]f a person was 18-years-old or if they're a young adult and they had a founded finding, 35 years put them in about a 50-year time frame. Their life is a lot different than when they were 18, 20-years-old. So [DSHS staff] felt that at some point the risk had been mitigated. People are a lot different 35 years later than probably what they were at the time with or without services.

SR 25, 26.

DSHS also stated that the reasons to adopt the increased retention period included defense of torts, consistency with other schedules, and the ability of former foster children to access records related to abuse and neglect. SR 24, 25, 29, 30. Emails from other DSHS staff during the relevant period show that the potential impact of retaining records for longer implicated employment prospects for "teachers, janitors, contracted providers, [and] daycare". SR 477. DSHS staff also stated that the impact of the retention on employment "is relatively small" SR 25-26.

The existence of a CPS finding made since January 1, 1999 disqualifies a person from employment in many jobs across multiple fields, including health care, long-term care, and child care. It bars a person from pursuing training or education to even enter certain professions. DSHS does not send records of findings made before January 1, 1999 to BCCU. SR

360-361. DSHS also does not send BCCU records that are destroyed pursuant to the DSHS records retention policy. SR 507. Accordingly, BCCU does not include these findings in background reports to employers unless an applicant self-discloses them. People with findings older than January 1, 1999 can demonstrate their “character, competence, and suitability” to work with children and vulnerable adults. *See, e.g.*, WAC 388-825-640 and WAC 388-825-0645. SR 165-168.

However, a finding maintained in FamLink after January 1, 1999, is an absolute barrier to some fields of employment, including child care, nursing care, and long-term care. *See, e.g.*, WAC 170-06-0070; 388-71-0540; 388-97-1820; 388-825-640; 388-825-645. CPS reports these findings to BCCU, and the various DSHS divisions tell BCCU what employment consequence to impose. SR 297; 490-493. Regardless of what treatment each division recommends to BCCU for findings, DSHS has determined that these records will be maintained and reported for at least 35 years.

People with these findings are not allowed to demonstrate their “character, competence, and suitability” to work with vulnerable populations in DSHS programs. *See, e.g.*, WAC 170-06-0070; 388-76-10120; 388-78A-2470; 388-97-1820; 388-71-0540; 388-825-640; 388-825-645 (disqualifying persons from various fields of employment for CPS findings). They are categorically barred from employment because of the

finding, and BCCU notifies the employer that they are disqualified because of the findings. SR 373, 259-260, 266; *see also* SR 403-406 (examples of background letters to employers). They are also excluded from positions in early education, as was the case for former Petitioner, Christine Nixon. WAC 170-06-0070. Ms. Nixon was voluntarily dismissed from this action after her finding was reversed on appeal. CP 44. Even if they are completely rehabilitated, if any criminal convictions are vacated or dismissed for compliance with probation, DSHS requires regulated employers to fire or refuse to hire people who have a CPS finding on their BCCU report.

C. The Proceedings Below

The Appellants filed this case on September 9, 2015, pleading one claim for relief under the APA and one claim for relief under 42 U.S.C. § 1983 for deprivation of their rights to equal protection of the law under the 14th Amendment to the United States Constitution. CP 19-21. The APA claims alleged DSHS used an unpromulgated rule when it determined that findings should be permanently disqualifying, and that this and DSHS's other rulemaking that disqualified the Appellants was arbitrary and capricious and unconstitutional under RCW 34.05.570.

At a hearing on December 9, 2016, Judge Mary Sue Wilson dismissed their 42 U.S.C. § 1983 claim and challenges to some of the challenged WACs on the basis that the Appellants lacked standing to

challenge those WACs because they were not seeking jobs in those fields. CP 376. The Court did not dismiss the Appellants' claim that DSHS violated the APA when it amended the retention schedule—and thereby the employment bar—from six to 35 years. The Court noted:

I think the record at this juncture indicates that DSHS has made a 35-year determination, and, that DSHS is the entity, if anybody in the state can set a timeframe for that ban on employment, and DSHS has done that without rulemaking. So the court will allow to go forward a 34.05.570(2) rulemaking challenge that is a failure to promulgate a rule using the rulemaking procedures to establish that 35-year timeframe.

RP at 28 (Dec. 16. 2017).

On February 10, 2017, Judge Christopher Lanese granted Appellants leave to amend the petition to include constitutional claims for relief in their APA claims. CP 379-380. On April 14, 2017, the court granted Appellant leave to supplement the administrative record, adding 545 pages in a Supplemental Administrative Record. CP 841-843.

On May 25, 2017, Judge Lanese heard oral argument on the administrative record. After requesting additional briefing on the issue of the applicability of RCW 74.39A.056, Judge Lanese issued a ruling dismissing the petition. CP 901-919. Appellants timely filed this appeal. CP 920.

V. ARGUMENT

Appellants seek relief under RCW 34.05.570 (2) to declare the invalidity of three properly promulgated rules and one unpromulgated rule, each of which stands as a barrier to the Appellants obtaining employment in long-term care. Appellants bear the burden of demonstrating these rules are invalid for one of the following reasons:

The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

RCW 34.05.570 (2)(c).

An appellate court applies the standards in RCW 34.05.570 “directly to the record before the agency, sitting in the same position as the superior court.” *Utter v. State, Dep’t of Soc. & Health Serv.*, 140 Wn. App. 293, 299 (2007), quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45 (1998). Questions of statutory or regulatory interpretation are reviewed de novo. *Tesoro Ref. & Mktg Co. v Dep’t of Revenue*, 164 Wn.2d 310, 322 (2008). The trial court’s conclusions of law are ignored. The trial court’s factual findings are ignored, except to the extent they are made on supplemental evidence admitted to the record.

A. DSHS Created an Unpromulgated Rule when it Decided to Retain and Disclose Founded Findings for the Purpose of Disqualifying People from Employment for 35 Years

When an agency creates a rule, despite the rule bearing some other label, the APA requires strict compliance with rulemaking requirements. An unwritten “rule” as defined by the APA is invalid as a matter of law. Under the APA, “any agency order, directive, or regulation of general applicability” constitutes a rule. RCW 34.05.010(16). The action must fall into one of five enumerated categories. Two categories of rules are potentially applicable here. First, a rule is any action by an agency that “establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW 34.05.010(16)(c). Second, a rule is any action “(d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession ...” *Id.*

Washington courts “have been vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.” *McGee Guest Home, Inc. v. Dep’t Soc. and Health Svcs.*, 142 Wn.2d 316, 322 (2000) (*citing to Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 648 (1992)).

The Appellants asked the trial court to find the agency violated the APA when it amended the directive to retain CPS findings—and thereby increase the employment bar—from six to 35 years without engaging in public rulemaking. The trial court, and the agency, erroneously determined that RCW 74.39A.056 was dispositive in this case, concluding that it prohibits work in long-term care for persons with these findings. The court neglected to consider RCW 43.43.832, which, instead of imposing a permanent ban, grants discretion to DSHS to determine how findings should impact employment. The court further neglected to consider that RCW 26.44.031 gives DSHS discretion to determine by rule how long to maintain and disclose findings. This is clear legal error.

Further, the implication of declaring DSHS's delegation to a retention committee to be an APA rule weighed on the decision of the trial court, an implication not warranted by the law. CP 914. These concerns are precisely why the Legislature adopted the APA: to ensure that the public is meaningfully involved in decisions that impact their rights under the law. RCW 34.05.001. DSHS did not comply with the APA when it nearly quadrupled the time period it would retain (and therefore disclose) findings, or when it determined that RCW 74.39A.056 required it to permanently bar people from employment based on CPS findings. Both of these decisions should have been made in a public forum subject to APA guarantees of

notice and opportunity to comment. Because the Appellants are harmed by this failure to engage in rulemaking, the Court should invalidate DSHS's directive to retain and/or to disclose their findings for 35 years.

1. Appellants are Entitled to Relief Under RCW 34.05.570(2) Because the Department Adopted an Employment Disqualification of 35 years or more Without Compliance with Statutory Rulemaking Procedures

The primary question for the Court is whether DSHS's directive to impose an employment disqualification for a period of 35 years or more is a "rule" under the APA. If it is, the Court must find the directive invalid and order the agency to engage in rulemaking because DSHS failed to promulgate it as required under the APA.

RCW 34.05.010 defines the term "rule" to include the following:

any agency order, directive, or regulation of general applicability ... (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law RCW 34.05.010 (16).

An order, directive, or rule of general applicability is one that applies to individuals as members of a class. *Hunter v. University of Washington*, 101 Wn. App. 283, 289 (2000). DSHS, pursuant to its authority under RCW 43.43.832, directs BCCU to report final CPS findings entered after January 1, 1999 on background check reports for 35 years. SR 58-59. This directive applies to all individuals who have such a finding and seek work in

regulated fields, such as nursing homes and other facility and in-home long-term care settings. *See, e.g.*, WAC 388-97-1820. Because the directive affects all people applying to work in regulated employment, it is of general applicability.

The APA carves out from the definition of “rule” those “statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public....” RCW 34.05.010 (16). However, when internal agency management intentionally or incidentally impairs employment for a class of people, it “affects private rights.” *See, e.g., Sudar v Dep’t of Fish & Wildlife*, 187 Wn. App. 22, 32-33 (2015). *Sudar* dealt with a challenge to state fishing policy that set internal agency goals for certain management priorities. *Id.* The *Sudar* court relied on the fact that the agency policy at issue did not have the force of law and did not subject a person to a penalty or deprive them of a benefit. *Id.*

Unlike in *Sudar*, by setting the employment disqualification at six years, then increasing it to 35 years, DSHS established, and then altered, a qualification, requirement, or standard relating to employment it regulates. Likewise, the fact that DSHS intended to increase the period of disqualification demonstrates that DSHS intended the rule to impact private rights. Prior to the adoption of the 35-year policy, a person with a finding could expect it to disqualify her for six years. Now that person must wait 35

years or more.

These qualifications relate to the enjoyment of benefits or privileges conferred by law. If the Appellants apply for regulated employment, they are required to authorize BCCU to issue a background check report. *See, e.g.,* RCW 43.43.842, RCW 74.39A.056, WAC 388-825-335, WAC 388-71-0510 and -0513. Because of Appellants' CPS findings, BCCU must issue a result that each Appellant is "disqualified" from employment with access to any vulnerable adult. SR 391-392; *see also* 517-519. DSHS has created no process for Appellants to challenge this result or demonstrate they are qualified for a particular position during the 35 years DSHS imposes the penalty.

The right to engage in a field of one's choosing is a protected liberty interest under the due process clause of the U.S. Constitution. *See, e.g., Ryan v. Dep't of Soc. and Health Svcs.*, 171 Wn. App. 454, 372 (2012). Protected interests in property or liberty are those that are conferred by state law, including the ability to work in a field of one's choice. *Board of Regents v. Roth*, 408 U.S. 564, 575-76 (1972). By operation of its directives, and as Judge Wilson stated in her December 9, 2016 ruling, DSHS established a 35-year period of disqualification. This qualification requirement to keep or obtain work in regulated employment significantly impairs Appellants' enjoyment of their right to work in their chosen fields.

Property or liberty interests protected by due process are, by definition, “benefits conferred by law” since they are legally enforceable benefits created by the state. *Board of Regents v. Roth*, 408 U.S. 564, 575-76 (1972). Washington courts considering challenges to unpromulgated rules have found a “benefit conferred by law” in the receipt of Medicaid funds, tuition reduction for university students, and the processing of applications for water permits. *See, e.g., Failor’s Pharmacy v. Dep’t of Soc. and Health Svcs.*, 125 Wn.2d 488 (1994); *Hunter v. University of Washington*, 101 Wn. App. 283, 290 (2000); *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373 (1997).

In *Hillis v. Dep’t of Ecology*, the court considered whether a state agency must comply with the APA to set procedures and priorities to review water rights applications. 131 Wn. 2d 373 (1997). Although the agency reviewed applications using the statutory requirements, it did so in a way that delayed the permit decision for some applicants. The agency did not adopt its process or prioritization through rulemaking. The Appellants in *Hillis* successfully argued that having to wait for an adjudication of their water rights, or attempt to fit into a priority category, was an alteration of the “qualification or requirement” relating to a privilege they held under state law to have their application decided. The court agreed, holding that the agency should have engaged in rulemaking to impose new requirements

on accessing a public benefit. The court noted that the purpose of the procedure “is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.” *Id.* at 399.

Like in *Hillis*, the Appellants in this matter have been affected by the establishment and amendment of a general policy: how long their findings will affect their ability to be employed in their chosen fields. They retain a legal right to apply for employment and licensing. But DSHS directives require an automatic denial of their application for 35 years. This penalty drastically interferes with their ability to obtain this employment or qualification.

The court in *Simpson Tacoma Kraft v. Ecology* considered an agency’s duty to engage in rule-making to set the standard it used to implement regulations that limit toxic discharges. 119 Wn.2d 640 (1992). The case did not concern whether or to what extent discharges *should* be limited. Rather, it concerned the *process* by which those standards should be adopted in Washington. *Id.* at 642. The agency arrived at the standard using federal guidance and data, but without going through rulemaking procedures. *Id.* at 643-44. Accordingly, the Superior Court invalidated the standard and enjoined the agency from enforcing it. *Id.* at 644. The Supreme Court unanimously affirmed, noting the legislative intent of the APA to

provide greater public access to administrative decision-making and to ensure that members of the public can participate meaningfully in the development of agency policies which affect them. *Id.* at 648-49.

In this case, DSHS is charged with implementing laws that require the agency to consider background information in determining an applicant's qualification to have access to children and vulnerable adults. RCW 43.43.832. DSHS decided to do this in part by choosing a period for which CPS findings would automatically disqualify an individual from such positions. Because DSHS set that numeric standard without engaging in rule-making, the 35-year penalty is invalid.

The Court should also look to whether the challenged policies “add any qualifications to the statutory basis for obtaining a benefit.” *Sudar v. Dep’t of Fish and Wildlife*, 187 Wn. App. 22, 33 (2015). A policy is not a rule “when agency action has no legal or regulatory effect or implicates no one’s legal interests.” *Id.* at 33. This distinction—what does the agency’s “rule” do to the benefits held by the public—is the exact one presented in this case. Retaining records, generally, will not impair a person’s rights under state law. It is likely a rare case where such a change in retention policy will have a dramatic effect on a person’s employment. However, the retention of the finding in the CPS database, along with BCCU data match and DSHS directives to disqualify individuals with CPS findings, does just

that, and for an extremely long period of time. This public impact triggers APA requirements.

The state Attorney General’s Office (AGO) also issued an informal opinion that supports the Appellants’ arguments. AGO Op. No. 12.² The AGO considered standards for apprenticeship contracts that allowed businesses to pay apprentices a lower wage than more skilled laborers. The AGO advised that the standards were likely rules because they were “associated with an important collateral privilege,” namely wage requirements. DSHS’s standard that individuals with CPS findings are disqualified from regulated employment for 35 years is directly associated with an important privilege—that of employment in their chosen fields.

DSHS set and increased the degree of punishment for violation of a statute without following the public notice and comment requirements of the APA. This sanction—the term of a loss of employment—is precisely the sort of judgment that requires public involvement due to the wide range of people affected by this decision. It impacts the thousands of people against whom DSHS enters founded findings every year. It impacts employers who would otherwise hire or retain those people. It impacts people who need long-term care and are deprived of their providers of

² <http://www.atg.wa.gov/ago-opinions/apprenticeships-state-apprenticeship-council-department-labor-and-industries>

choice for over three decades because of these findings. The duration of the employment disqualification penalty is a rule. Because DSHS failed to comply with the APA in establishing and altering the penalty, it is legally invalid.

B. RCW 74.39A.056 does not Compel DSHS to Permanently Disqualify the Appellants from Employment

The trial court, to which the Court of Appeals need not show deference, dismissed the Appellants' claims on a threshold issue. The court accepted DSHS's argument that RCW 74.39A.056 requires DSHS to permanently maintain and impose lifetime disqualifications for persons with founded findings. CP 904 (¶¶5, 7). DSHS devised this interpretation immediately prior to trial, arguing that the statute compelled it to permanently disqualify the Appellants. CP 822. DSHS's interpretation was at odds with its previous policy decisions regarding the disqualification period, as reflected in the administrative record. The trial court failed to acknowledge these inconsistencies in DSHS's reasoning.

RCW 74.39A.056 does not compel DSHS to permanently disqualify the Appellants and does not specify any records retention period. DSHS retains authority to determine for how long findings must be maintained, be disclosed, and act as an automatic employment bar. The Court should reject

DSHS's arguments that RCW 74.39A.056 compels DSHS to forever disqualify the Appellants from employment.

1. RCW 74.39A.056 grants DSHS discretion to determine how long findings should disqualify a person from employment

The plain language of RCW 74.39A.056 fails to answer simple questions as to its effect. To decide how RCW 74.39A.056 applies to this case, the Court should review the plain language of the statute within the legislative history and in connection with two other relevant statutes that govern the scope of DSHS's authority. Comparison of these statutes shows that RCW 74.39A.056 does not compel DSHS to permanently disqualify the Appellants from the jobs they want.

The relevant portion of RCW 74.39A.056 states:

No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority or a court of law or entered into a state registry with a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter 74.34 RCW shall be employed in the care of and have unsupervised access to vulnerable adults.

RCW 74.39A.056 (2).

To look at the plain language alone, it must be “unambiguous and ‘the statutory scheme [must be] coherent and consistent.’” *Barnhart v.*

Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002), citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *see also* Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229 (2004). But the language of RCW 74.39A.056 is ambiguous.

The statute does not define the word “final” as it refers to findings, nor does the enabling legislation that allows DSHS to make findings define this word in the context of a founded finding. *See generally* RCW 26.44. Nor is the phrase “entered into a state registry” defined in the statute. The trial court specifically wrestled with the meaning of “entered” and requested additional briefing on RCW 74.39A.056. CP 886. These questions are not answered by the plain language and require additional context.

2. Read together, the statutes governing the employment disqualification do not compel DSHS to permanently disqualify the Appellants

Because the language of the statute does not resolve the legal issues on its face, the Court should review related statutes together to interpret RCW 74.39A.056. *In re Personal Restraint Petition of Yim*, 139 Wn.2d 581, 592 (1999). RCW 43.43.832 governs DSHS’s authority to impose disqualifications from DSHS-regulated employment; RCW 26.44.031 gives DSHS authority to determine how long a finding must be maintained and disclosed; and RCW 74.39A.056 requires disqualification when DSHS has

chosen to maintain a finding in a registry. Read together, these statutes show that DSHS has authority to impose a disqualification period of its choice yet failed to undertake rulemaking to do so.

“In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *State v. Wright*, 84 Wn.2d 645, 650 (1974). Courts also consider the sequence of all statutes relating to the same subject matter. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211 (2001). There is a presumption that the legislature is aware of prior law including judicial or administrative interpretations of statutes. *Dep't of Transp. v. State Employee Ins. Bd.*, 97 Wn.2d 454, 462 (1982). “Earlier enactments dealing with the same subject matter are presumed to have been considered by the legislature when it amends legislation.” *State v. Roth*, 78 Wn.2d 711, 715 (1971).

RCW 43.43.832 gives DSHS authority to promulgate rules regarding background checks for certain positions, including those positions sought by Appellants. DSHS must do the following:

[E]stablish rules and set standards to require specific action...when considering **additional information including but not limited to civil adjudication proceedings as defined in RCW 43.43.830** and any out-of-state equivalent...when considering persons for state employment in positions directly responsible for the supervision, care, or treatment of children, vulnerable adults,

or individuals with mental illness or developmental disabilities[.]

RCW 43.43.832(2) (emphasis added).³ This statute allows DSHS to determine through rulemaking how findings should impact employment.

RCW 43.43.832 also gives DSHS discretion to determine how to treat a finding in a background check. Consistent with other requirements, DSHS may exercise a veto over the employment of a person in care paid for by DSHS based on factors in a person's background check including findings of abuse or neglect, criminal records, and other "additional information". Also, DSHS maintains authority to operate a background check system and determine whether findings should be permanent or expunged.

In 2007, the legislature amended RCW 26.44.031 to allow the Department to maintain founded findings as it determines by rule. Laws of 2007, ch. 220, § 3. The Legislature thus delegated to DSHS the authority to determine how long a CPS finding must be kept in a person's background check and used against them.

The Court should read these three key statutes together to determine that DSHS has discretion to determine by rule how long to retain findings,

³ RCW 43.43.830 defines civil adjudication proceedings to include all founded child abuse or neglect findings that become final through exhaustion or failure to exhaust administrative remedies.

how long to disclose them, and how long to impose employment penalties based on those findings.

3. The employment disqualification of RCW 74.39A.056 existed prior to the grant of authority for DSHS to maintain founded findings in RCW 26.44.031

The employment disqualification in RCW 74.39A.056 (2) has existed in one form or another since 1997. Legislative history shows that this disqualification existed in statute prior to the 2012 initiative establishing RCW 74.39A.056 or its predecessor initiative in 2008. *See* Laws of 2011, ch. 31, § 5 (amending former RCW 74.39A.050 and Laws of 2009, ch. 580 s. 7). In fact, this language appeared as early as 1997, regulating long-term care in RCW chapter 74.39A. *See* Laws of 1997, Ch. 392, § 209.

Because the statutory employment disqualification of RCW 74.39A.056 existed prior to the grant of discretion in RCW 26.44.031, the Legislature is presumed to have been aware of the effect of giving DSHS control over the retention of founded findings. This control included the discretion to exclude or remove findings from a “registry” through expungement or time limits on maintenance, allowing DSHS to remove the disqualification of RCW 74.39A.056. Therefore, the disqualification of RCW 74.39A.056 should be read in light of DSHS’s power to keep and destroy records according to a properly promulgated rule.

4. DSHS's trial-devised interpretation of RCW 74.39A.056 should not be given deference because it is inconsistent with nearly all of DSHS's prior actions

Deference to agency expertise is not conferred on unpromulgated rules. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000) (“[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”). If some deference is warranted, how much “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Trial strategy or “convenient litigating positions” do not constitute the application of agency expertise that is entitled to deference. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

DSHS incorporated a new legal theory in its trial briefing and second summary judgment motion. For the first time, the agency argued that RCW 74.39A.056 compelled DSHS to permanently disqualify persons with CPS findings from employment. CP 822. DSHS's trial-devised interpretation was strategic based on Appellants' claims but is inconsistent with its prior actions.

First, the record does not support DSHS's argument. The supplemental administrative record documents that DSHS believed the Appellants were "ineligible for specific DSHS-regulated [employment] for 35 years from the date [they] received [their] founded finding." SR 517-519. The clearest implication from this answer is that, after 35 years, the Appellants might seek employment after DSHS stopped maintaining their findings in a database. DSHS "supplemented" its answers to these interrogatories immediately prior to trial to change these answers to reflect its litigation strategy. *Id.* Yet, its original answer indicates that the disqualification period was coextensive with the retention period.

Second, DSHS's deposition statements show that DSHS believed the retention period for findings also controlled the employment disqualification period. DSHS's agent at its CR 30(b)(6) deposition testified that DSHS's decision to increase the retention period assumed that a person would be barred from employment for 35 years because of DSHS's change in retention schedules. SR 25, 26. The reasoning further assumed that such a person might be rehabilitated enough to be employable after 35 years. *Id.* at 26 ("People are a lot different 35 years later than probably what they were at the time with or without services."). DSHS's unguarded responses, made by DSHS staff, are more reflective of the true decision-making of the

agency. If findings were permanent regardless of their retention in a registry or database, then these considerations of DSHS staff make no sense.

Third, the Department's current interpretation of its authority conflicts with its authority under RCW 43.43.832 and its rulemaking around Adult Protective Services findings. RCW 74.39A.056 (3) directed DSHS to create an APS registry. If, as DSHS argued, a finding must always be disqualifying if it has ever been entered into a registry then the following rule concerning APS findings, with the additional subsection below adopted in 2016, makes no sense and is essentially inoperative:

- (3) A final finding may be removed from the department's registry under the following circumstances:
 - (a) The department determines the finding was made in error;
 - (b) The finding is rescinded following judicial review;
 - (c) When the department is notified that a person with a final finding is deceased; or
 - (d) When a final finding is made against a nursing assistant, employed in a nursing facility or skilled nursing facility based upon a singular instance of neglect of a resident, the department may remove the finding of neglect from the department's registry in response to a petition. Any such removal shall be based upon a written petition by the nursing assistant at least one year after the finding of neglect has been finalized and in accordance with requirements of federal law, 42 U.S.C.1396r (g)(1)(D).

WAC 388-71-01275.

The agency argued at trial that it concluded RCW 74.39A.056 (2) mandates lifetime disqualification from employment in health care if a person ever had a CPS finding. CP 821-822. As the statute applies equally

to APS and CPS findings, the same argument must apply to APS findings. Yet DSHS exercised its authority to create an expungement process—by rulemaking—for APS findings. It also exercised its authority to create a registry for APS findings. Finally, DSHS saw fit to declare, by rule, that APS findings are permanent. WAC 388-71-01275 (2). It did not do any of this for CPS findings. Its inconsistency around these findings demonstrates that it merely neglected to engage in rulemaking for CPS findings.

5. There is no “registry” for CPS findings, thus RCW 74.39A.056 does not compel disqualification

Guidelines for statutory interpretation indicate that words in a statute should be construed in relation to words that they accompany in the statute. RCW 74.39A.056 (2) exists in the same context as the command from the legislature that DSHS establish a registry for APS findings. *See* RCW 74.39A.056 (3). DSHS promulgated rules to implement this registry and made APS findings permanent in those rules, except in certain instances required by law. The Court should interpret the meaning of “registry” as DSHS has defined that term throughout its rulemaking.

DSHS’s trial strategy argued that DSHS’s FamLink database is a “registry” for purposes of RCW 74.39A.056, even though DSHS stated in the record that there is no CPS registry in Washington State. SR 506 (“There is no central registry or database of individuals who have been found to have

committed child abuse and neglect in the state of Washington.”). This glaring inconsistency in the arguments at trial compared to the administrative record highlights the problems with failing to engage in rulemaking.

When the legislature has authorized state agencies to create registries, it has done so clearly and explicitly by directing the appropriate agency to establish such a registry. *See, e.g.*, RCW 26.23.030 (child support registry), RCW 74.34.056 (adult abuse registry), RCW 70.122.130 (Health care declarations registry); RCW 68.64.200 (organ donor registry); RCW 43.43.540 (sex offender and kidnapper registry). DSHS formerly had a registry for CPS findings. It no longer does. *See Dunning v. Pacerelli*, 63 Wn.App. 232, fn. 1 (1991). (“Under former RCW 26.44.070, DSHS maintained a “central registry” of reported cases of child abuse which was accessible by persons “directly responsible for the care and treatment of children ... pursuant to chapter 74.15 RCW; ...”. Repealed by Laws of 1987, ch. 486, § 16.”).

Thus when the Legislature gave DSHS the authority of RCW 26.44.031 in 2007, the Legislature had knowledge that (a) CPS no longer had a registry and (b) that there was an employment disqualification in long-term care for persons with findings entered into a registry. Even assuming that FamLink is a registry, statutory interpretation requires a reading that

gives effect to both statutes. The only interpretation that meets the requirements of both is that RCW 74.39A.056 only bars employment when findings can be found in a registry. When they are not found there, the law does not bar employment.

6. Because DSHS never engaged in rulemaking or other formal policymaking regarding these interpretations, they are invalid and not entitled to any deference

If DSHS's argument that RCW 74.39A.056 (2) results in permanent disqualification no matter how DSHS retains the records is accurate, a regulatory expungement should not be effective because it is preempted by the permanent disqualification in the statute. Because this would contradict DSHS's rulemaking, it would make that rulemaking inoperative.

Nothing in the record indicates that DSHS has ever adopted any statement of policy or practice taking the position that the CPS FamLink system or BCCU's database was a "registry" replacing its former central registry. DSHS's own statements in the administrative record of this case indicate it did not believe it had a registry. Only on the eve of trial did DSHS determine that it had a registry. Such a determination should be given no weight by this Court.

DSHS's trial-devised interpretation was not thoroughly considered. The Department has offered no formal policy or evidence of any informal policy supporting these interpretations of the registry and definitions of

“final findings”. Its statements in the supplemental administrative record regarding its deliberations do not mention this reasoning. *See, e.g.*, SR 24, 25, 29, 30.

DSHS’s interpretation of RCW 74.39A.056 leads to results that are inconsistent with other statutes and DSHS’s practices and statements in the record. The Court should see this interpretation for what it is: a post-hoc rationalization for a position in litigation. It deserves no deference and is arbitrary and capricious.

C. The Agency’s Rules and Unpromulgated Rule at Issue are Arbitrary and Capricious

The Court may declare a rule invalid under RCW 34.05.570 if the rule is arbitrary and capricious. Under state law, a rule may be arbitrary and capricious “if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Washington Independent Telephone Ass’n v. Washington Utilities and Transp. Com’n*, 148 Wn.2d 887, 905 (2003). RCW 34.05.001 also directs courts to consider federal court decisions that interpret similar provisions of the federal APA. Federal courts have considered agency decisions arbitrary if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that

it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. The Decision to Bar Employment Through a 35-year Retention Policy is Arbitrary and Capricious

The evidence before the Court demonstrates that DSHS failed to consider important aspects of its decision to impose a 35-year disqualification on employment for persons with findings. The agency’s consideration of the effect of a 35-year disqualification essentially only involved the scenario of entering a finding against a person near age 18, who might be rehabilitated by age 50. This scenario doesn’t rely on actual data of persons with findings, doesn’t account for persons older than 18 years, provides no source for the extraordinary assumption that people with findings are unlikely to be suitable for regulated work until they turn 50, and doesn’t explain the contradiction of why DSHS allows character reviews for people with findings older than 1999, even if those people are younger than 50. The consideration of the impact—that it is just a small swath of employment—is directly contradicted by the concerns expressed by agency personnel. The basis supporting the period of disqualification is so implausible—that a 35-year disqualification gave an 18-year old enough time to become rehabilitated—that the agency’s expertise is not implicated.

The Department was fully aware that it was altering the period of time that it would impair a person's employment prospects. Staff within the Department advocated for retaining records in order to ensure that people with findings would remain disqualified from employment. SR 477. DSHS's agents apparently took into account that 35 years seemed to be an adequate period of time for a person to mitigate their risk of harm and to be employable sometime in their 50s. There is no evidence that they discussed or considered people who were older at the time the Department entered a finding against them. There is no evidence that they considered a permanent sanction for a person aged 40 years appropriate. They did not consider any of the factors that the agency itself has determined are important to consider for other background issues.⁴ This gaping hole in reasoning is not merely evidence of the agency focusing on one aspect of a problem. It willfully ignores the facts and circumstances implicated in the decision-making process, and, as the federal courts warn against, fails to consider an important aspect of the problem created by its rule.

⁴ See, e.g., WAC 388-825-650 (stating factors DSHS considers when evaluate the background of a person for employment, including seriousness of crimes, age at time of crimes, and other factors related to suitability for employment).

2. The Three Challenged WACs are Arbitrary and Capricious Because They Allow Character Reviews for Some, But Not All, Persons with Findings without Any Rationale

The agency's rules at WAC 388-71-0540, 388-825-640, and 388-825-645 are invalid because the agency provides no justification in its administrative record for allowing character, competence, and suitability reviews for persons with pre-1999 findings. WAC 388-71-0540(5) states that a person will be disqualified from employment when they have:

- (d) A finding of abuse or neglect of a child under RCW 24.44.020 and chapter 388-15 WAC that is:
 - (i) Listed on the department's background check central unit (BCCU) report; or
 - (ii) Disclosed by the individual, except for findings made before December, 1998. Findings made before December 1998 require a character, competence, and suitability determination.

The WACs challenged at 388-825-640 and 388-825-645 create a similar administrative scheme for a different division of the Department. The result in both cases is that persons with findings issued prior to December 1998 are allowed to demonstrate their suitability to work in regulated employment, while the Appellants and others with post-1998 findings are not.

The administrative record created at the time of rulemaking provides no insight or explanation why such a distinction should be made. There is no record that the abuse and neglect standard for pre-1999 findings is significantly different, nor is there evidence that those with post-1999

findings should be punished more harshly than other persons with this class of findings. This distinction is also at odds with the Department's suggestion that RCW 74.39A.056 bars this Court from granting the Appellants any relief.

Ms. Pacheco-Jones is a case in point. DSHS issued her finding in June of 1999. SR 533. Had DSHS made that finding six months earlier, Ms. Pacheco-Jones would now have the ability to demonstrate her suitability to work with vulnerable adults or children. Even if the allegations at the time had been much more serious, including intentionally harming her children, DSHS would look at her current suitability to work. *See, e.g.*, SR 294; SR 327-328 (“we would certainly take a look at what the person's status is today....”). It would not look at her suitability, frozen in time in 1999, as it does now. Because her finding was made after January 1, 1999, she has no such right and is forever saddled with her actions twenty years ago.

Looking solely at the reason for adoption of the rule in the concise explanatory statement for WAC 388-71-0540, DSHS stated: “To consolidate and streamline background check stands across all ageing [sic] and disability programs administered by AL TSA and DDA.” AR PROD000713. Nowhere in the rulemaking file is there any explanation of why pre-1999 findings should not be similarly disqualifying. Because the agency failed to make a factual basis to establish this distinction, it appears

purely arbitrary from the record before the Court. The rules should be invalidated on this basis.

D. The Challenged WACs are Unconstitutional Because they are the Result of Erroneous Speculation

The Equal Protection Clause of the United States Constitution provides that no state shall deny to any person within its jurisdiction “the equal protection of the laws.” DSHS’s unpromulgated rule violates the Equal Protection Clause by burdening a significant right. The lifetime ban reflects animus toward individuals like the Appellants. Furthermore, the unpromulgated rule is based on irrational speculation that fails to pass any level of review under the Equal Protection or state Privileges and Immunities Clause.

Appellants based their constitutional challenges on both the evidence in the administrative record, and their proffered expert witness, Dee Wilson, an expert in the field of child welfare. CP 442-452; *see also* CP 902 (order admitting Declaration of Dee Wilson to the record). Mr. Wilson’s conclusions confirm that parents with founded findings do not necessarily present higher risk factors to work in fields of regulated employment based on those findings alone.

1. The Unpromulgated Rule Burdens a Significant Right of the Appellants and Reflects Significant Animus Toward the Appellants

Equal Protection Clause claims are assigned to three levels of scrutiny: strict, intermediate, and rational basis. However, there are two levels of rational basis scrutiny. Under the higher standard of rational basis review, the Supreme Court has invalidated classifications for bias or irrationality with less deference to the agency than under lower rational basis scrutiny. See Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. LAW REV. 2070 (2015).

Washington State has endorsed this heightened level of scrutiny. In *Miguel*, the Court of Appeals found that a “discriminatory classification that is based on prejudice or bias is not rational as a matter of law.” *Miguel v. Guess*, 112 Wn. App. 536, 553 (2002), review denied, 148 Wn.2d 1019, , citing *Romer*, 517 U.S. at 633-34; *Cleburne*, 473 U.S. at 448; *Palmore*, 466 U.S. at 432-33. In cases where the Supreme Court invalidated legislation under “rational basis with bite,” several factors led to heightened scrutiny. These factors include whether the legislation involves significant rights or whether animus motivated the distinction.

- a. *When a Rule Involves Significant Rights, the Court Should Review the Rule Under the Heightened Level of Rational Basis Scrutiny*

Legislation that has received “rational basis with bite” scrutiny includes eligibility for public benefits, burdens to access to contraceptives, right to counsel, individual dignity, education, and personal interests in the home and association. The Supreme Court identified these rights not as fundamental rights (which would be subject to strict scrutiny) but significant rights. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 618–19, 621–22, 624 (1985). Generally, these significant rights regard personal liberty or common public expectations. The Supreme Court described what academics term “rational basis with bite” as a standard where legislation “can hardly be considered rational unless it furthers some substantial goal of the State.” *Plyler*, 457 U.S. at 223–24.

The significant right at issue here is the right to engage in employment of one’s choosing, both a personal liberty issue and a common public expectation issue. Ms. Garcia wishes to provide care for her adult child. The state would pay her for that care if she was not barred by the founded findings. Ms. Semenenko seeks to return to her work caring for vulnerable adults. Ms. Pacheco-Jones also seeks employment she cannot get due to the CPS finding against her.

DSHS has barred Appellants from employment with vulnerable individuals without allowing review of the seriousness or relevance of their findings or their current suitability. On the other hand, DSHS allows individuals with serious and valid findings from prior to December 1998 to be employed with vulnerable adults. Because the 35-year employment disqualification affects a significant right and does not further a substantial goal of the state, it is invalid under “rational basis with bite” review.

b. *The Court Should Review the Rule Under the Heightened Level of Rational Basis Scrutiny*

Rules that adversely impact an unpopular group—such as persons alleged to have committed child abuse or neglect—should receive a more “searching” rational basis review. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1012 (2011). The more searching review is to ensure the classification is not drawn out of animus, which can be established by direct evidence of bias in the record of enactment, and through inference based on the rule’s structure.

The lack of formal process DSHS engaged in to alter the duration of employment consequences indicates the lack of consideration DSHS believed persons with founded findings should receive. SR 265 (suggesting “2 million years” timeframe for retaining founded findings). This animus is unwarranted. DSHS does not further a substantial goal of the state by

barring a small subsection of persons with founded findings while excluding substantially similar persons with unfounded findings who are nearly equally likely to raise concerns. It is also at odds with concerns raised by the public about a limited pool of providers and the harm that permanent disqualification could cause. *See, e.g.*, SR 133. Because the unpromulgated rule is drawn from animus and does not further a substantial goal of the state, the unpromulgated rule should be invalidated under “rational basis with bite” review.

2. The Unpromulgated Rule Fails Any Form of Rational Basis Review Under the Equal Protection Clause and the State Privileges and Immunities Clause Because it is Based on Irrational Speculation

Rational basis review under our Equal Protection and the state’s Privileges and Immunities Clause, while the most deferential standard, requires the court to determine that the challenged law is “rationally related to a legitimate state interest.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222 (2006) (citations omitted). Recently, Chief Judge Bjorgen highlighted that rational basis review is not a rubber stamp but requires analysis of the rudimentary fit of the government entity’s speculation. *State v. Seward*, 196 Wn..App. 579 (2006) (dissent); *see also DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144 (1998) (“[T]he rational basis standard may be satisfied where the ‘legislative choice ... [is] based on rational speculation

unsupported by evidence or empirical data.” (emphasis added)). “[C]ourts have invalidated legislation under it where the purported rationale for challenged legislation is too attenuated or irrational in light of the legislation's effect.” *Seward*, 196 Wn. App. at 590.

The practical reality and viability of the speculation by the state agency is, therefore, very relevant in this Court’s consideration. *See, e.g., State v. Berrier*, 110 Wn. App 639, 649-50 (2002) (investigating and rejecting actual reasons offered by state for treating similarly situated persons differently); *State v. W.W.*, 76 Wn. App. 754, 759-60 (1995) (rejecting proffered reason that statute and court rule did not violate equal protection); *Turner v. Fouche*, 396 U.S. 346, 361–62 (1970) (“Whatever objectives [the state] seeks to obtain...must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.”). The Supreme Court of Pennsylvania, using rational basis review under Pennsylvania Constitutional Due Process analysis, invalidated more comprehensive criminal background check legislation despite the State’s proffered basis as to the risk of certain persons with criminal records. *Nixon v. Commonwealth*, 576 Pa. 385, 403-405 839 A.2d 277 (2003).

DSHS engaged in irrational speculation regarding the import and implications of the change to the duration of the employment bar. DSHS is aware of and chose to ignore evidence that persons with founded findings

are little different than persons with unfounded findings. CP 443. DSHS is aware that persons with CPS findings prior to 1998 will continue to be eligible for employment with vulnerable persons. SR 360. DSHS is aware that many persons with findings that are less than 35 years old are fit and suitable to care for vulnerable persons. *See e.g.*, SR 293-294 (lines 16-25 & 1-19). That DSHS has a structure in place to complete character, competency, and suitability reviews is an acknowledgement that blanket bans are insufficient to determine suitability for care of vulnerable persons.

Yet DSHS engaged in specious speculation regarding the example of a young person with a finding rehabilitating after 35 years and then decided to approve an automatic, irrebuttable employment penalty. The agency based its directive on an irrational conception of persons with founded findings and the needs of the community. SR 25. The example is attenuated from reality and irrational, especially in light of information DSHS was already aware of. Because the 35-year bar is based upon irrational speculation, it is facially invalid under the state Privileges and Immunities Clause and the federal Equal Protection Clause. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (A regulation can be facially unconstitutional if a substantial number of its potential applications are unconstitutional.).

E. The Trial Court Erred in Dismissing the Second Claim for Relief

Appellants' Second Claim for Relief requested injunctive relief against a state official, in his or her official capacity,⁵ alleging ongoing violations of federal law, and seeking prospective injunctive relief. CP 21; *see also Ex Parte Young*, 209 U.S. 123 (1908) (authorizing prospective injunctive relief against persons in their official capacity pursuant to Section 1983). The petition stated the following claim: "Under color of state law, Defendant Quigley has violated Plaintiffs' rights to equal protection of the law by creating an irrational classification that denies Plaintiffs the ability to work in a field of their choosing." CP 21. Further: "Defendant's actions deprive Plaintiffs of rights, privileges, or immunities secured to them by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983" CP 21. These are the essential elements of a Section 1983 claim for relief. *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

State courts should adjudicate federal claims that are properly before them. The Supreme Court said, in *Howlett v. Rose*:

⁵ Appellants' complaint initially named Secretary Kevin Quigley, who has since resigned his position. The official office of the Secretary of DSHS is nevertheless the real party in interest in an official capacity suit, and it is the office to which the Court's injunctive relief would be directed.

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.

496 U.S. 356, 367 (1990).

Because Washington State courts have jurisdiction to entertain Section 1983 claims, and the defendant provided no basis for denying the court's jurisdiction, the Court should reject defendant's arguments to the contrary.

F. Appellants are Entitled to Costs and Attorney Fees

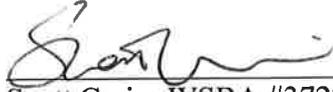
Appellants are entitled to their costs and attorney fees if they prevail in this action, under the Equal Access to Justice Act and 42 U.S.C. sec. 1988.

VI. CONCLUSION

Appellants request that the Court reverse the trial court's decision, determine that the agency erred by failing to engage in rulemaking, find the three challenged WACs to be arbitrary and capricious and/or unconstitutional, and remand this matter to the agency to engage in appropriate rulemaking.

Respectfully submitted this 15th day of March, 2018.

NORTHWEST JUSTICE PROJECT

A handwritten signature in black ink, appearing to read "Scott Crain", written over a horizontal line.

Scott Crain, WSBA #37224

Meagan MacKenzie, WSBA #21876

Jeffrey Keddie, WSBA #47101

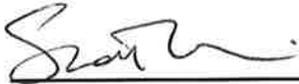
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 15, 2017, I cause the foregoing to be served on the persons below via the Court of Appeals' e-filing electronic service delivery portal:

Lauren Kirigin
Office of the Attorney General
7141 Cleanwater Dr. SW
Olympia, WA 98504

DATED: March 15, 2017 at Seattle, Washington.



Scott Crain

Appendix

App. 1-6	Applicable Statutes: RCW 43.43.832
App. 7-9	Applicable Statutes: RCW 74.39A.056
App. 10	Applicable Statutes: RCW 26.44.031

RCW 43.43.832**Background checks—Disclosure of information—Sharing of criminal background information by health care facilities. (Effective until July 1, 2018.)**

(1) The Washington state patrol identification and criminal history section shall disclose conviction records as follows:

(a) An applicant's conviction record, upon the request of a business or organization as defined in RCW **43.43.830**, a developmentally disabled person, or a vulnerable adult as defined in RCW **43.43.830** or his or her guardian;

(b) The conviction record of an applicant for certification, upon the request of the Washington professional educator standards board;

(c) Any conviction record to aid in the investigation and prosecution of child, developmentally disabled person, and vulnerable adult abuse cases and to protect children and adults from further incidents of abuse, upon the request of a law enforcement agency, the office of the attorney general, prosecuting authority, or the department of social and health services; and

(d) A prospective client's or resident's conviction record, upon the request of a business or organization that qualifies for exemption under section 501(c)(3) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(3)) and that provides emergency shelter or transitional housing for children, persons with developmental disabilities, or vulnerable adults.

(2) The secretary of the department of social and health services must establish rules and set standards to require specific action when considering the information received pursuant to subsection (1) of this section, and when considering additional information including but not limited to civil adjudication proceedings as defined in RCW **43.43.830** and any out-of-state equivalent, in the following circumstances:

(a) When considering persons for state employment in positions directly responsible for the supervision, care, or treatment of children, vulnerable adults, or individuals with mental illness or developmental disabilities provided that: For persons residing in a home that will be utilized to provide foster care for dependent youth, a criminal background check will be required for all persons aged sixteen and older and the department of social and health services may require a criminal background check for persons who are younger than sixteen in situations where it may be warranted to ensure the safety of youth in foster care;

(b) When considering persons for state positions involving unsupervised access to vulnerable adults to conduct comprehensive assessments, financial eligibility determinations, licensing and certification activities, investigations, surveys, or case management; or for state positions otherwise required by federal law to meet employment standards;

(c) When licensing agencies or facilities with individuals in positions directly responsible for the care, supervision, or treatment of children, developmentally disabled persons, or vulnerable adults, including but not limited to agencies or facilities licensed under chapter **74.15** or **18.51** RCW;

(d) When contracting with individuals or businesses or organizations for the care, supervision, case management, or treatment, including peer counseling, of children, developmentally disabled persons, or vulnerable adults, including but not limited to services contracted for under chapter **18.20**, **70.127**, **70.128**, **72.36**, or **74.39A** RCW or Title **71A** RCW;

(e) When individual providers are paid by the state or providers are paid by home care agencies to provide in-home services involving unsupervised access to persons with physical, mental, or developmental disabilities or mental illness, or to vulnerable adults as defined in chapter **74.34** RCW, including but not limited to services provided under chapter **74.39** or **74.39A** RCW.

(3) The director of the department of early learning shall investigate the conviction records, pending charges, and other information including civil adjudication proceeding records of current employees and of any person actively being considered for any position with the department who will or may have unsupervised access to children, or for state positions otherwise required by federal law

to meet employment standards. "Considered for any position" includes decisions about (a) initial hiring, layoffs, reallocations, transfers, promotions, or demotions, or (b) other decisions that result in an individual being in a position that will or may have unsupervised access to children as an employee, an intern, or a volunteer.

(4) The director of the department of early learning shall adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances:

(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood education services, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(b) When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(c) When contracting with any business or organization for activities that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services;

(d) When establishing the eligibility criteria for individual providers to receive state paid subsidies to provide child day care or early learning services that will or may involve unsupervised access to children.

(5) Whenever a state conviction record check is required by state law, persons may be employed or engaged as volunteers or independent contractors on a conditional basis pending completion of the state background investigation. Whenever a national criminal record check through the federal bureau of investigation is required by state law, a person may be employed or engaged as a volunteer or independent contractor on a conditional basis pending completion of the national check. The Washington personnel resources board shall adopt rules to accomplish the purposes of this subsection as it applies to state employees.

(6)(a) For purposes of facilitating timely access to criminal background information and to reasonably minimize the number of requests made under this section, recognizing that certain health care providers change employment frequently, health care facilities may, upon request from another health care facility, share copies of completed criminal background inquiry information.

(b) Completed criminal background inquiry information may be shared by a willing health care facility only if the following conditions are satisfied: The licensed health care facility sharing the criminal background inquiry information is reasonably known to be the person's most recent employer, no more than twelve months has elapsed from the date the person was last employed at a licensed health care facility to the date of their current employment application, and the criminal background information is no more than two years old.

(c) If criminal background inquiry information is shared, the health care facility employing the subject of the inquiry must require the applicant to sign a disclosure statement indicating that there has been no conviction or finding as described in RCW **43.43.842** since the completion date of the most recent criminal background inquiry.

(d) Any health care facility that knows or has reason to believe that an applicant has or may have a disqualifying conviction or finding as described in RCW **43.43.842**, subsequent to the completion date of their most recent criminal background inquiry, shall be prohibited from relying on the applicant's previous employer's criminal background inquiry information. A new criminal background inquiry shall be requested pursuant to RCW **43.43.830** through **43.43.842**.

(e) Health care facilities that share criminal background inquiry information shall be immune from any claim of defamation, invasion of privacy, negligence, or any other claim in connection with any

dissemination of this information in accordance with this subsection.

(f) Health care facilities shall transmit and receive the criminal background inquiry information in a manner that reasonably protects the subject's rights to privacy and confidentiality.

[**2017 3rd sp.s. c 20 § 5**. Prior: **2012 c 44 § 2**; **2012 c 10 § 41**; **2011 c 253 § 6**; **2007 c 387 § 10**; **2006 c 263 § 826**; **2005 c 421 § 2**; **2000 c 87 § 1**; **1997 c 392 § 524**; **1995 c 250 § 2**; **1993 c 281 § 51**; **1990 c 3 § 1102**; prior: **1989 c 334 § 2**; **1989 c 90 § 2**; **1987 c 486 § 2**.]

NOTES:

Construction—Competitive procurement process and contract provisions—Conflict with federal requirements and Indian Child Welfare Act of 1978—2017 3rd sp.s. c 20: See notes following RCW **74.13.270**.

Application—2012 c 10: See note following RCW **18.20.010**.

Findings—Purpose—Part headings not law—2006 c 263: See notes following RCW **28A.150.230**.

Short title—Findings—Construction—Conflict with federal requirements—Part headings and captions not law—1997 c 392: See notes following RCW **74.39A.009**.

Effective date—1993 c 281: See note following RCW **41.06.022**.

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW **18.155.900** through **18.155.902**.

RCW 43.43.832

Background checks—Disclosure of information—Sharing of criminal background information by health care facilities. (Effective July 1, 2018.)

(1) The Washington state patrol identification and criminal history section shall disclose conviction records as follows:

(a) An applicant's conviction record, upon the request of a business or organization as defined in RCW **43.43.830**, a developmentally disabled person, or a vulnerable adult as defined in RCW **43.43.830** or his or her guardian;

(b) The conviction record of an applicant for certification, upon the request of the Washington professional educator standards board;

(c) Any conviction record to aid in the investigation and prosecution of child, developmentally disabled person, and vulnerable adult abuse cases and to protect children and adults from further incidents of abuse, upon the request of a law enforcement agency, the office of the attorney general, prosecuting authority, or the department of social and health services; and

(d) A prospective client's or resident's conviction record, upon the request of a business or organization that qualifies for exemption under section 501(c)(3) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(3)) and that provides emergency shelter or transitional housing for children, persons with developmental disabilities, or vulnerable adults.

(2) The secretary of the department of social and health services and the secretary of children, youth, and families must establish rules and set standards to require specific action when considering the information received pursuant to subsection (1) of this section, and when considering additional information including but not limited to civil adjudication proceedings as defined in RCW **43.43.830** and any out-of-state equivalent, in the following circumstances:

(a) When considering persons for state employment in positions directly responsible for the supervision, care, or treatment of children, vulnerable adults, or individuals with mental illness or developmental disabilities provided that: For persons residing in a home that will be utilized to provide foster care for dependent youth, a criminal background check will be required for all persons aged sixteen and older and the department of social and health services may require a criminal background check for persons who are younger than sixteen in situations where it may be warranted to ensure the safety of youth in foster care;

(b) When considering persons for state positions involving unsupervised access to vulnerable adults to conduct comprehensive assessments, financial eligibility determinations, licensing and certification activities, investigations, surveys, or case management; or for state positions otherwise required by federal law to meet employment standards;

(c) When licensing agencies or facilities with individuals in positions directly responsible for the care, supervision, or treatment of children, developmentally disabled persons, or vulnerable adults, including but not limited to agencies or facilities licensed under chapter **74.15** or **18.51** RCW;

(d) When contracting with individuals or businesses or organizations for the care, supervision, case management, or treatment, including peer counseling, of children, developmentally disabled persons, or vulnerable adults, including but not limited to services contracted for under chapter **18.20**, **70.127**, **70.128**, **72.36**, or **74.39A** RCW or Title **71A** RCW;

(e) When individual providers are paid by the state or providers are paid by home care agencies to provide in-home services involving unsupervised access to persons with physical, mental, or developmental disabilities or mental illness, or to vulnerable adults as defined in chapter **74.34** RCW, including but not limited to services provided under chapter **74.39** or **74.39A** RCW.

(3) The secretary of the department of children, youth, and families shall investigate the conviction records, pending charges, and other information including civil adjudication proceeding records of current employees and of any person actively being considered for any position with the department who will or may have unsupervised access to children, or for state positions otherwise required by federal law to meet employment standards. "Considered for any position" includes decisions about (a) initial hiring, layoffs, reallocations, transfers, promotions, or demotions, or (b) other decisions that result in an individual being in a position that will or may have unsupervised access to children as an employee, an intern, or a volunteer.

(4) The secretary of the department of children, youth, and families shall adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances:

(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood education services, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(b) When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(c) When contracting with any business or organization for activities that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services;

(d) When establishing the eligibility criteria for individual providers to receive state paid subsidies to provide child day care or early learning services that will or may involve unsupervised access to children.

(5) Whenever a state conviction record check is required by state law, persons may be employed or engaged as volunteers or independent contractors on a conditional basis pending completion of

the state background investigation. Whenever a national criminal record check through the federal bureau of investigation is required by state law, a person may be employed or engaged as a volunteer or independent contractor on a conditional basis pending completion of the national check. The Washington personnel resources board shall adopt rules to accomplish the purposes of this subsection as it applies to state employees.

(6)(a) For purposes of facilitating timely access to criminal background information and to reasonably minimize the number of requests made under this section, recognizing that certain health care providers change employment frequently, health care facilities may, upon request from another health care facility, share copies of completed criminal background inquiry information.

(b) Completed criminal background inquiry information may be shared by a willing health care facility only if the following conditions are satisfied: The licensed health care facility sharing the criminal background inquiry information is reasonably known to be the person's most recent employer, no more than twelve months has elapsed from the date the person was last employed at a licensed health care facility to the date of their current employment application, and the criminal background information is no more than two years old.

(c) If criminal background inquiry information is shared, the health care facility employing the subject of the inquiry must require the applicant to sign a disclosure statement indicating that there has been no conviction or finding as described in RCW 43.43.842 since the completion date of the most recent criminal background inquiry.

(d) Any health care facility that knows or has reason to believe that an applicant has or may have a disqualifying conviction or finding as described in RCW 43.43.842, subsequent to the completion date of their most recent criminal background inquiry, shall be prohibited from relying on the applicant's previous employer's criminal background inquiry information. A new criminal background inquiry shall be requested pursuant to RCW 43.43.830 through 43.43.842.

(e) Health care facilities that share criminal background inquiry information shall be immune from any claim of defamation, invasion of privacy, negligence, or any other claim in connection with any dissemination of this information in accordance with this subsection.

(f) Health care facilities shall transmit and receive the criminal background inquiry information in a manner that reasonably protects the subject's rights to privacy and confidentiality.

[2017 3rd sp.s. c 20 § 5; 2017 3rd sp.s. c 6 § 224. Prior: 2012 c 44 § 2; 2012 c 10 § 41; 2011 c 253 § 6; 2007 c 387 § 10; 2006 c 263 § 826; 2005 c 421 § 2; 2000 c 87 § 1; 1997 c 392 § 524; 1995 c 250 § 2; 1993 c 281 § 51; 1990 c 3 § 1102; prior: 1989 c 334 § 2; 1989 c 90 § 2; 1987 c 486 § 2.]

NOTES:

Reviser's note: This section was amended by 2017 3rd sp.s. c 6 § 224 and by 2017 3rd sp.s. c 20 § 5, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Construction—Competitive procurement process and contract provisions—Conflict with federal requirements and Indian Child Welfare Act of 1978—2017 3rd sp.s. c 20: See notes following RCW 74.13.270.

Effective date—2017 3rd sp.s. c 6 §§ 102, 104-115, 201-227, 301-337, 401-419, 501-513, 801-803, and 805-822: See note following RCW 43.216.025.

Conflict with federal requirements—2017 3rd sp.s. c 6: See RCW 43.216.908.

Application—2012 c 10: See note following RCW 18.20.010.

Findings—Purpose—Part headings not law—2006 c 263: See notes following RCW [28A.150.230](#).

Short title—Findings—Construction—Conflict with federal requirements—Part headings and captions not law—1997 c 392: See notes following RCW [74.39A.009](#).

Effective date—1993 c 281: See note following RCW [41.06.022](#).

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW [18.155.900](#) through [18.155.902](#).

RCW 74.39A.056**Criminal history checks on long-term care workers.**

(1)(a) All long-term care workers shall be screened through state and federal background checks in a uniform and timely manner to verify that they do not have a criminal history that would disqualify them from working with vulnerable persons. The department must perform criminal background checks for individual providers and prospective individual providers and make the information available as provided by law.

(b)(i) Except as provided in (b)(ii) of this subsection, for long-term care workers hired after January 7, 2012, the background checks required under this section shall include checking against the federal bureau of investigation fingerprint identification records system and against the national sex offenders registry or their successor programs. The department shall require these long-term care workers to submit fingerprints for the purpose of investigating conviction records through both the Washington state patrol and the federal bureau of investigation. The department shall not pass on the cost of these criminal background checks to the workers or their employers.

(ii) This subsection does not apply to long-term care workers employed by community residential service businesses until January 1, 2016.

(c) The department shall share state and federal background check results with the department of health in accordance with RCW **18.88B.080**.

(2) No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority or a court of law or entered into a state registry with a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter **74.34** RCW shall be employed in the care of and have unsupervised access to vulnerable adults.

(3) The department shall establish, by rule, a state registry which contains identifying information about long-term care workers identified under this chapter who have final substantiated findings of abuse, neglect, financial exploitation, or abandonment of a vulnerable adult as defined in RCW **74.34.020**. The rule must include disclosure, disposition of findings, notification, findings of fact, appeal rights, and fair hearing requirements. The department shall disclose, upon request, final substantiated findings of abuse, neglect, financial exploitation, or abandonment to any person so requesting this information. This information must also be shared with the department of health to advance the purposes of chapter **18.88B** RCW.

(4) The department shall adopt rules to implement this section.

[**2012 c 164 § 503**; 2012 c 1 § 101 (Initiative Measure No. 1163, approved November 8, 2011).]

NOTES:

Reviser's note: (1) The language of this section, as enacted by 2012 c 1 § 101, was identical to RCW **74.39A.055** as amended by 2009 c 580 § 2, which was repealed by **2012 c 1 § 115**. This section has since been amended by **2012 c 164 § 503**.

(2) The code reviser was directed to codify the sections listed in 2012 c 1 § 302 with the same codification numbers as repealed sections. Following standard practices and pursuant to RCW **1.08.015**, sections 101 through 109 and 111 through 113, chapter 1, Laws of 2012 were given unique numbers to effectuate the orderly and logical arrangement of the code.

Finding—Intent—Rules—Effective date—2012 c 164: See notes following RCW **18.88B.010**.

Intent—Findings—2012 c 1 (Initiative Measure No. 1163): "It is the intent of the people

through this initiative to protect vulnerable elderly and people with disabilities by reinstating the requirement that all long-term care workers obtain criminal background checks and adequate training. The people of the state of Washington find as follows:

(1) The state legislature proposes to eliminate the requirement that long-term care workers obtain criminal background checks and adequate training, which would jeopardize the safety and quality care of vulnerable elderly and persons with disabilities. Should the legislature take this action, this initiative will reinstate these critical protections for vulnerable elderly and persons with disabilities; and

(2) Taxpayers' investment will be protected by requiring regular program audits, including fraud investigations, and capping administrative expenses." [2012 c 1 § 1 (Initiative Measure No. 1163, approved November 8, 2011).]

Performance audits—2012 c 1 (Initiative Measure No. 1163): "The state auditor shall conduct performance audits of the long-term in-home care program. The first audit must be completed within twelve months after January 7, 2012, and must be completed on a biennial basis thereafter. As part of this auditing process, the state shall hire five additional fraud investigators to ensure that clients receiving services at taxpayers' expense are medically and financially qualified to receive the services and are actually receiving the services." [[2012 c 164 § 709](#); 2012 c 1 § 201 (Initiative Measure No. 1163, approved November 8, 2011).]

Spending limits—2012 c 1 (Initiative Measure No. 1163): "The people hereby establish limits on the percentage of tax revenues that can be used for administrative expenses in the long-term in-home care program. Within one hundred eighty days of January 7, 2012, the state shall prepare a plan to cap administrative expenses so that at least ninety percent of taxpayer spending must be devoted to direct care. This limitation must be achieved within two years from January 7, 2012." [2012 c 1 § 202 (Initiative Measure No. 1163, approved November 8, 2011).]

Contingent effective dates—2012 c 1 (Initiative Measure No. 1163): "(1) Sections 101 and 115(6) of this act only take effect if [RCW 74.39A.055](#) is amended or repealed by the legislature in 2011.

(2) Sections 102 and 115(10) of this act only take effect if [RCW 74.39A.260](#) is amended or repealed by the legislature in 2011.

(3) Sections 103 and 115(1) of this act only take effect if [RCW 18.88B.020](#) is amended or repealed by the legislature in 2011.

(4) Sections 104 and 115(2) of this act only take effect if [RCW 18.88B.030](#) is amended or repealed by the legislature in 2011.

(5) Sections 105 and 115(3) of this act only take effect if [RCW 18.88B.040](#) is amended or repealed by the legislature in 2011.

(6) Sections 106 and 115(5) of this act only take effect if [RCW 74.39A.050](#) is amended or repealed by the legislature in 2011.

(7) Sections 107 and 115(7) of this act only take effect if [RCW 74.39A.073](#) is amended or repealed by the legislature in 2011.

(8) Sections 108 and 115(8) of this act only take effect if [RCW 74.39A.075](#) is amended or repealed by the legislature in 2011.

(9) Sections 109 and 115(9) of this act only take effect if [RCW 74.39A.085](#) is amended or repealed by the legislature in 2011.

(10) Sections 110 and 115(11) of this act only take effect if [RCW 74.39A.310](#) is amended or repealed by the legislature in 2011.

(11) Sections 111 and 115(12) of this act only take effect if [RCW 74.39A.330](#) is amended or repealed by the legislature in 2011.

(12) Sections 112 and 115(13) of this act only take effect if [RCW 74.39A.340](#) is amended or

repealed by the legislature in 2011.

(13) Sections 113 and 115(14) of this act only take effect if RCW **74.39A.350** is amended or repealed by the legislature in 2011.

(14) Sections 114 and 115(4) of this act only take effect if RCW **74.39A.009** is amended or repealed by the legislature in 2011.

(15) Section 303 of this act takes effect only if one or more other sections of this act take effect pursuant to paragraphs (1) through (14) of this section." [2012 c 1 § 301 (Initiative Measure No. 1163, approved November 8, 2011).]

Application—2012 c 1 (Initiative Measure No. 1163): "Notwithstanding any action of the legislature during 2011, all long-term care workers as defined under RCW **74.39A.009**(16), as it existed on April 1, 2011, are covered by sections 101 through 113 of this act or by the corresponding original versions of the statutes, as referenced in section 302 (1) through (13) on the schedules set forth in those sections, as amended by chapter 164, Laws of 2012, except that long-term care workers employed by community residential service businesses are exempt to the extent provided in RCW **18.88B.041**, **74.39A.056**, **74.39A.074**, **74.39A.331**, **74.39A.341**, and **74.39A.351**." [**2012 c 164 § 710**; 2012 c 1 § 303 (Initiative Measure No. 1163, approved November 8, 2011).]

Construction—2012 c 1 (Initiative Measure No. 1163): "The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act." [2012 c 1 § 305 (Initiative Measure No. 1163, approved November 8, 2011).]

Effective date—2012 c 1 (Initiative Measure No. 1163): "This act takes effect sixty days from its *enactment by the people [January 7, 2012]." [2012 c 1 § 307 (Initiative Measure No. 1163, approved November 8, 2011).]

***Reviser's note:** Initiative Measure No. 1163 was approved by a vote of the people November 8, 2011. The secretary of state has determined that the effective date of Initiative Measure No. 1163 is January 7, 2012.

Short title—2012 c 1 (Initiative Measure No. 1163): "This act may be known and cited as the restoring quality home care initiative." [2012 c 1 § 308 (Initiative Measure No. 1163, approved November 8, 2011).]

RCW 26.44.031**Records—Maintenance and disclosure—Destruction of screened-out, unfounded, or inconclusive reports—Rules—Proceedings for enforcement.**

(1) To protect the privacy in reporting and the maintenance of reports of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents, and to safeguard against arbitrary, malicious, or erroneous information or actions, the department shall not disclose or maintain information related to reports of child abuse or neglect except as provided in this section or as otherwise required by state and federal law.

(2) The department shall destroy all of its records concerning:

(a) A screened-out report, within three years from the receipt of the report; and

(b) An unfounded or inconclusive report, within six years of completion of the investigation, unless a prior or subsequent founded report has been received regarding the child who is the subject of the report, a sibling or half-sibling of the child, or a parent, guardian, or legal custodian of the child, before the records are destroyed.

(3) The department may keep records concerning founded reports of child abuse or neglect as the department determines by rule.

(4) No unfounded, screened-out, or inconclusive report or information about a family's participation or nonparticipation in the family assessment response may be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW without the consent of the individual who is the subject of the report or family assessment, unless:

(a) The individual seeks to become a licensed foster parent or adoptive parent; or

(b) The individual is the parent or legal custodian of a child being served by one of the agencies referenced in this subsection.

(5)(a) If the department fails to comply with this section, an individual who is the subject of a report may institute proceedings for injunctive or other appropriate relief for enforcement of the requirement to purge information. These proceedings may be instituted in the superior court for the county in which the person resides or, if the person is not then a resident of this state, in the superior court for Thurston county.

(b) If the department fails to comply with subsection (4) of this section and an individual who is the subject of the report or family assessment response information is harmed by the disclosure of information, in addition to the relief provided in (a) of this subsection, the court may award a penalty of up to one thousand dollars and reasonable attorneys' fees and court costs to the petitioner.

(c) A proceeding under this subsection does not preclude other methods of enforcement provided for by law.

(6) Nothing in this section shall prevent the department from retaining general, nonidentifying information which is required for state and federal reporting and management purposes.

[2012 c 259 § 4; 2007 c 220 § 3; 1997 c 282 § 1.]

NOTES:

Effective date—2012 c 259 §§ 1 and 3-10: See note following RCW 26.44.020.

Effective date—Implementation—2007 c 220 §§ 1-3: See notes following RCW 26.44.020.

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